

THE
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LECTURES

Thirty-eighth series

**The Fabric
of English
Civil Justice**

Sir Jack I. H. Jacob



STEVENS

The Fabric of English Civil Justice

by

Sir Jack I. H. Jacob, Q.C.

Hon. LL.D., Hon. Dr. Jur.;

Honorary Bencher of Gray's Inn;

Fellow of University College London;

Director of the Institute of Advanced Legal Studies

Sir Jack Jacob's book, based on his 1986 Hamlyn Lectures, draws on the insights gained over many years' experience of English civil procedure to offer a panoramic overview of one of the most essential elements in any system of justice. The author begins by sketching in the fundamental features of the system, and then discusses a range of issues and problems arising out of every stage. The approach is critical, comparative, and reformist.

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THE HAMLYN TRUST

LONDON
STEVENS & SONS
1987

Published in 1987
by Stevens & Sons Ltd.,
11 New Fetter Lane, London
Computerset by Promenade Graphics Ltd., Cheltenham
and printed in Great Britain by Page Bros. (Norwich) Ltd.

British Library Cataloguing in Publication Data

Jacob, *Sir* Jack I. H.

The fabric of English civil justice.—
(The Hamlyn lectures; 38)

1. Civil procedure—England

I. Title II. Series

344.207'5 KD7325

ISBN 0-420-47530-3

ISBN 0-420-47540-0 Pbk

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1987

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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 at the age of eighty. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor for many years. She was a woman of strong 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 also travelled frequently to 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 the 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 European Peoples and realising and appreciating such privileges

may recognise the responsibilities and obligations attaching to them.”

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The thirty-eighth series of Hamlyn Lectures was delivered at University College London in June 1986 by Sir Jack I. H. Jacob Q.C.

April 1987

AUBREY L. DIAMOND
Chairman of the Trustees

1. Fundamental Features

A. Introductory

English civil justice is the subject I have chosen for these lectures, though in truth it was the subject that chose me. I have had the good fortune of having enjoyed an unusually close relationship in many capacities with this subject during the whole of my life in the law. Yet I know I am a seedling student learning to lisp the language of procedure, yearning for its reform and watching the continual changes in its improvement being made in almost all countries of the world. The paramount lesson my experience has taught me is that the system of civil justice is of transcendent importance for the people of this country, just as it is for the people of every country. These lectures may therefore claim to lie close to the heart of the Hamlyn Trust. It is quite likely that Miss Hamlyn sensed the fact that there are profound differences between the English and the continental systems of

the administration of justice, and in making her notable bequest she may well have had foremost in her mind that the "common people" of the united Kingdom enjoy privileges under their machinery of justice in comparison with European people.¹

In England, we have increasingly been using the expression "civil justice" in place of "civil procedure" to describe the entire system of the administration of justice in civil matters.² In this sense, the ambit of civil justice is wide and far-reaching and its bounds have not yet been fully chartered; it encompasses the whole area of what is comprised in civil procedural law. For convenience, the subject may be said to consist of three parts, namely, the institutional part, the professional part and the procedural part, that

¹ The privileges enjoyed by the common people in different parts of the United Kingdom may themselves be different. There are, for example, some basic differences between the English and Scottish systems in the organisation, structure and jurisdiction of their respective civil courts and in their systems of pleadings, discovery of documents, pre-trial processes, trial by jury and the enforcement of judgments and orders. The differences between the English and the Northern Irish systems are not so extensive, but they are basic enough, for example, in the trial of civil actions by jury and in the enforcement of judgment debts, including imprisonment for civil debt.

² In November 1983, the Lord Chancellor announced his intention "to undertake the complete and systematic review of *civil procedure*" (italics supplied) (see Cmnd. 9077). In September 1984, the Law Commission mounted a seminar on "*Civil Procedure*" (italics supplied). On the other hand, in his report on the seminar, Lord Templeman emphasised that the subject of the seminar was in fact the entire "System of Civil Justice" which he adopted as the title for his report. (See (1985) Vol. 51, Arbitration, p. 321). In February 1985, the Lord Chancellor set up an inquiry "to be called the Civil Justice Review" and this inquiry is still in being. See also the journal *Civil Justice Quarterly* (Sweet & Maxwell), the first issue of which was published in January 1982, and which is now in its fifth year.

is, civil procedure in the narrower sense of the term as the practice and procedure of the civil legal process.³ These are not separate and self-contained areas of civil justice, since they intermesh and interact with each other, and indeed it is necessary as well as desirable to regard the subject of civil justice as a single organic whole.

Moreover, civil justice should not be seen as the private preserve of lawyers only, although of course they have the technical and specialised knowledge and expertise of the operation of the civil legal process. Like truth, civil justice has many facets—cultural, historical, moral, social, economic, administrative as well as legal and others besides. The system of civil justice should therefore be the explicit and enduring concern, not only of lawyers, but also of experts in other disciplines, especially in the social sciences, and a meaningful debate should be continually taking place on all aspects and problems of civil justice between lawyers and such other experts.

This is all the more necessary and vital since civil justice, especially its procedural part, is generally, or at any rate popularly, regarded as being highly technical, rule-ridden, formalistic, shrouded in mystery and serviced by its own cloistered priests, some of whom perform their ritual capers and speak an unfamiliar language in strange surroundings and in the higher strata dressed in ornamental garb. Thus it is that for most people English civil justice is a remote, incomprehensible, mystifying and in some ways terrifying area of the law. What is needed above all today is a breath of fresh air to blow through the corridors of civil justice to

³ As to what is comprised in each of these three parts, the institutional, professional, and procedural, see Jacob, *The Reform of Civil Procedural Law* (Sweet & Maxwell, 1982), p. 3, and (1980) 14 *The Law Teacher* 2.

de-mystify the process, to render it plain, simple and intelligible, to enable not only the experts in other disciplines but also the man in the High Street to understand and appreciate its operation and in this way to bring justice closer to the common people.

Having regard to the magnitude and complexity of this subject and its technical and practical character, the task of presenting it within the space and in the style of my many illustrious and all distinguished predecessors as Hamlyn lecturers is indeed formidable. On the one hand, this is not the occasion nor would it be really useful to dwell at length or in detail on a few selected problems, and on the other hand it would need a massive effort, a text-book no less, to treat exhaustively the whole subject of English civil justice. I have chosen the middle way and will deal with the essential elements which I have called the fabric of English civil justice. Whatever image the word "fabric" may conjure up for you, whether it be a building, a hamlet or a mansion, or whether it be a cloth, an embroidery or a tapestry, I employ it as the way of presenting the framework, the structure or texture of English civil justice as a coherent and comprehensive integral subject. I propose therefore to depict a panoramic overview, or, to put it in another way, to carry out an exploratory survey of the subject, and to act as a guide to its basic attributes, as if on a tour of all the rooms in the mansion, or as if savouring the construction, composition and colours of the tapestry. As a good guide should, I will endeavour to cover the whole subject without delaying the tour by dwelling over-long on details.

To this end, I intend to begin by sketching some fundamental features of English civil justice, then to proceed to an exposition or descriptive account of the whole range of the stages and problems comprised in the system, with a

comparative, critical and reformist approach, and to conclude with a glance at the future.

To begin with, then, I identify, as it were, some ten markers, each of which may be regarded as a primary principle of the system of English civil justice and which taken together present the basic form and shape of its fabric and the essential methods of its operation.

B. Fundamental Features

The Adversary System

The fundamental, characteristic feature of English civil justice is commonly referred to as "the adversary system."⁴ This system has been the traditional, cardinal basis for the conduct of civil procedure in England since about the middle of the thirteenth century,⁵ and it is well settled and deeply rooted. It was not the creation of statute nor was it implanted as the result of a doctrinal choice of other methods of procedure but rather it grew and developed out of the soil, responding in a practical way to the social, political and cultural needs of the people. It was probably the product which stemmed from the fortuitous conjunction in

⁴ It is not clear when this term came to be applied to English civil procedure. Jeremy Bentham used the word "contestational" (see "The Principles of Judicial Procedure," in *The Works of Jeremy Bentham* (John Bowring ed.), (Edinburgh, William Tait, 1843), Vol. II, p. 28 (hereinafter referred to as "*Bentham Principles*").) Alternative terms are "the contradictory system," "the confrontational system," or "the accusatorial system," though this latter term is more accurately applied to criminal justice.

⁵ See Pollock and Maitland, *The History of English Law*, Vol. 2, p. 671.

1215 of the promise in Magna Carta of the right to "trial by peers,"⁶ and of the prohibition by the Lateran Council forbidding the clergy to take part in trials by ordeal. It followed the adoption on a general basis of the method of trial by jury by the Superior Common Law Courts,⁷ which at about that time replaced other modes of trial, such as trial by battle, by oath or compurgation and by ordeal. It enabled the English legal system to escape the new procedure by "inquisition" introduced by Pope Innocent III. It affords strong evidence of the historical continuity of the system of English civil justice, which has been capable of surviving great political, social and constitutional crises and of absorbing and adapting radical and fundamental changes in procedure. It also underscores the extensive and widespread influence of English civil justice, for almost all the countries in which English law was introduced have continued to operate their civil procedure, with appropriate modifications to meet their separate national and local conditions and social aspirations, on the model of the English adversary system.

The main alternative method of conducting civil pro-

⁶ See Magna Carta 1215 or The Great Charter of King John granted June 15, 1215, Clauses 20, 21, 22, 29, 50, 56 and 57. Clause 20 speaks of the "oath of good men of the neighbourhood," which of course was how the jury originally functioned. On August 24, 1215, Pope Innocent III declared Magna Carta to be null and void but it continued in operation and has had a profound influence on the whole history of English justice.

⁷ The Court of Chancery, administering its equitable jurisdiction, employed a somewhat different procedure, based on that of the canon law and dispensed by the Ecclesiastical Courts, which was in part at least akin to the civil law system operating in the European countries, until the fusion of common law and equity under the Judicature Acts 1873 and 1875.

cedure is that prevailing in the civil law countries of Europe⁸ which is called "the inquisitorial system."⁹ In both the adversary and the inquisitorial systems, there is a division of functions between the Court on the one hand and the parties on the other. This division of functions, however, is the very reverse in the adversary system from the way in which it operates in the inquisitorial system. The fundamental divergence between the two systems is that under the English adversary system the court plays an inactive, passive, non-interventionist part whereas under the civil law inquisitorial system, the court plays an active, authoritative, interventionist role; and, correspondingly, under the adversary system, the parties play a major, dominating, independent role to persuade the court to adjudicate or otherwise resolve the dispute in their favour whereas under the inquisitorial system, they play a minor, tentative, supportive role to enable the court to perform its function to inquire into and determine the dispute.

Both systems assume the contradictory or adversarial character of the civil proceedings they are called upon to

⁸ It may be more accurate to exclude the Scandinavian countries, which stand between the English and other continental systems, but of course to include other countries, as for example, the socialist countries, the Franco-phonetic states of Africa, and all the states of Latin America.

⁹ This expression was no doubt derived from the fact that Pope Innocent introduced the "Inquisition," as a new procedure, under which the judge proceeded *ex officio* either of his own motion or on the suggestions of a promoter and collected testimony against the suspect in secret. Nevertheless it is today somewhat perjorative and inaccurate, but is used to sharpen the contrast with "the adversary system." A more appropriate term is "the investigatory system" which fastens on one of the more important functions of the civil law courts. Better descriptive terms would be "the activist system" or "the interventionist system."

deal with, namely, that the opposing parties are in controversy, in conflict, in combat about the dispute between them, but they employ essentially different ways for their adjudication, resolution or other disposal. These different ways derive from fundamentally different conceptual criteria and perhaps also different social, cultural and political tenets of what civil procedure is about, what courts are for and how they should operate. Under the adversary system, the basic assumptions are that civil disputes are a matter of private concern of the parties involved, and may even be regarded as their private property, though their determination by the courts may have wider, more far-reaching, even public repercussions, and that the parties are themselves the best judges of how to pursue and serve their own interests in the conduct and control of their respective cases, free from the directions of or intervention by the court. On the other hand, under the inquisitorial system, the basic assumptions are that civil procedure is a branch of public law, so that a right of action is seen as a public law right over and above the private substantive right of the party asserting it, and that once the jurisdiction of the court is invoked in relation to a private dispute, there arises an immediate public interest, and the court then comes under a state duty forthwith to take that dispute under its control, to charter its future content and conduct, to search for the underlying truth, to bring the dispute to a conclusion by conciliation if possible or otherwise by adjudication. Each system is naturally content with its own machinery of civil justice, subject to improving its methods and techniques. It may perhaps be permissible to speculate whether on the merits of a given case, based on substantially similar facts, the conclusion of the dispute arrived at in the courts of both systems would be substantially the same.

1. Role of the Court

When dealing with the expected behaviour of a judge Pollock and Maitland contrasted the conduct of a man of science, carrying out research in his laboratory and using all appropriate methods for the solution of problems and the discovery of truth, with the role of the umpire in English games, who does not invent tests for the powers of the two sides but is there merely to see that the rules of the game are observed. They concluded that the strong inclination of English procedure was towards the second of these ideas, and they added, referring to the cricket match,

“The judges sit in Court, not in order that they may discover the truth, but in order that they may answer the question, ‘How’s that?’ The English judge will, if he can, play the umpire rather than the inquisitor.”¹⁰

The inactive, passive and non-interventionist role of the court in English civil justice operates throughout the whole range of civil proceedings. This generalised role of the English court is, however, subject to important exceptions in which the court is under the duty¹¹ or is empowered to act

¹⁰ See Pollock and Maitland, *The History of English Law*, Vol. II, p. 671; Holdsworth, *A History of English Law*, Vol. I, pp. 299–302 and Vol. IX, pp. 280–281, 318. It may be of interest to mention that, in cricket, the umpire gives his decisions only upon an “appeal” or application made to him by one side, whereas in football (soccer), the referee makes his decisions on his own initiative, without application made to him by either side.

¹¹ The main classes of cases in which the court is under the *duty* to be active and investigative include those concerning minors and mental patients, the administrations of trusts and of the estates of deceased persons and insolvency proceedings relating to individuals (bankruptcy) and companies (liquidations). In some cases such a *duty* is imposed by statute, e.g. under the State Immunity Act 1978 and the Civil Jurisdiction and Judgments Act 1982. Other instances in which this *duty* arises include

of its own motion¹² and thus to be active and if necessary to ascertain "the truth." Apart from these exceptional circumstances, the court takes no initiative at any stage of the proceedings; it has no power or duty to determine what are the issues or questions in dispute between the parties, save as

the duty to take notice of illegality (see *Holman v. Johnson* (1775) Cowp. 341; *Snell v. Unit Finance Ltd.* [1964] 2 Q.B. 203., C.A. or statutory invalidity *Lockett v. Wood* (1908) 24 T.L.R. 617 (gaming debt) and see *Phillips v. Copping* [1935] 1 K.B., C.A. in which Scrutton L.J. said at p. 21: "It is the duty of the Court when asked to give a judgment which is contrary to statute to take the point, although the litigants may not take it.", and the court will of its motion decline jurisdiction where the proceedings are based on a fiction (*Royster v. Cavey* [1947] 1 K.B. 204, C.A.) or on hypothetical questions or issues (*Sumner v. William Henderson & Sons* [1963] 1 W.L.R. 823; [1963] 2 All E.R. 712, C.A.; *Avon County Council v. Howlett* [1983] 1 W.L.R. 605; [1983] 1 All E.R. 1073, C.A.) or on dead or spent issues (*Glasgow Navigation Co. v. Iron Ore Co.* [1910] A.C. 293; *Sunlife Assurance of Canada v. Jewis* [1944] A.C. 111). The court is also under a *duty* of its own motion to exclude any document or evidence which is protected from disclosure on the ground of Crown privilege (see *Duncan v. Cammell Laird & Co.* [1942] A.C. 624, as modified by *Conway v. Rimmer* [1968] A.C. 910), and presumably this duty arises in the case of the extended grounds of public interest privilege.

¹² Such powers are conferred by several of the Rules of the Supreme Court and the County Court Rules but they are rarely exercised. The most extensive of these rules is C.C.R. 1981, Ord. 13, r. 2(1) which provides that "in any action or matter the Court may at any time, on application or of its own motion, give such directions as it thinks proper with regard to any matter arising in the course of the proceedings." Such a rule should be introduced into the Supreme Court Rules. A striking example of the power to exercise an active role in civil proceedings is contained in the Magistrates Courts Act 1952, s.61 which relates to domestic proceedings in which the court is required to assist an unrepresented or otherwise an incompetent party to conduct the examination of witnesses (see *Simms v. Moore* [1970] 3 All E.R. 2). There is a strong case for introducing such a provision to assist litigants in person in County Courts.

may appear from the pleadings or other statements of the parties. The court has no investigative process of its own¹³; it cannot appoint a court expert, nor call for the report of an expert or require experiments or observations to be made, save at the request of a party. It does not itself examine, still less cross-examine, the parties or their witnesses, for to do so, as Lord Greene pointed out, the judge would be descending "into the arena and is liable to have his vision clouded by the dust of conflict"¹⁴ or as Lord Denning expressed it, he would, "drop the mantle of a Judge and assume the role of the advocate."¹⁵ The judge has no power to call a witness, whom neither party desires to call, though he may recall a witness for further examination.¹⁶ The court

¹³ Save, possibly, to require the Official Solicitor to carry out specified investigations, see Supreme Court Act 1981, s.90; *Re Harbin and Masterman* [1896] 1 Ch. 351, 368, 371, C.A.; *Re A Minor* [1982] 1 W.L.R. 438; [1982] 2 All E.R. 32, C.A.

¹⁴ See *Yuill v. Yuill* [1945] P. 15.

¹⁵ See *Jones v. National Coal Board* [1957] 2 Q.B. 55, C.A. In *R. v. Matthews* [1984] 78 Cr.App.R. 23, C.A. there were substantial interventions by the trial judge during the examination of the accused at the trial, but his appeal against his conviction was dismissed. If this case was not wrongly decided, as I think it was, it must be treated as exceptional and depending on its own facts, and also on the fact, though implicit, that the Court of Appeal (Criminal Division) has no power to order a new trial.

¹⁶ *Fallon v. Calvert* [1960] 2 Q.B. 201: "In a civil suit, the function of a Court in this country (unlike that of Courts in some other countries), is to decide cases on the evidence that the parties think fit to call before it. It is not inquisitorial." (*ibid.*, *per* Pearce L.J.). See, however, the partial but powerful dissent of Justice Frankfurter in *Johnson v. United States* (1948) 333 U.S. 46, 68 391, S.Ct., (in which an available witness was not called by either party, nor was his deposition introduced at the trial) where he said, "A Court room is not a laboratory for the scientific pursuit of truth. . . . A trial is not a game of blind man's buff and the trial judge . . . need not blindfold himself by failing to call a vital witness simply because the parties, for reasons of trial tactics, choose to

has no power or duty to promote a settlement or compromise between the parties. It relies on the advocates to cite or refer to the applicable law and it does not normally carry out its own researches in this respect. In short, the English court takes no active part in the initiation, conduct, preparation or presentation of a civil case before or at the trial or on appeal.

Nevertheless, although the English court maintains its inactive role, it does not remain negative or remote during the actual hearing or trial of the proceedings. On the contrary, at all stages of the proceedings before or at the trial or on appeal, at the actual trial or hearing, the English court plays a dominating, positive and interventionist role. The conduct of the proceedings then comes under the direct, immediate and overall control of the court which thus plays a pointed and practical role by the dialectical process of asking searching questions calling for immediate answers about any matters arising in the proceedings. This open intervention for the search for the truth, within the parameters of the proceedings as they are constituted, helps greatly to clarify, amplify or correct any points or questions raised by the parties or the court.

It should also be emphasised that the passive role of the English court greatly enhances the standing, influence and authority of the judiciary at all levels and may well account for the high respect and esteem in which they are held, as well as their comparatively small numbers.

2: Role of the Parties

By contrast, under the adversary system, the passive role of the court becomes the active role of the parties and their

withhold his testimony. *Federal judges are not referees at prize-fights but functionaries of justice* (italics supplied). . . . A Federal judge has the power to call and examine witnesses to elicit the truth.”

lawyers. The roles are in fact reversed, and the responsibility for the initiation, conduct, preparation and presentation of civil proceedings is shifted from the court to the parties, mainly of course the legal practitioners. This has the effect of greatly increasing the duties and obligations of the lawyers in the civil judicial process and also the dependence of the litigants themselves as well as the courts on their skill, competence and integrity.

Under the principle of what is called "party control," but subject to compliance with the rules, practices and orders of the court, and so far as the lawyers are concerned subject to their duties and responsibilities as officers of the court and their obligations under the disciplinary code of their respective professional bodies, the parties retain the initiative at all stages of civil proceedings. They can agree to extend time limits which they are required to observe under the rules or orders of the court. They are free by their pleadings or other requisite statements to delimit the issues or questions of fact or law, which they desire the court to determine and the court is bound to confine itself only to those issues or questions and no others. They interview the parties and their witnesses, including experts, take statements from them and they can call at the trial only those witnesses they choose and in the order they choose,¹⁷ though they have the responsibility of ensuring their attendance at the trial. Under the principle of "party prosecution," the parties may move a case forward rapidly or slowly, though if there is prolonged and inexcusable delay extending beyond the applicable limitation period which is prejudicial to the defendant the action may be dismissed for want of prosecution. It is up to each of the parties to apply

¹⁷ *Briscoe v. Briscoe* [1968] P. 501.

to the court to compel his opponent to comply with the rules or orders of the court or to apply for the appropriate sanction either by way of costs or by way of dismissing the action or striking out the defence, as may be, if there is a breach or failure to comply with the rules or orders of the court. At the trial, the parties have the primary responsibility of examining and cross-examining the witnesses. Under the principle of "party autonomy," parties are entitled at all stages of the proceedings (save in the case of claims by or on behalf of minors or mental patients) to settle their cases on any terms they choose without the approval of the court.

In short, it is the duty and responsibility of the lawyers of the parties, both of the solicitor who is employed by the litigant whose main responsibilities are to initiate and prepare the case and of the barrister who is engaged by the solicitor and whose main responsibilities are to present and conduct the case at the stages of pre-trial and trial and on appeal, to ensure that the case of the client is fully and effectively begun or defended and framed, prepared and presented. They are also entitled, within the limits of professional propriety, to take advantage of any weaknesses or mistakes of the opposite party. As Lord Denning expressed it in martial terms,¹⁸

"In litigation as in war. If one side makes a mistake, the other can take advantage of it. No holds are barred."

Under the adversary system there is room for the employ-

¹⁸ *Burmah Oil Co. v. Governor and Co. of the Bank of England* [1977] 1 W.L.R. 473; [1977] 2 All E.R. 461.

ment of surprise and technicalities as weapons in the conduct of the litigation. Indeed, throughout the whole litigation process, the parties and their lawyers are at arms' length and in general it is contrary to professional usage for the lawyers of either party to inform or alert the lawyer of the opposite party that he may be committing a fatal error.

3. Failings and Changes

By exalting the role of the parties and their lawyers, the English adversary system has the effect of setting the parties against each other as opponents or antagonists, or even as foes or enemies, who must be vanquished in the forensic combat.¹⁹ The lawyers on both sides engage in what is called "a battle of wits"; they take each other on as "legal gladiators" in the litigation arena. Yet in spite of, or perhaps because of this feature, the adversary system is much admired, particularly by practitioners who operate it and the judiciary who apply it; and indeed, there is much to commend it, especially as it should be regarded and evaluated, not in isolation as a separate system, but as the framework for the functioning of the other fundamental principles of English civil justice. My own belief is that it reflects and responds to English cultural values, and conforms more closely with the English character of independence and "fair play," and that therefore the common people of England would prefer to retain it rather than to adopt the inquisitorial system, its counterpart on the European continent. They would, I believe, prefer that the conduct of their civil disputes should be under the control of the

¹⁹ A caricature of the adversary system suggests that a civil action should be regarded "as a cock fight wherein he wins whose advocates have the gamest bird with the longest spurs," see *Wigram on Evidence* (3rd ed. 1845), Vol. VI.

lawyers of their own choice rather than be managed by judges, however eminent and independent, who are in no way answerable to them.

Nevertheless, the English adversary system has many inherent failings, which are manifested in practice more often than is generally realised. Since it is the lawyers who choose when and what procedural steps should be taken or resisted, which they think would best serve their respective interests, it is a hit and miss system, sometimes producing the right result and sometimes not. The adversary system inevitably creates avoidable delays and increases both the labour and the costs. It introduces an element of sportsmanship or gamesmanship into the conduct of civil proceedings, and it develops the propensity on the part of the lawyers to indulge in procedural technical manoeuvres.²⁰ For the proper functioning of the adversary system, a basic assumption is that the opposite parties command equal resources and can engage lawyers having equal skill, expertise and competence, but in practice this assumption is not fulfilled in a much larger volume and variety of cases than is generally imagined; and indeed, the adversary system accentuates the inequality in terms of resources and legal advice and representation between the parties. Under the adversary system, some lawyers at any rate fall below, a few very much below, the standard of skill, competence and integrity expected of them by their respective professions, with the result that many claims and defences are defeated, often without a decision on the merits, and are thrown on the dust-heap of lost causes. The true casualties of the adversary system are the litigants themselves, who are frustrated in their search for justice, and the notion that a liti-

²⁰ See n. 16, above.

gant who is defeated by the negligence of his own lawyer will seek redress against him by going to another lawyer is more fanciful than real. Lastly, it may be said that, in the interplay between the court and the parties and their lawyers, the adversary system envelops the machinery of civil justice with a kind of mystique, even mysticism, which alienates people and inhibits them from resorting to the courts for the resolution or determination of their disputes.

In view of these and other failings and defects of the adversary system, it is clearly necessary that urgent steps be taken to improve its machinery. The obvious solution which springs to mind, that the English adversary system should be replaced by the Continental inquisitorial system,²¹ is wholly misconceived both in principle and in practice. As a matter of principle, the proposal to reverse the roles of the court and the parties does not take into account some imponderable intangibles, such as the cultural texture of society, the habits and practices of the legal profession, the needs, values and aspirations of the people, their inarticulated concept of how civil justice should be administered, especially the overriding social need for public justice, so that justice can be seen to be done. As a matter of practice, such a proposal does not take into account the overwhelming difficulties which would be experienced by the practitioners and the judiciary if they were required to change their methods, practices and habits to conform with the inquisitorial system. Moreover, such a proposal would be impracticable since the fundamental difference between the common law system and the continental system in the

²¹ See Report by Justice, *Going to Law, A critique of English Civil Procedure*, (London, Stevens and Sons, 1974).

administration of civil justice lies much deeper, for it lies in the way in which the judiciary is chosen, appointed and promoted. In the continental systems of law, the judiciary at all levels is largely, though of course not entirely, comprised of *career* judges, that is, lawyers trained, after passing their educational qualifications, to be judges, and they follow a judicial career and are promoted to higher judicial office according to the career structure of the judiciary without ever having been engaged in the actual day-to-day practice of the law. On the other hand, in the common law systems, the judiciary is largely, but of course not entirely, chosen from among practising lawyers and there are no career judges. This difference in the composition of the judiciary between the continental and common law systems, is, I suggest, a decisive reason for dismissing altogether the idea that we can or should replace the adversary system by the inquisitorial system of civil justice.

On the other hand, in remodelling and refashioning the adversary system, I suggest it would be useful to look for guidance to the principle underlying the inquisitorial system, namely, that once the jurisdiction of the court has been invoked, the court should become invested with the public duty and interest to ensure the proper conduct, content and progress of the proceedings. Such increased power of the court, to be more active and responsible, would also help to promote equality in procedure, especially where one party is not legally or even competently represented. The active role of the court would enable it to monitor the progress of the proceedings, to control their future conduct, to formulate the real issues or questions between the parties, to determine that there has been full disclosure of documents between them, to ensure the exchange of experts' reports and if and when this power is introduced the exchange of

the statements of the witnesses of the parties, to increase the powers of the court to act of its own motion as, for example, to appoint a court expert and to enable the trial court to call a witness not called by the parties. Above all, the court should be under a duty at all stages to endeavour by conciliation to promote the settlement or compromise of the proceedings. In these and other ways, the adversary systems would be able to cast-off its present failings and defects and respond more positively to producing a more effective and efficient machinery of civil justice.

Principle of Orality

Another fundamental feature of English civil justice is embodied in the "principle of orality." This principle dominates the conduct of civil proceedings at all stages both at first instance, before and at the trial, and on appeal, and in all courts both superior and inferior as well as in tribunals. Its origins stretch back to the earliest days of the common law system of trial by jury, as this is the obvious manner of the conduct of such a trial. It is a deeply ingrained habit of the English legal process. It affords the medium for a litigant in person to take part in the proceedings and to present his own case. It runs in parallel with the principle of publicity, and both orality and publicity are crucial to the proper functioning of the adversary system. Even in instances where written material is produced to the court, as where written pleadings or other documents such as affidavit evidence or the correspondence between the parties, are referred to or reports of cases are cited to the court, the actual hearing of the proceedings in court is conducted orally: there is the oral reading of the relevant written material, the oral arguments, the oral exchanges between the court and the lawyers or the parties if acting in person,

the oral evidence at the trial, the oral judgment of the court.²²

The advantage of orality is that it fosters the "principle of immediacy," and together orality and immediacy have the effect of enabling the Court to conduct the kind of direct, immediate and dialectical investigation into the relevant facts and the applicable law and by this process of "cross-fertilisation," they promote the ascertainment of the truth and the production of the correct decision.

The disadvantage of orality is its inevitable tendency to prolong the hearings and trials and thus to add considerably to increasing delays and costs. There is therefore a growing movement in England towards introducing "written procedures," especially at the appellate stage, for example, by the production of "skeleton arguments" and the chronology of events, so as to enable the court to read and use such material before and at the hearing and avoid the need for reading them orally. To some extent, this developing practice bears a close similarity to the practice prevailing in other common law jurisdictions, such as the use of "Briefs" in the United States and the use of "Factums" in Canada, in which the relevant facts and legal submissions are extensively developed and presented.

In this connection, it is perhaps worth remembering that even in England, in the Court of Chancery, the dominant method for the conduct of equity proceedings was in the form of written documents. The Bill in Chancery with its nine parts, the narrative, charging and interrogating parts

²² "One of the most striking features of proceedings in an English Court, whether original or appellate, is its comprehensive orality. The whole of the case, from beginning to end, is conducted by word of mouth. From beginning to end, the intelligent listener can follow everything," *per* Sir Robert Megarry (formerly the Vice-Chancellor) in *Lawyer and Litigant in England* (1962 Hamlyn Lectures), p. 167.

and so forth was followed by extensive written interrogatories and if necessary by cross-interrogatories which were administered to the witnesses in private before an examiner or commissioner sworn to secrecy, with none of the parties or their agents being allowed to be present. When these depositions were completed, the parties would be furnished with copies at their own expense and they would be presented to the court without any further evidence being admissible; and they formed the basis on which the oral arguments of the parties would be presented to the court. This system was modified during the nineteenth century and finally abolished by the Judicature Acts of 1873 and 1875. Nevertheless, a considerable volume and variety of proceedings in the Chancery Division are still conducted in written form, mainly by affidavit evidence, though they are finally concluded by oral argument in open court.

By contrast with the prevalence of orality and immediacy in English civil justice, many of the European continental systems and their offshoots in Latin America employ the presentation of written material to the court as the predominating method for the conduct of civil proceedings. This basic procedure has been and is under severe criticism by European and Latin American proceduralists, who are championing the introduction of oral procedures in their respective countries and this movement is gradually gaining ground. It is perhaps a strange circumstance that while in England we are seeking to move towards written procedures, in civil law countries they are seeking to move towards oral procedures.

Principle of Publicity

A further fundamental and characteristic feature of English civil justice is its administration in public. This has a long

and ancient history, since it is the manifest method of trial by jury. The imperative need for public justice was emphatically stressed by Jeremy Bentham when he said, for example,

“The grand security of securities is publicity—exposure—the completest exposure of the whole system of procedure—whatever is done by anybody, being done before the eyes of the universal public.”²³

The need for public justice, which has now been statutorily recognised,²⁴ is that it removes the possibility of arbitrariness in the administration of justice, so that in effect the public would have the opportunity of “judging the judges”: by sitting in public, the judges are themselves accountable and on trial. This was powerfully expressed in the great aphorism that,

“It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done.”²⁵

The opposite of public justice is of course the administration of justice in private and in secret, behind closed doors, hidden from the view of the public and the press and shel-

²³ Bentham, *Principles*, p. 8.

²⁴ See Supreme Court Act 1981, s.67. “Our constitution has been found to be the best guaranteed by the open administration of justice” (*per* Lord Shaw in *Scott v. Scott* (1913) A.C. 417. “Justice is not a cloistered virtue.” (*per* Lord Atkin in *Aubard v. Att.-Gen. for Trinidad and Tobago*, [1936] A.C. 322, 335. See also R.S.C. Ord. 38, r. 1, which gives effect to the *dictum* of Earl Loreburn in *Scott v. Scott*, *supra* that “the inveterate rule is that justice shall be administered in open Court.”

²⁵ See *R. v. Sussex Justices, ex p. McCarthy* [1924] 1 K.B. 256, 259 *per* Lord Hewart, L.C.J.

tered from public accountability. There are, indeed, two prevailing exceptions to the open public system of conducting civil proceedings, namely, (1) the hearing of pre-trial proceedings "in Chambers," at which only the parties and their advisers are entitled to be present and from which the public and the press are excluded, and (2) the hearing of proceedings or the trial or part thereof "in Camera," where the court or the trial judge orders that the court should be closed or cleared and the public and press excluded.²⁶ Both these exceptions may be necessary in matters which require protection from publicity, such as matters concerning national security, those relating to persons under disability, *i.e.* minors and mental patients, or those relating to secret processes and other special matters, such as hearings before the Commissioners of Inland Revenue relating to tax affairs and such like matters.

Subject to these exceptions, the principle of publicity should prevail throughout the whole range of civil proceedings. For this reason, the practice of hearing pre-trial applications in Chambers should be abrogated. The strange and perhaps indefensible contrast between the hearing of interlocutory applications for an injunction, in open court in the Chancery Division, and in private in Chambers in the Queen's Bench Division, should be the first and immediate practice to be scrapped.

Principle of Finality

A basic feature of English civil justice may be called "the principle of finality." This may itself have been derived

²⁶ See *R. v. Chief Registrar of Building Societies, ex p. New Cross Building Society*, [1984] Q.B. 229, C.A.

from the practice of jury trials in the former Superior Common Law Courts, in which the general verdict of the jury was regarded as "final" unless it was, on proper grounds, set aside and a different judgment given or order made. By virtue of this principle, the order or judgment of every court and tribunal, both inferior and superior, and at all stages both before or at the trial or hearing is treated as final and operative or enforceable, however wrong or irregular it may be, unless and until it is reversed or set aside or varied by a superior court or tribunal or unless its operational enforcement has been stayed or suspended.

The principle of finality is itself based on a fundamental maxim of the law which is generally expressed by a Latin maxim "*interest reipublicae ut sit finis litis*," which can be translated that, it is in the interest of society that there should be an end to litigation. The underlying idea is that the judicial process should itself operate to still dissension and to promote harmony in society. This principle also has the object and the effect of enhancing public respect for the law and reinforcing the authority of the judiciary, as well as precluding the protraction of the legal process and the increase of costs. In the English system of civil justice, this principle has the decisive effect of reducing the number of appeals, for the principle which the appellate court adopts is that the decision appealed against is right unless the contrary is shown. This accounts for the fact that the volume of appeals in England is considerably less than the volume in continental European countries, where the principle of finality does not operate in the same way or to the same extent and in those countries the appellate court can and often does remit a case back to the court of first instance in order that it should consider fresh oral or documentary evidence which had not been presented or considered earlier.

Principle of Specialisation

This principle, which reflects the general tendency in society in all disciplines and every field of endeavour, has exerted a fundamental influence on English civil justice in two crucial respects, namely, the structure of the civil courts and tribunals and the organisation of the legal profession.

Specialisation accounts for the vast variety of specialist courts and tribunals administering civil justice in specialised areas of the law. Indeed, in England, there have always been specialist courts of one kind or another. The most striking instance of such specialist courts, which of course has its counterpart in continental countries, is provided by the great divide between criminal and civil justice administered under different modes of procedure and practice in criminal and civil courts respectively. On the other hand, an equally fundamental feature of English civil justice which gave rise to specialist courts but which has no counterpart whatever in continental countries is the other great divide between common law and equity administered until the Judicature Acts 1873 and 1875 under entirely different methods of procedure and practice and awarding quite different remedies by the common law courts on the one side and by the Court of Chancery on the other; and although since 1875, the common law courts and the Court of Chancery have been integrated into a single High Court of Justice, their separate specialist characters still predominantly prevail under the guise of separate Divisions of the High Court. Other notable examples of specialist courts, some of which have retained their early specialist attributes, include the High Court of Admiralty, the ecclesiastical courts, the courts dealing with insolvency proceedings, the Court of Probate, the Family Division of the High Court

derived at one removed from the Divorce Court, and more recently the Patents Court and the Commercial Court.

It is, however, in the area of tribunals other than the ordinary courts of law that the principle of specialisation has manifested its enormous and extensive dominance. This has been especially so since the war and under the influence of the classic Report of the (Franks) Committee on Administrative Tribunals and Inquiries.²⁷ In the last 40 years or so there has literally been a proliferation of such separate tribunals. At present, there are innumerable different groups of such tribunals each dealing with a specialised area of the law or of legal control or administration or of professional codes of conduct, and this number is likely to increase. They reflect the greater complexities of modern society and the growing specialisation of legal rules which require judicial control and decision, though in rather a less formal manner than the ordinary courts of law.

The underlying justification for a specialist court or tribunal is that it provides a kind of built-in unit of expert knowledge, skill and experience, presided over by an expert judge or other judicial officer or body before whom an expert advocate will appear generally instructed by an expert attorney. Such a court or tribunal will thus be able to administer justice more in conformity with the needs and requirements of its own specialist field and with much less delay and expense. It will need no fresh instruction in the matters with which it has to deal and is better placed to make a more realistic appraisal of the evidence and of the opinions of expert witnesses, as well as the contentions of

²⁷ Cmnd. 218 (1957).

specialist practitioners. It develops its own expertise and exercises its jurisdiction within its own specialist field with greater understanding and authority.

On the other hand, it needs to be realised that a specialist court or tribunal may become somewhat inward looking, too wrapped up, as it were, in its own specialist subject, and not sufficiently aware or alive to its own social setting or the needs of society. Over-specialisation may perhaps be an even greater danger than non-specialisation in the field of the administration of civil justice. The specialist court or tribunal may be likely to develop its own peculiar procedures and practices and grow still more specialist and esoteric. It may indulge itself in the notion that it knows its own business best and that any inquiry into its machinery and methods of administering justice is mere meddling by ignorant outsiders. There may therefore be a need for a periodic review by an authoritative body of the work of specialist courts and tribunals, much like the functions fulfilled by the Council of Tribunals over the tribunals under its supervision.

Specialisation also accounts for the division of the English legal profession into two quite separate and independent branches, namely, barristers and solicitors. The basis for this division lies in the right of audience before the Supreme Court at the oral, public trial or hearing or on appeal. Barristers have this right, but solicitors do not, although they and their clerks are entitled to appear in pre-trial proceedings in Chambers in the High Court and also in the County Courts and other inferior courts and tribunals. The importance of the right of audience is that it provides the opportunity for advocacy, which calls for the exercise of specialised skills and expertise in the presentation of a party's case before the court. In this sense, advo-

cacy is the art of persuasion, the talent and technique of capturing the mind of the court. Barristers are the specialist advocates, whereas solicitors are mainly specialist office lawyers, assisted by legal executives who are themselves organised in a separate Institute and are specialist in particular branches of practice, including civil litigation. A barrister may not be engaged to advise or appear in court except through a solicitor, who must first be retained directly by the litigant. Among barristers, there is a further specialist division between those who are "junior" and those who are "senior" (called "Queen's Counsel"), who do not ordinarily appear in court except with or "to lead" a junior.

Each branch of the legal profession has a separate autonomous organisation with its own professional examinations, code of conduct and career prospects. Even within the two branches of the profession, there is considerable specialisation both by barristers and solicitors in particular areas of civil matters, such as commercial law, shipping, industrial relations, family proceedings relating to children and property, claims for personal injuries, patents and other intellectual property, taxation law, administrative law and so forth. It is mainly from these specialist legal practitioners that the appointment of judges is made to the High Court from among barristers only, and to the inferior courts largely from barristers but with an occasional sprinkling from among solicitors.

The division of the English legal profession into two branches of barristers and solicitors is beginning to show signs of strain. These will be likely to increase as the style of advocacy changes. It is no longer florid or flowery or even eloquent; it is becoming more and more pedestrian, prosaic and persuasive. Indeed, the whole thrust of advocacy is

likely to undergo a fundamental change as written procedures take the place of oral procedures, since orality is the life-blood of advocacy as it is practised today. Solicitors may be led to claim that they are as good and as effective advocates on written procedures as barristers could be. Nevertheless, it may well be that there will always be a need for specialist oral advocates and therefore for a special order of barristers within the legal profession.

The division of the English legal profession into two separate branches does not of course have its counterpart in continental Europe at all, where even in France the separate professions of *avocat* and *avoue* have been amalgamated, though there, notaries have a specialist area of practice. But the principle of specialisation exerts its influence on the organisation of the lawyers in most European countries in its own peculiar ways. Thus students from law schools in those countries have to make one of three choices as to their career in the law, whether to become legal practitioners, or judges, or law teachers. On the whole, these are quite separate and distinct groups of lawyers, so that, for example, a practitioner cannot be made a judge, nor can a law teacher act as a practitioner, though he may be called upon to serve as a member of a court, especially at the appellate stage. It may be said indeed that in Europe the legal profession is divided not into two, but into three branches, practitioners, judges and teachers.

Demarcation between Pre-Trial and Trial

A pre-eminent feature of the system of English civil justice is the sharp demarcation between the stages of pre-trial and trial. This marked division arises from two related factors, namely,

- (a) the method of trial, which consists of a continuous uninterrupted, concentrated oral hearing before the court sitting in public, at which both parties must present the whole of their respective cases, the evidence of their witnesses, including experts, all relevant documents and their legal arguments, and
- (b) the inevitable interval between the commencement of the proceedings and the trial.

These factors obviously require that the parties should have the fullest opportunity to prepare their respective cases for the trial, and they further require that the parties should have the fullest protection of their rights and interests pending the trial. For this reason, the procedures and remedies at the pre-trial stage assume enormous, even decisive, importance and have a considerable effect on the outcome of the proceedings, as will appear more fully later.²⁸ Under the adversary system these pre-trial processes, which comprise all the procedural steps which may or must be taken before the trial, remain under the control of the parties and are taken at their initiative, so that if they are employed properly, diligently and skilfully they can be used to accelerate the progress of an action and bring it to trial or to a settlement or to some other disposal without a trial as effectively and speedily as possible, but equally, they can be made to operate in a very complex, technical and elaborate way, as the means of obstruction or to delay the progress of an action towards the trial or settlement or other disposal.

By contrast, the European continental systems do not in general make any division between the stages of pre-trial

²⁸ See Chap. 2, p. 68.

and trial, simply because they do not have the method or stage of "trial" as it exists under English civil justice.²⁹ In those systems all the procedural processes that are taken before the final hearing or disposal of the civil suit form part of the "trial" itself. They are not preliminary, provisional or interlocutory in character or purpose, as they are in England, but they constitute integral elements of the continuing process of trial. Under the inquisitorial system, they are largely under the control of the court itself rather than the parties, so that the progress of the proceedings is determined by the court though it may be influenced by or at the request of the parties; and of course the evidence that emerges during the stages before the final hearing may persuade the parties, perhaps even at the suggestion or proposal of the court, to reach a settlement or otherwise to dispose of the proceedings before the final hearing.

Structure of Courts and Tribunals

In the system of English civil justice, there are several factors which have made a decisive contribution towards the shaping of the organisation of the civil courts, and they continue to exert their influence to this day. In general terms, though subject to some qualifications and some dilution today, these factors include the following characteristic English features: that England is a unitary state; that it has no written constitution; that it has developed and still enjoys its own indigenous system or systems of law; and that it has always experienced and still does a centripetal

²⁹ I rather believe that there is no single word in any of the continental languages which conveys the equivalent meaning of the English word "trial."

force in the system of its administration of civil justice. These factors have avoided the need for England to have federal courts on the one side and state or provincial courts on the other, with competing and complex claims to jurisdiction, or to have a separate constitutional court, since constitutional law forms part and parcel of the ordinary body of law and the ordinary courts thus have jurisdiction over constitutional questions. They also avoid the complication that exists in some unitary states, as in France, of having separate regional courts, particularly at the appellate level. They have had and still have a powerful centralising effect on the machinery of civil justice, so that the higher echelons of judicial authority and administration are concentrated in London, from where they radiate their rule and sway to all parts of the country.

The present organisation of the civil courts and tribunals in England appears to be a somewhat complex, diffuse and heterogeneous structure, but it is, in essence, or at any rate compared with the past and also compared with the legal systems in some European countries and elsewhere, fairly simple, comprehensive and highly functional. These qualities may be attributed to the main fundamental features which underlie this structure which may be said to be based on the following principles, namely,

- (1) Division between superior courts and inferior courts;
- (2) Decentralisation of both the superior and inferior courts;
- (3) Distribution of business between courts of general jurisdiction and specialist courts;
- (4) Separation between courts and tribunals other than the ordinary courts of law;
- (5) Basic common appeal system.

1. Superior Courts

Before the Judicature Acts 1873 and 1875, the structure of the superior civil courts in England was well-nigh chaotic. There were numerous separate independent courts, such as the Three Superior Common Law Courts, the Court of Chancery, the Courts of Admiralty, Probate, Divorce and many others. Some of these courts were not the creation of statute but of the common law, deriving their jurisdiction from the royal prerogative over judicial matters. Each of these courts exercised its own autonomous jurisdiction operating its own sectarian practices and procedures, with no rational or common appeal system.

Against this background, it is difficult to magnify the overwhelming importance of the Judicature Acts of 1873 and 1875 in unifying the structure of the superior courts into a single Supreme Court of Judicature. This was divided into two parts, consisting of the Court of Appeal and the High Court. For historical reasons, as well as for the better despatch of business, the High Court was originally divided into five,³⁰ reduced in 1881 to three, Divisions which since 1971 have been re-organised on a more rational basis which has been continued by the Supreme Court Act 1981.³¹ These consist of the following,

- (a) *The Chancery Division*, which traces its lineage to the former Court of Chancery. It deals basically with

³⁰ There was then an understandable sensitivity to retain in office the heads of these Common Law Superior Courts, the Chief Justices of the Queen's Bench and the Common Pleas and the Chief Baron of the Exchequer, until a more propitious time, which arose by natural causes in 1881, when they were amalgamated into the Queen's Bench Division.

³¹ For the Divisions of the High Court, see Supreme Court Act 1981, ss.5 and 6. For the distribution of business between them, see Supreme Court Act 1981, s.61. For Divisional Courts, see *ibid.* s.66.

property matters and it has as part of it a specialist *Patents Court*³²;

- (b) *The Queen's Bench Division*, which traces its lineage to the *Curia Regis*, from which there emerged in turn the Superior Common Law Courts, the Court of Exchequer, the Court of Common Pleas and the Court of King's (Queen's) Bench. It deals primarily with personal actions in common law matters arising out of contract and tort, and it has as part of it two specialist courts, the *Admiralty Court*³³ and the *Commercial Court*.³⁴ Moreover, by way of judicial review, this Division ordinarily exercises the vitally important supervisory jurisdiction of the High Court over the proceedings and decisions of inferior courts, tribunals and other persons or bodies who make judicial decisions or perform public duties and acts³⁵;
- (c) *The Family Division*, which deals with matters concerning matrimonial and family relations and property, including of course all matters relating to children.³⁶

Although formally divided into "Divisions," the High Court is a single integral Court, and except where expressly provided otherwise, all its judges have in all respects equal power, authority and jurisdiction.³⁷ The jurisdiction of the

³² See *ibid.* s.6(1)(a) and s.62(1); and see Patents Acts 1949 to 1961 and 1977; R.S.C. Ord. 104.

³³ See *ibid.* s.6(1)(b), ss.20–24 and s.62(3); and see R.S.C. Ord. 75.

³⁴ See *ibid.* s.6(1)(b) and s.62(3); and see R.S.C. Ord. 72.

³⁵ See *ibid.* s.31; and see R.S.C. Ord. 53.

³⁶ See *ibid.* s.5(1)(a), and Matrimonial Causes Act 1973 and other statutes and rules, *Supreme Court Practice*, Vol. 2, Pt. 7.

³⁷ See *ibid.* s.4(3).

High Court is general and unlimited and extends over the whole of England and Wales.³⁸ For administrative purposes, however, the country is divided into six circuits, each with a Circuit Administrator working under the authority of Presiding High Court Judges and operating a unified court service under the control of the Lord Chancellor.³⁹

The High Court is based in the Royal Courts of Justice in London, but it is nevertheless decentralised throughout the country in two ways. First, by the provision of *District Registries*, of which there are about 140 and which may be described as country branches of the High Court, though each is closely attached to the local County Court.⁴⁰ Each district registry is, as it were, self-sufficient with its own District Registrar, its own offices and staff. Secondly, by the provision of *Trial Centres* of which there are about 26 based in the main provincial towns.⁴¹ These have replaced the ancient Assize System under which itinerant judges travelled to all the counties of England and Wales to bring justice to the door of the litigants. The judges, however, still “go on circuit” from London to these permanent civil trial centres, thereby retaining the advantages of a centralised system, such as the uniformity and certainty of the law and the development of a coherent and authoritative body of law throughout the country as well as enjoying a collegiate climate based on the Inns of Court.

³⁸ See *ibid.* s.16.

³⁹ See Courts Act 1971, ss.27–29, and see *Supreme Court Practice*, Vol. 2, paras. 4802 *et seq.*

⁴⁰ See Supreme Court Act 1981, ss.99–103, and Civil Courts Orders 1983, as amended in 1984; and see *Supreme Court Practice*, Vol. 2, para. 4809.

⁴¹ See *ibid.* s.71; R.S.C. Ord. 33, r. 1, and see *Supreme Court Practice*, Vol. 1, para. 33/1/3.

2. Inferior Courts

Until the creation of the County Courts in 1846, there was no single inferior court exercising general jurisdiction within specified monetary limits. On the contrary, until fairly recently, England had a multitude of inferior local courts exercising jurisdiction by amount or subject matter or geographical boundaries or a combination of these and other criteria. Some of these courts were ancient; some were based in several flourishing ports; some were to be found in the more prosperous cities and boroughs. They all basked in the atmosphere of civic pride and reflected the advantages of a decentralised system providing local justice, accessible, convenient, speedy and flexible.⁴² Since the last century, however, the thrust in the system of inferior courts has been to reduce their number, influence and jurisdiction until the whole range of inferior local courts has been swept away,⁴³ leaving the County Courts, with the limited civil jurisdiction of Magistrates' Courts, to be the sole surviving civil inferior courts.

After many earnest efforts to create a single system of local courts,⁴⁴ the County Courts were established in 1846 as courts primarily intended for the recovery of "small debts" with their jurisdiction limited to £20⁴⁵; they were meant to be the "poor man's" court. From the beginning, however, the work-load of the County Courts has increased enormously by the continual raising of the monetary limits

⁴² As, for example, the Courts of Requests.

⁴³ See Courts Act 1971, ss.42, 43; Administration of Justice Act 1977, s.23, Sched. 4.

⁴⁴ See Speech on Local Courts delivered in the House of Commons on April 29, 1830 in *Speeches of Henry Brougham, with Historical Introduction* (Edinburgh, 1838) Vol. 11, p. 489.

⁴⁵ Its preamble read "An Act for the recovery of small debts and demands."

of their jurisdiction, not merely to match inflation but in absolute terms, and by ever-widening the scope of the matters within their jurisdiction. The County Court Judge came to be called "the judicial beast of burden."⁴⁶ The County Courts have nevertheless continued to flourish and they have come to deal with the largest volume of civil proceedings covering almost their whole range and variety. It may therefore be claimed that today County Courts provide the foundation or the basic texture of the system of courts in the fabric of English civil justice.

Fortunately, there are extensive powers, which themselves have been increased, for the transfer of proceedings to and from the County Courts and the High Court⁴⁷ and from one County Court to another,⁴⁸ both for the purposes of dealing with such proceedings and the enforcement of judgments.⁴⁹ With these powers of transfer and the increase in the monetary and subject matter jurisdiction of the County Courts, we are fast reaching the stage, if we are not already there, when apart from any other consideration, it may be difficult to draw the dividing line, certainly so far as the monetary limits are concerned, between the High Court and the County Courts, and we may therefore need, not so much to make a leap, as simply to take another obvious step forward and integrate the County Courts with the High Court into a single Supreme Court of Judicature, as was recommended by the Judicature Commissioners in 1872.⁵⁰

⁴⁶ See Holdsworth, *A History of English Law*, Vol. 1, p. 192.

⁴⁷ See County Courts Act 1984, ss.40-45 and County Courts Rules 1981, Pts. II and III.

⁴⁸ See County Court Rules 1981, Ord. 16, Pt. I.

⁴⁹ See County Courts Act 1984, ss.105 and 106.

⁵⁰ See Second Report of Judicature Commissioners (1872) C. 631, pp. 10, 13, 14 and 19.

In the County Courts, an area of proceedings which is of exceptional importance is that relating to "*small claims*."⁵¹ At present, such proceedings are those in which the sum claimed or the amount involved does not exceed £500 or a party duly requests a reference to arbitration. A special procedure is provided for dealing with such "*small claims*," in which the hearing is required to be informal and the strict rules of evidence will not apply; and although the parties are entitled to be represented by lawyers, this is discouraged because solicitors' costs would ordinarily not be allowed, save in specified circumstances. These provisions may be regarded as heralding the beginnings of a small claims court or tribunal for small and even modest civil claims, whether as part of the County Court system or not. In this way, we may perhaps come full circle to establish a "poor man's" court.

Magistrates' Courts are primarily criminal courts but nevertheless they exercise civil jurisdiction in two important areas of proceedings, namely, those relating to matrimonial and family affairs and those relating to the recovery of local rates. These anomalies are traceable to historical accidents and they can no longer be justified, especially when it appears that it is precisely in relation to maintenance orders and orders for the payment of local rates that imprisonment for civil debt still subsists in England.⁵² The fabric of civil justice is seriously disfigured by continuing the civil jurisdiction of Magistrates' Courts in matters relating to matrimonial and family affairs, from which they ought to be removed as a matter of urgency; and the recovery of local

⁵¹ See County Courts Act 1984, s.64 ("Reference to Arbitration"), and County Court Rules 1981, Ord. 19, Pt. I.

⁵² See Administration of Justice Act 1970, s.11 and Sched. 4.

rates, like the recovery of national taxes, would seem to be more rationally the function of the civil courts than the criminal courts.

3. Tribunals

Within the fabric of civil justice, there are to be found tribunals other than the ordinary courts of law which exercise considerable judicial powers and an extensive jurisdiction, covering a vast range of disparate matters. These tribunals serve as an alternative mode of dispute-resolution to that provided by the ordinary courts of law; they constitute a separate but parallel system to that of the ordinary courts of law for the administration of civil justice, except that their decisions may ultimately be challenged before a court of law. They are not merely an adjunct to but form part and parcel of the process of making judicial decisions and resolving civil disputes. They are to be regarded as a distinct but essential branch of the judicial process, for they fulfil the function of adjudication and not merely of administration. They have grown in importance and influence and may now be said to have become deeply rooted in the English legal system.

Although there are a great number and variety of tribunals other than the ordinary courts of law, there is no single or systematic structure or organisation which embraces them all. They are, as it were, individualised by the particular specialist subject matter with which they deal, or by the method of their creation or the limited jurisdiction and appropriate procedure within which they function. The system of tribunals therefore defies logical or realistic classification, but nevertheless it may be convenient to identify three main groups, namely, statutory, domestic and arbitral tribunals.

4. Statutory Tribunals

Before 1958, there were the glimmerings of tribunals other than the ordinary courts of law, established or recognised by statute, as for example, compensation tribunals for the compulsory enclosures of agricultural land or the compulsory acquisition of land for the canal and railway systems and Courts of Referees to deal with unemployment insurance. The influence of Dicey's doctrine of the rule of law was almost decisive against the development or spread of administrative law and justice in England. After the war, however, with the increasing complexity of modern industrial society and the considerable expansion of the so-called Welfare State and its many social services, it became apparent that the system of the ordinary courts of law was not capable of coping with the enormous escalation in the volume and variety of claims and disputes, not only between subject and subject but more especially between subject and the State both at central and local government levels. The general rule of the common law that the jurisdiction of the ordinary courts could not be ousted had to yield to the pragmatic demand that there was urgent need for alternative modes of informal judicial disposition of claims and demands in many areas, which the ordinary courts of law could not, or would not wish to, entertain.

Since 1958, there has been a prolific increase of tribunals and inquiries other than the ordinary courts of law. This may be largely attributed to the Franks Report, published in 1957,⁵³ which acted as the catalyst in producing the modern system of statutory tribunals and inquiries. These tribunals are not ordinary courts but neither are they

⁵³ Report of the Committee on Administrative Tribunals and Enquiries, (1957), Cmnd. 218.

appendages of the executive. Their basic characteristics have been identified as openness, fairness and impartiality⁵⁴ and they have certain advantages over courts, such as cheapness, expedition, freedom from technicality, accessibility, and expert knowledge of their particular subjects.⁵⁵ They exhibit great flexibility in their procedures; the hearings are conducted in an orderly but in an informal atmosphere; the rules of evidence are relaxed, and the costs are minimal. In the public eye, the image of the tribunal is less forbidding than the daunting setting of the court. Tribunals vary widely in their constitution, such as the appointment, qualifications and terms of service of their members and in their functions. They also differ greatly in their procedures, as for example, some of them having an in-built hierarchy of appeals. All in all, it may be said that the creation of the system of statutory tribunals and inquiries, some of them under the control of the Council of Tribunals, has been greatly to enhance and improve the fabric of English civil justice.

In European countries, there is no comparable general system of tribunals and inquiries other than and separate from the ordinary courts of law. Most of the purposes for which our tribunals have been established are in fact fully and effectively carried out within their system of the ordinary courts of law, exercising specialist jurisdiction in particular areas. In England, the line dividing the matters which are to be channelled to the ordinary courts of law and those to tribunals is based on political or administrative

⁵⁴ *Ibid.* p. 10, para. 41 and 42.

⁵⁵ *Ibid.* p. 9, para. 38. They adopted what was said by the Donoughmore Committee on Ministers' Powers, (1932) Cmnd. 4060.

considerations and not on legal or juridical principles. Perhaps, in passing, one form of lay, *i.e.* non-legal, tribunal which exists in France which may give us some cause for envy is their important and influential *Tribunaux de Commerce*, of which each of the main towns and cities can boast of one.

5. Domestic Tribunals

Domestic tribunals are those which private or professional bodies or associations or groups of people set up or for whom they are otherwise set up to resolve disputes between their own members, or to apply their own code of conduct and exercise control or discipline over them. In the great majority of these instances, the jurisdiction of such domestic tribunals is derived from the contractual relationship between the members and the body, association or group which they have agreed to join. In many other instances, particularly some professional bodies, such domestic tribunals are established by statute, as for example in the case of solicitors, the Solicitors Disciplinary Tribunal. In other instances, the jurisdiction of such domestic tribunals is partly derived from contract and partly from a Charter establishing the body in question, as for example, in the case of a Visitor of a University, or from some other source of law.

There are a great variety and number of such domestic tribunals and between them they exercise their powers over a great volume of civil proceedings. Such proceedings can be of crucial importance to the people concerned, affecting their livelihood, employment, reputation and position in society. For this reason, domestic tribunals form an important and integral part of the fabric of English civil justice.

The overriding requirement for the exercise by such dom-

estic tribunals of their jurisdiction and powers is that they must comply with their own applicable rules of procedure and with the principles of natural justice. In the case of all such tribunals, their decisions may be challenged either under the applicable statute or by way of appeal or by way of Judicial Review,⁵⁶ under the supervisory jurisdiction of the High Court over tribunals or under their domestic procedures as in the case of a University Visitor.

6. Arbitration Tribunals

Arbitration provides the classic method of an alternative informal process of dispute-resolution to the formal machinery of the ordinary courts of law. It has come to form an increasingly important and vital part in the fabric of English civil justice. There are, of course, no firm statistics to go on, but the received anecdotal evidence is that arbitration accounts for a great volume of references, a wide variety of subjects referred, substantial, even enormous, amounts of money involved and a thriving international forum in London. From many quarters come cries urging more people to submit their differences and disputes to arbitration. Some of these cries may be based, not so much on the attraction of arbitration but rather the rejection of litigation, and when they come from high judicial voices, they may perhaps be prompted by the need to reduce the work-load of the courts rather than to induce the increase of the business of arbitrators.

The jurisdiction of an arbitral tribunal, whether it consists of one or more arbitrators, is of course basically consensual in character,⁵⁷ and the agreement to submit differences and disputes to arbitration may be made before or after they

⁵⁶ See Supreme Court Act 1981, s.31, and R.S.C. Ord. 53.

⁵⁷ See Arbitration Act 1950, s.32.

have arisen or may be contained in the rules of trade associations of which the parties are members. The general assumption is that arbitrations enable cases to be dealt with speedily, cheaply and in some instances without lawyers and with the parties presenting their own cases, free from legal technicalities, with decisions made by experts who know the practices, usages and customs of the relevant trade or business. There are no doubt a vast number of arbitrations which are so concluded, but it is also fairly clear that there are a substantial number of arbitrations in which delay, expense, costs and complexity occur. On which side of this divide a particular arbitration will fall depends upon the parties themselves and the arbitral tribunal they have chosen. It is the parties who are entitled to choose how the tribunal should be constituted and what their procedural rules should be, which they do very frequently by reference to the rules of particular arbitration institutions, though of course they may also provide in their agreement for particular procedures to be followed in the conduct of the proceedings.

In England, in recent years, there has been a significant movement towards improving the machinery of arbitration.⁵⁸ This is particularly to be found in the endeavour to clothe an arbitration award with the principle of finality, to reduce delays in the conduct of arbitration proceedings, to restrict appeals against arbitration awards, save in exceptional circumstances, and to increase the basis for the recognition and enforcement of arbitration awards across national frontiers. The services rendered by English arbitrators has attracted a vast volume of international com-

⁵⁸ See Arbitration Acts 1975 and 1979.

mercial arbitrations to London, and this move may increase considerably if arbitrators respond to the encouragement to play a more active, interventionist role in the conduct of the proceedings both before and at the final hearing. Arbitrators are being encouraged to induce the parties to exchange the statements of witnesses, including experts, to empower the arbitrators to call for independent experts' reports, to make full disclosure of all relevant documents, to reduce the extent of orality and to increase the range of written procedures. In international commercial arbitration proceedings, we may have to discard some of the attributes of the adversary system of civil litigation.

System of Costs

There are three separate but related facets of the systems of costs in civil proceedings which may be said to be fundamental features of English civil justice, namely, the incidence of costs, the provision of legal aid and the taxation of costs. Each of these will be briefly dealt with here.

1. Incidence of Costs⁵⁹

The most baneful feature of English civil justice is the incidence of costs. This is because of the operation of the broad, general rule that "costs follow the event," which put bluntly in the terms of a game means that the loser pays the costs of the winner, including his lawyer's fees, costs and

⁵⁹ See Supreme Court Act 1981, s.51, and R.S.C. Ord. 62.

charges.⁶⁰ It is a stark, simple rule, which has a pervading influence throughout the whole process of civil litigation, since it applies to all stages of the proceedings, at first instance and on appeal, except for a few interlocutory steps. Justification for the rule lies in the concept of "fault" since the loser is considered to be in the wrong in pursuing or contesting the proceedings and must therefore compensate his victim for the costs incurred by him. Inevitably, the application of the rule has far-reaching consequences. It greatly magnifies the factor of costs, which itself becomes a stake in the litigation, over and above the merits of the case, since if the loser has to pay in the end, there is an added incentive to the natural instinct to win. It makes winning more victorious and losing more disastrous. The parties must needs become cost-conscious, especially as, at any rate in the High Court, the costs are calculated not by the amount at stake, though this will be taken into account, but by each step taken in the proceedings, so that it is not possible to state at the beginning of an action what the costs will be at its end. Sometimes this makes parties settle or compromise cases which they would or should otherwise fight, and such settlements motivated by the desire to avoid or the fear to incur further costs might well not be fair or proper; sometimes it makes parties fight cases which they would or should otherwise settle, because the matter of costs stands in the way. In many cases, the costs exceed the amount of the claim or the value of what is at stake and thus the uncertainty as to the incidence and the amount of the costs becomes the powerful disincentive to pursuing or defending claims, however meritorious such claims or defences may be. The bane and burden of costs have existed for gener-

⁶⁰ R.S.C. Ord. 62, r. 3(3).

ations in the English system of civil justice and the problem of costs remains as intractable today as it ever has been.

2. Provision for Legal Aid⁶¹

The most serious blemish in the system of costs was and still is the excessive and prohibitive amount of the costs of resorting to the Courts for the determination or resolution of civil disputes or questions. The effect is to put justice out of the reach of people who may be classed as poor or even those with moderate means. Grave injustices may thereby be occasioned and many meritorious claims go unredressed. Justice would seem to be rationed by the purse and the costs-factor gives credence to the taunt "there is one law for the rich and another for the poor."

In England, the history of legal aid for the poor stretches back to the Middle Ages, first to those classed as "paupers" and later to those classed as "poor persons." The Beveridge Report of 1942, which designed a comprehensive system of social insurance, did not include provision for legal services, which perhaps reflects the low value then attached to the serious personal and social ailments that may be caused by legal disputes and conflicts. This omission was fortunately soon rectified in 1945 by the Rushliffe Report on Legal Aid and Advice, which laid the foundation for the introduction of the Legal Aid Scheme in England and Wales. The implementation of the recommendations of this Report was perhaps accelerated by two factors, namely, the increasing volume of petitions for divorce and other litigation relating to children and matrimonial property, and the enormous increase in actions for damages for personal injuries and

⁶¹ Legal Aid Acts 1974–1979, and the Regulations made thereunder; see *Supreme Court Practice*, Vol. 2, Pt. 12, "Legal Aid."

death due to the abolition of the rule of contributory negligence and of the doctrine of common employment.

At any rate, in 1949, the Legal Aid and Advice Act made the great leap forward of bringing the Legal Aid Scheme into effect. It mitigates the harshness of the costs-factor in civil litigation, and brings justice within the reach of a considerable number of people who are classed as "legally assisted persons" though the number was much greater at the time the Act was passed than it is today. The underlying purpose of the Legal Aid Scheme is to enable those who are eligible for Legal Aid to undertake permissible litigation without having to pay costs beyond their means either to finance the litigation or to meet the liability for costs if they should lose under the rule that costs follow the event. There is a State subsidy, payable out of the Legal Aid Fund, towards the cost of employment of solicitors and barristers and any necessary disbursements. Eligibility for Legal Aid is tested in two ways, first there is a "means test" as to both income and capital by Social Security Officers,⁶² and secondly there is a "merits test" investigated by a local committee of lawyers.⁶³ The contribution of a legally assisted person may be assessed at "nil" or he may be required to pay a fixed periodic contribution. If he should lose, his liability is limited to what the Court considers he can reasonably afford. He is free to choose his own solicitor who is himself free to choose his own barrister. They are both remunerated for their services out of the Legal Aid Fund though a percentage is deducted to assist in financing the Scheme. The administration of the Scheme is entrusted

⁶² See Legal Aid Act 1974, s.6. ⁶³ See *ibid.* s.7(5) and (5A). This test has two prongs, for the applicant must show that his application is based on reasonable grounds (s.7(5)), and also that it is reasonable that he should receive legal aid (s. 7(5A)).

to the Law Society, answerable to the Lord Chancellor, who is advised on matters of general policy by an Advisory Committee.

Many changes have been introduced into the Legal Aid Scheme since it was first enacted. It is enough to say here that this Scheme represents a fundamental and beneficent feature of English civil justice.

3. Taxation of Costs⁶⁴

A most useful and fundamental feature of English justice, both civil and criminal, is that the costs which a solicitor may claim by way of remuneration for his services, including all his disbursements and the fees paid or payable to Counsel may be examined, or as it is called "taxed," by an Officer of the Court, who may be a Master or other Officer of the Supreme Court Taxing Office or other Court office. Taxation involves the inquiry and scrutiny by the Court Officer of the entitlement to each item for which remuneration is claimed and its amount as well as of each item of disbursement and its amount and thus taxation constitutes an exceptional but important instance in which the court plays an active role and carries out its own investigation. The burden is on the solicitor whose bill is being taxed to justify each item and the amount he claims for his remuneration or his disbursements.

The taxation of a solicitor's "bill of costs" extends to both contentious and non-contentious business. In the case of contentious business, the losing party who is liable to pay the costs of the litigation, can of course tax the bill of costs of the winning party. In both contentious and non-contentious

⁶⁴ See Solicitors (Amendment) Act 1974, Pt. III, Remuneration of Solicitors, and R.S.C. Ord. 62.

business, the client himself can require that his solicitor's bill of costs should be taxed. The total amount found to be due to the solicitor after the conclusion of the taxation may then be enforced as a judgment of the court. If that amount is below a specified proportion of the total of the bill before it was taxed, the solicitor will be liable for the costs of the taxation but he will recover such costs if it exceeds that percentage.

From the findings of the Taxing Master or Officer an appeal lies to the Judge in Chambers sitting with assessors including another Taxing Master and an experienced legal practitioner.

It will be seen that the result of the system of taxation is that the legal profession is the only profession which has its own court machinery for regulating or re-valuing the remuneration of its members and so avoiding the unhappy spectacle of an action to recover legal professional fees.

Sources of Civil Procedural Law

In England, we do not have a Code of Civil Procedure, as they do in all European countries. In 1825, Jeremy Bentham began an "Initial Sketch of the Procedure Code," but as with so many other of his works, he did not get beyond this tentative stage.⁶⁵ No one has since ventured to undertake this task. Whether we need, or could even frame, a Code of Judicial Procedure is perhaps too large a question to raise here. It must be confessed there is not today a popular, still less a pressing, demand, nor can it be said that we are ready intellectually or doctrinally or in any other way, for such a code. Nonetheless, I venture to think that the

⁶⁵ See Bentham, *Principles*. The Sketch is at Appendix A to the *Principles*, p. 178.

time will surely come, sooner than perhaps we imagine, when we shall have seriously to consider the concept and the creation of a Code of Civil Procedure.⁶⁶ This will be a formidable undertaking, but it will be a task of enormous social and cultural value, which will require an innovative and imaginative spirit and a courageous and constructive approach. Its underlying justification would be, not the mere re-ordering of the machinery of the civil judicial process, but the actual, palpable and widespread improvement of the quality of justice, bringing justice within the reach and the understanding of all and providing a simple, speedy, inexpensive, accessible and effective system for its dispensation, free from formalism and technicalities.

In the absence of a Code of Civil Procedure, it is necessary to gather the law of English civil justice from several and disparate sources. Some of these are the ordinary sources of law, such as statutes enacted by Parliament, or delegated legislation authorised by statute or judicial decisions, which constitute sources of both substantive and procedural law. On the other hand, in England there are distinctive sources of procedural law which are out of the ordinary and are not to be found in Europe, nor even elsewhere, in the manner in which they are made or in which they operate in England. Such sources of law include Rules of Court, Practice Directions, Prescribed and Practice Forms and above all, the inherent jurisdiction of the court. These sources represent fundamental and characteristic features of English civil justice, since they govern, affect and apply only to procedural law and practice and not to substantive rules of law.

⁶⁶ See Jacob, "Justice Between Man and Man," in *Current Legal Problems* (1985) Vol. 38, p. 211.

1. Statute Law

The primary source of civil procedural law, is, of course, statute law. The range of the statutes which deal, whether directly or indirectly, with the civil procedural system is too vast and extensive to be listed here. Although all statutes have equal legal force and effect, it may perhaps be helpful and convenient to regard the statutes that relate to civil justice as being divided into two groups, namely, those that are of paramount and essential importance and those that are incidental or ancillary to the operation of the civil procedural process. Among the first group of such statutes, which have a more direct operation, influence and effect on the system of civil justice are those that provide for the structure, organisation, jurisdiction, hierarchy, distribution of business and the personnel of the courts and tribunals. Included in this first group, of course, are such statutes as the Supreme Court Act 1981, the Appellate Jurisdiction Act 1876, the County Courts Act 1984, the Magistrates Courts Act 1980, and the Tribunals and Inquiries Act 1971. Among the second group of such statutes, whose operation, influence and effect on the system of civil justice may be regarded as being incidental or ancillary are those that deal with separate areas of the civil process, such as the limitation of actions, civil evidence, enforcement procedures, proceedings by and against the Crown and foreign states, arbitration and such like statutes. This division is of course not a hard and fast one and many would place a particular statute in one group rather than the other.

An important feature of English civil justice concerns the operation of statutes, for once a statute is held to affect only the practice and procedure of the courts, the presumption against retrospective interpretation has no application, so that, unless the statute otherwise provides, expressly or by

necessary implication, any changes effected by it will apply to pending proceedings and will thus be given retrospective effect.⁶⁷

2. Rules of Court⁶⁸

A distinctive feature of English civil justice are the powers conferred by Act of Parliament on appropriate rule-making authorities to make "Rules of Court" for the purposes of regulating and prescribing the practice and procedure to be followed in the respective courts for which each of them is constituted. These rule-making powers were first conferred in 1833 on the Judges of the Superior Common Law Courts in relation to pleadings only,⁶⁹ but of course, since then, the powers have been considerably extended to the whole of practice and procedure and other specified proceedings and branches of the law⁷⁰ and to all courts and tribunals. Such extension began with the Supreme Court when it was created by the Judicature Acts 1873 and 1875. The Rules of Court so made relating to all courts and tribunals thus comprise an authoritative, extensive and wide-ranging *corpus* or body of civil procedural law, which to some extent may be regarded as the English equivalent of much of what is contained in the European Codes of Civil Procedure. They constitute a dominating feature of the entire civil judicial process, since they provide the framework for the practical, workaday operation of this process, and they form an essential, even indispensable, part of the

⁶⁷ See *Barber v. Pigden* [1937] 1 K.B. 664; *Blyth v. Blyth*, [1966] A.C. 643.

⁶⁸ See Jacob, "The Machinery of the Rule Committee" in *The Reform of Civil Procedural Law* (Sweet & Maxwell, 1982), p. 323.

⁶⁹ Civil Procedure Act 1833, s.3. See Jacob, "Civil Procedure since 1800" in *ibid.* p. 213.

⁷⁰ See Supreme Court Act 1981, ss.84 and 87.

machinery of civil justice. They can be made, amended or annulled, speedily and informally, as occasion demands, in response to changing circumstances or requirements. Indeed, it may truly be said that if we did not have this system for the exercise of authoritative rule-making powers which we now enjoy, we should have had to invent it.

Since the Rules of Court play such a crucial part in the machinery of English civil justice, it may perhaps be helpful to develop briefly some of their salient aspects and for this purpose, it will be convenient to take the Supreme Court Rule Committee as the model.

(a) *Subordinate Legislation*

Since they are made under statutory powers, the Rules of Court themselves have the force and effect of law. The rule-making authority itself is a subordinate legislative body and in making the Rules of Court is performing a legislative function. It must therefore ensure that the Rules of Court do not exceed its own statutory powers and limits, otherwise they would be *ultra vires* and invalid.

(b) *Judge-made Legislation*

The Supreme Court Rule Committee consists of eight pre-eminent judges and four practitioners.⁷¹ The Lord Chancellor must himself be a party to any proposed Rule of Court, so that in effect he can exercise what may be called "the right of veto," and the rules are made by him "together with" any four or more members of the Com-

⁷¹ See *ibid.* s.85. They comprise the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Family Division, the Vice-Chancellor, two practising barristers and two practising solicitors.

mittee. Thus, in making Rules of Court this heavily-laden judicial body exercises legislative powers. In England, it is not thought that there is any conflict of function or interest for judges who normally exercise judicial powers to exercise also legislative powers, since in one way or the other they are regulating the practice and procedure of the courts.

(c) *Procedural not Substantive Law*

This view may be supported in England by the fact that the most decisive limitation on the powers of the Supreme Court Rule Committee, as well as of other rule-making authorities, is that they extend to regulating the "practice and procedure" of the Supreme Court or other courts for which the rules are made. Although under these powers, almost the entire process of civil litigation and proceedings is regulated by the applicable Rules of Court, yet these powers do not extend into the area of substantive law. There is thus a vital and essential dichotomy created between "substance" and "procedure,"⁷² between substantive law, the function of which is to define, create, confer or impose legal rights and duties and procedural law, the function of which is to provide the machinery, the manner or the means by which legal rights and duties may be enforced or recognised by the courts of law or other recognised or properly constituted tribunal.

(d) *Responsiveness to Change*

The inestimable value of the English system of rule-making is that the process of the Rule Committees to make new rules, to add, delete, amend or substitute any necessary

⁷² See Jacob, "Practice and Procedure" in *Halsbury's Laws of England* (4th Ed.) Vol. 37, para. 10.

rules, may be operated speedily and informally to meet the changing demands of procedural reform, and generally this is done after consultation with interested bodies but sometimes even without such consultation. Except where primary legislation is necessary to empower the Rule Committees to make rules on fresh topics, they do not have to wait for Parliamentary time to be found and the elaborate Parliamentary procedures and processes to be gone through and they can make the necessary changes as and when it is appropriate to do so. Thus, the first Rules of the Supreme Court in 1875 were wholly replaced in 1883, and these were entirely revised in 1965. In between these dates, and since the last revision, there have literally been innumerable occasions when new Rules of Court were made mostly of minor importance but some making radical and fundamental changes in procedure.

In contrast to the making of English Rules of Court, in European countries, the judges of the ordinary courts do not take any part in the rule-making processes at all. In France, for example, the canon that the courts have no power to make Rules of Court which have a legal and binding effect is regarded as a corollary of the doctrine of the separation of powers and is viewed as the equivalent of a constitutional principle. On the other hand, the absence of judicial rule-making power has not stood in the way of desirable reforms, for there are in most European countries close ties between the Ministry of Justice and a specialist branch of the Judiciary, as, for example, in France, the Conseil d'Etat, though this machinery has been criticised as being a threat to civil liberties. The executive branch of the government generally have broad legislative powers and these have been used to facilitate the introduction of procedural reforms. Thus, in France, the subjects reserved by the

constitution for primary legislation by parliament do not include civil procedure, and therefore the Code of Civil Procedure may be and has been revised and rewritten by executive action on the part of the Ministry of Justice with the approval of the Conseil d'Etat.

3. Judicial Precedent

As in the case of other branches of English law, judicial decisions provide a rich quarry of civil procedural law. Those given by the appellate courts are of course binding upon all the lower courts, for the doctrine of *stare decisis* or judicial precedent applies as much to procedural as to substantive law. Judicial decisions thus play a crucial and significant part in English civil justice by providing authoritative guidance, certainty and uniformity in the procedure and practice of the courts. Experience in recent years has shown that there are about two to three hundred cases on civil procedural questions reported annually. Some of these cases are of far-reaching importance and may be said to have a virtually legislative effect, so much have they changed the operation of civil procedural law. Many of the other cases lay down the principles or provide examples of the way in which the discretionary powers of the court should be or have been exercised. Very often, the decision of the appellate court upon a procedural question, on what may be called "procedural facts" may well have the effect of creating or imposing a substantive legal right or duty, without deciding the substantive merits of the particular case. The judicial decisions in a given area of procedural law, as for example, on applications for judicial review or on matters of industrial relations, help to build and develop a uniform and systematic body of law, a kind of specialised jurisprudence in that area.

By contrast, in European countries, judicial decisions, even of the appellate courts, do not have binding effect, for the principle of *stare decisis* does not apply there, and thus they do not provide a source of law. Nevertheless, they are of persuasive authority and are more often than is thought consulted, if not cited, in later cases, and indeed they are closely studied and constantly cited by scholars, including proceduralists, in their writings. In this way, they provide what the French call the *jurisprudence* on a particular area of law, and they serve to develop a uniform and systematic body of guidance, if not of authority, based on their respective Codes of Civil Procedure.

4. Practice Directions

An extremely important and interesting source of rules of practice and procedure is provided by what are called "Practice Directions." These are peculiarly English, in the sense that they are essentially practical and pragmatic, and they are not to be found in European countries, or for that matter elsewhere besides. Their peculiar character lies in the fact that they do not have the force of law but yet they are expected to be and are in fact applied by the courts and complied with by practitioners, officers of the Court and others who are involved in the judicial process. They have what may be called a demi-legislative effect.

Practice Directions are issued from time to time, at fairly frequent occasions, by the senior judges and Masters of the separate Divisions of the High Court as well as the Court of Appeal to regulate the mode and manner of procedure in their respective courts. They provide directions as to the methods of practice and procedure for the guidance and assistance of the litigants in the conduct of their proceedings and in the administration of civil justice generally. Perhaps

the most important Practice Direction is that which was issued by the House of Lords in which the House announced that, in specified circumstances, it would no longer be bound by its own decisions.⁷³ Other examples of important Practice Directions are those relating to the trial of actions in the Queen's Bench Division and in the Chancery Division in London and outside London, the procedure for claims and judgments expressed in foreign currency, the machinery for conducting business with the courts by post instead of by personal attendance, and the times limited for acknowledging service of process served out to the jurisdiction and such like directions.

The juridical authority for the making of Practice Directions is derived from the inherent jurisdiction of the Court to control and regulate its own process.

5. Prescribed and Practice Forms

An exceptionally valuable source of civil procedural law and practice is provided by forms of documents for use in the practical application and operation of the judicial process. At almost every stage of civil proceedings, except the oral stage, a particular form is needed to express what is required to be done or what has been done, and it contains the only authoritative record of the step which is being or has been taken.

In the English system, there are two classes of such forms, namely, Prescribed and Practice Forms. Prescribed Forms are those prescribed by the Rules of Court and thus they have the force of law and they must be used where applicable with such variations as the circumstances of the

⁷³ Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 123 k; [1966] 3 All E.R. 77.

particular case require. Practice Forms are those directed to be used by Practice Directions and thus they do not have the force of law, but they are nevertheless in constant use. Both these classes of forms provide the lubrication for the smooth and speedy working of the machinery of civil justice.

6. The Inherent Jurisdiction of the Court⁷⁴

The most extraordinary source of law in the English legal system is commonly called "the inherent jurisdiction of the court." There is no equivalent to this peculiar English concept of judicial power in any European country. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, mainly civil but also criminal, and not part of substantive law. It is normally exercisable by the Superior Courts of Law and to a limited extent by inferior courts but not by tribunals. It is not to be confused with the statutory jurisdiction of the court nor with the exercise of discretionary judicial powers. It is not derived from any statute or rule of law, but from the very nature of the court as a court of law, which is why it is called "inherent." The underlying principle in English procedural law is that the essential character of a court of law necessarily involves that it should be invested with the power to maintain its authority, to control and regulate its process and to prevent its process from being abused or obstructed. Such a

⁷⁴ See Jacob, "The Inherent Jurisdiction of the Court" in *The Reform of Civil Procedural Law*, *supra* p. 221 and *Current Legal Problems* (1970) Vol. 23, p. 23. This paper was cited and applied in *Montreal Trust Co. v. Churchill Forest Industries (Manitoba Ltd)*. [1971] 4 W.W.R. 542; 21 D.L.R. (3d) 75 (Manitoba Court of Appeal); *Taylor v. Att.-Gen.* (1975) 2 N.Z.L.R. 675 (New Zealand Court of Appeal). See also *per* Lord Diplock in *Bremer Vulkan etc. v. South India Shipping Corp.* [1981] A.C. 909, and *Halsbury's Laws of England*, (4th Ed.) Vol. 37, para. 14.

power is intrinsic in a superior court of law; it is its very life-blood, its very essence, its immanent attribute. The court must needs have such a power in order to enable it to maintain and fulfil its character as a court of justice.

Apart from the power to control and regulate its process, the inherent jurisdiction of the court is exercised by coercive powers, in the case of contempt of court by punishing the offender and in the case of an abuse of process, by an order to stay or dismiss the action or to give judgment against the defendant or to impose terms as it thinks fit. Blackstone thought that the coercive powers in relation to contempt of court had been "actually exercised as early as the annals of our law extend." Lord Blackburn asserted that this inherent power to stay or dismiss actions has been exercised from very early times and he thought indeed from the earliest times.

A basic and distinctive feature of the inherent jurisdiction of the court is that it is exercisable by summary process, without a plenary trial conducted in the normal or ordinary way, that is, in an open, public oral trial nor even after the normal preparations for such a trial such as the discovery of documents and generally without waiting for the trial or for the outcome of any pending or other proceeding. Moreover, the inherent jurisdiction of the court may be exercised even in matters which are regulated by statute or by Rules of Court, so long as the court can do so without contravening any statutory provision.

The inherent jurisdiction of the court is thus a virile and viable doctrine of English procedural law. It has been defined as being a reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just and convenient to do so, and in particular to compel the observance of the due process of law,

to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

7. The Practice of the Court

A somewhat amorphous and strange source of civil procedural law is provided by the "Practice of the Court" which is expressly recognised by statute.⁷⁵ It is not laid down in any Rule of Court or Practice Direction, nor is it defined or described, but it is derived from what the court states to have been the course which has been followed in particular proceedings over a period of time by successive judges. The course or practice of the court is said to be "the law of the court," and such a course or practice is one which has become fixed and settled so that it should not be departed from. Its underlying principle is, no doubt, to maintain uniformity and certainty in the practice of the court, though it is probably open to a judge to differ from what he is told or believes is the practice of the court.

8. Practice Books

In England,⁷⁶ books and writings on the practice and procedure of the courts have not been treated as themselves

⁷⁵ See Supreme Court Act 1981, s.67, and *Halsbury's Laws of England* (4th Ed.), Vol. 37, para. 15.

⁷⁶ In Scotland, the works of the institutional writers are accorded much greater authority, and it is generally accepted that, in default of other authority, a statement in the institutional writings will almost certainly be taken as settling the law; see David M. Walker, *The Scottish Legal System* 1981 (5th Ed. W. Green & Sons). Among the most famous and authoritative are those by Viscount Stair, *The Institutions of the Law of Scotland* (1681), and Erskine, *An Institute of the Law of Scotland* (1773). See also Sheriff A. C. Black "The Institutional Writings 1600-1826" in *An Introductory Survey of the Sources and Literature of Scots Law* (Stain Society, Vol. 1. (1936) p. 59.); D. M. Walker, "The Scottish Jurists" (Green, 1985).

constituting a true source of civil procedural law but rather as providing both the courts and practitioners with valuable and convenient instruction and learning on the underlying principles or the state of the procedural law and practice. In modern times, such books, updated from time to time, are in fact in constant, everyday use, and are relied on by both the legal profession and the judiciary as giving guidance, assistance and even authority in matters of practice and procedure.

On the other hand, in European countries, an important and distinctive source of civil procedural law consists of the writings of jurists, scholars and learned experts. These carry a great deal of weight and are generally regarded as useful and authoritative. This source of law, for example, is known in France as *le doctrine* (or in Italy, *Dottrina*), and it may take the form of commentaries on the Code of Civil Procedure in which each article is interpreted with citations of judicial decisions and the opinions of other jurists and scholars, or the general treatment of civil procedure in textbooks, monographs or articles in legal periodicals, in which existing materials are collected, analysed and systematised.

Supremacy of Procedure

Civil procedural law is perhaps the most pervasive and extensive branch of the law, since it is the indispensable instrument to activate every other branch of the law, except the criminal law. Its essential function is to infuse life into all other areas of the law, to bring into actual being and to give reality and effect to all the legal rights and duties of every person and body in society. Bentham long ago defined "procedure" as the course taken for the execution of the laws, and he characterised it as *adjective law* in contrast to

the correspondent opposite term *substantive law*; and he stressed that the object and end of the code of procedural law is to give execution and effect to the rules of substantive law.⁷⁷

This way of thinking has been the traditional English and even common law view of the place of civil procedural law in the legal system. It underscores the fundamental features of English civil justice as being complementary, or accessory or auxiliary to the substantive areas of law. The province of procedure is to assist in the administration of justice by enabling legal rights and duties to be enforced and defended and to achieve justice on the substantive merits of the case. Procedure has been described as the servant not the master of justice, so that its rules should not compel any court to do what will cause injustice in any particular case.⁷⁸ This character of civil procedural law places it at least on an equal footing with substantive law, so that it should not be regarded as secondary or still less "second-class" law.

Indeed, a closer analysis of the machinery of civil justice seems to reveal that in its actual everyday operation, procedure stands on a much higher level of importance, significance and usefulness in the legal system. The truth is that recourse to the courts is the ultimate testing ground of all rules of substantive law. In whatever form the substantive rules of law are stated or clothed, whether it be in a statutory provision or in a private document, such as a contract or a will, or in a judicial decision or any other form, their true legal meaning and effect can only be ultimately ascertained and applied by the decision of the appropriate court

⁷⁷ Bentham *Principles*, p. 5. He also called it "an accessory code" *ibid* p. 4.

⁷⁸ See *per* Collins M. R. in *Re Coles and Ravenshear* [1907] 1 K.B. 1, at p. 4.

of law, perhaps the final appellate court, the House of Lords, or even where this is directly applicable the decisions of the European Court of Justice. Today, more perhaps than ever before, it is the received perception of practitioners, politicians and the public that what is the law applicable in any given circumstances or events is not that which it is thought to be or any person has been advised that it is, but it is that which is duly laid down by the appropriate court of law in actual proceedings dealing with those circumstances or events. It is by operating the machinery of civil justice that those proceedings are brought before the court and it is in such proceedings that the law is determined and applied. When in a seminal maxim Sir Maurice Amos postulated⁷⁹ that, "Procedure lies at the heart of the law," he was in fact proclaiming the supremacy of pro-

⁷⁹ See "A Day in Court at Home and Abroad," (1926) C.L.J. 340. In the first paragraph of their Final Report (Cmnd. 8878 (1953), the Evershed Committee on Supreme Court Practice and Procedure recalled the famous adage of Sir Henry Maine (Early Law and Custom, John Murray, London, 1901) that "Substantive law has at first (*i.e.* in the infancy of Courts of Justice) the look of being gradually secreted in the interstices of procedure" and they added that "the shape and development of the substantive law of England have always been, and always will be, strongly influenced by matters of procedure and that it is from the practice and procedure of the Courts . . . that the ordinary citizen . . . obtains his experience of our legal system, and on that evidence he is likely to form his judgment on the claim commonly made of Englishmen to excellence in the administration of justice." Holdsworth expressed the view that "it was from the law of procedure and around the forms of actions that the principles of the common law were developed" *A History of English Law* Vol. IX, p. 311. See also Jacob, "[The administration of justice] constitutes the touchstone of the quality of justice enjoyed by the members of a civilised community. For the administration of justice is the life-blood of the civil legal system of any country, and at the same time, it is also the life-line of its citizens to secure justice and, as Bentham put it, the effectuation of their legal rights." "The Administration of Justice" in *The Reform of Civil Procedural Law*, (Sweet & Maxwell, 1982), p. 59.

cedure; and perhaps the true relation between substantive law and procedural law should be redefined in terms of the primacy of substantive law and the supremacy of procedure. The supremacy of procedure is the practical way of asserting the primacy of the law, the practical way of securing the rule of law, for the law is ultimately to be found and applied in the decisions of the courts in actual cases.

This conclusion is greatly fortified by the protective character of procedural law. It is a fundamental feature of English civil justice that the machinery of procedure should operate on the principle of the due process of law. On this basis, civil justice provides the effective safeguard against arbitrary, capricious or unprincipled invasion or denial of the legal rights of any person, and it takes on the character of a protective shield to prevent any person being deprived of or suffering any loss of his rights except by due process of law. The phrase "due process of law" has its roots in Magna Carta⁸⁰ and it is expressly written into the Fourteenth Amendment of the American Constitution,⁸¹ yet it has had its dark periods in England, as for example, during the excesses of the Court of Star Chamber and also in America, as for example, in the decisions of the Supreme Court before the changes made by President Franklin Roosevelt. In modern times, however, the precept of the due process of law has come to be equated with the fundamental characteristics which the Franks Report attached to tribunals, namely, openness, fairness and impartiality.⁸² It may be said to be the foundation of some fundamental prin-

⁸⁰ It is said to have been expressly used for the first time in an English statute in the middle of the thirteenth century.

⁸¹ This provides (*inter alia*) "nor shall any State deprive any person of life, liberty or property, without due process of law."

⁸² See n. 41 above.

ciples of English civil justice, as for example, the principles of *Natural Justice*, *Public Justice*, and *Equality in Procedural Law*. Indeed, the fabric of English civil justice is enormously strengthened and enhanced by the wide reception and application of the principle of the due process of law.

An ancient, unexpected source, no less than the Second Book of Samuel, provides some support for the concept of the supremacy of procedure.⁸³ When Absalom was plotting rebellion against his father, King David, one of the popular causes he espoused to rally the support of the people and to win their hearts was the vital need for recourse to the judgment seat, the supremacy of procedure. It is related that he stood beside the gate, and to those who came to the King for judgment, but there was none to hear them, he cried, "Oh that I were made judge in the land, that every man which hath any suit or cause might come to me, and I would do him justice!"

The supremacy of procedure points towards the pathway to justice.

⁸³ Samuel Book II, Chap. 15, VV. 1-6.

2. Pre-Trial

A. Nature and Importance of Pre-Trial

In the fabric of English civil justice, the cornerstone of the mansion or the centrepiece of the tapestry, whichever image you prefer, is the system of procedure before the trial. The stage of pre-trial in the conduct of proceedings in courts and tribunals is of crucial, paramount importance, particularly in the context of the English adversary system. It embraces the whole range of procedural steps from the commencement of the proceedings until the stage of the trial itself. It accounts for the largest number of actions and proceedings terminating in one way or another in disposal without a trial, leaving a very small fraction to go to a plenary trial. It is the stage in which the greatest speed and effectiveness in procedure can be achieved, and conversely, the greatest delays and obstruction can occur or be occasioned or contrived. It provides an abundant variety of procedural

weapons and devices that may be deployed by each of the parties to advance his own case or to defeat the case of his opponent. It affords the largest opportunity for the lawyers of the parties to exercise their procedural skills and expertise in the conduct of civil proceedings. It engenders the largest number and variety of technicalities in procedure, by reason of errors or omissions made by one party or failure by him to comply with the requirements of the rules or orders of the court, of which the opposite party seeks to take advantage, without regard to the merits of the case.

In short, the pre-trial process plays a predominant part in English civil justice. It can be a process which may be simple, speedy and comparatively inexpensive, as in the case of entering a default judgment or obtaining a consent order, but equally it may also be and very often is a process which is costly, time-consuming and labour-intensive, involving a great deal of energy and industry on the part of the practitioners, the judiciary as well as the administrative staff of the courts. Whichever way it operates, it imposes a heavy burden on the judicial system. How to reduce this burden is perhaps the largest question at present facing the system of English civil justice. One thing at least seems clear enough, that it is at the pre-trial stage more than at any other that fundamental radical changes are needed and will be most fruitful and rewarding. The thrust of these changes must surely lie in the direction of making the pre-trial procedures a great deal more simple and speedy and economical, more effective and less technical, reducing their volume and variety and introducing a completely open system of pre-trial procedures, under which each party should at an early stage in the life of an action disclose to the other the entirety of the admissible evidence on which he relies and thereby enabling both parties to make a truly real and

rational appraisal of the strength or weakness of their respective cases.

Such changes could and would very likely promote more and fairer settlements arrived at in the light rather than in the dark about the material evidence, and, if a trial did ensue, they would enable it to be conducted on a more effective and equitable basis. In these ways such changes would be likely to improve the quality of justice that is meted out.

In any event, but especially for considering what necessary changes should be made, I venture to think that the system of English civil justice cannot be fully understood or appreciated without a complete mastery of the pre-trial process. For this purpose it will necessary to examine its functions and to describe, or at any rate to sketch, its operation. It will of course only be possible here to give the barest outline of this process. For greater clarity and simplicity, I propose to take as the model the course of an action in the Queen's Bench Division of the High Court, for it is generally recognised that this provides the prototype on which the procedures in other courts and tribunals is based, though of course with necessary modifications.

Functions of Pre-Trial

The procedures operating at the pre-trial stage perform three basic functions, namely,

- (1) preparation for trial;
- (2) disposal without a trial; and
- (3) interlocutory or provisional remedies pending trial.

Although these procedures have different objectives, they should not be regarded as being necessarily separate and self-contained, but they all operate before the trial, the con-

centrated, public and oral hearing of all the evidence and arguments in court. While, therefore, the primary purpose of pre-trial may be said to be to give the parties the fullest opportunity of preparing their respective cases for the ultimate trial, in truth the pre-trial process offers many procedural modes and methods for disposing of actions without an actual trial, and moreover, it provides many interlocutory and provisional remedies and measures for preserving or protecting the rights and interests of the parties pending the trial. In theory, all the preparatory stages of an action are geared to the concept that there will ultimately be a trial, but in practice, much the greater proportion of the time, energy and costs of the parties is directed towards the termination of actions by their disposal without a trial, and the obtaining of effective provisional and protective measures while awaiting the trial. Although the trial looms ahead and the parties must forsooth prepare for an eventual trial, yet all the while and by every means, they operate the pre-trial process to avoid the trial. In theory, the trial is the model of English civil justice but in practice it is the rare exception.¹

Preparation for Trial

The procedures that must be followed for the purpose of preparing for trial are naturally regulated by Rules of

¹ In 1984 in the Queen's Bench Division there were 190,439 actions commenced, of which 2,212 were determined after trial, *i.e.* 1.16 per cent, and of these there were about 1,460, *i.e.* 66.0 per cent actions for personal injury and death and about 750, *i.e.* 33.9 per cent. other actions (See Judicial Statistics, Annual Report 1984, Cmnd. 9599, Tables 3.1 and 3.4). In the County Courts, there were 2,142,340 complaints entered (*i.e.* actions other than specialist proceedings), of which 15,999, *i.e.* 0.75 per cent. were disposed of after trial by Judge and 6,263, *i.e.* 0.29 per cent. by Registrar (see *ibid.* Tables 7.1 and 7.4).

Court. They determine the necessary successive steps which must be taken by each of the parties and the time for each of them doing so, and the framework in which the action can be properly constituted, such as who can or should or must be parties, what claims can be joined, what the pleadings should contain, the nature and extent of discovery of documents and so forth. There is indeed an overall scale-plan or blueprint, which defines, designs and charters the structure of an action and its pre-trial stages. In strictness, each party is obliged to adhere to this framework and time-scale; but in practice, it is extremely rare for both parties to do so, with the result that the court is frequently called upon to make orders to compel one or other of the parties to take particular or further steps within specified times to perform their respective obligations.

It is a generally accepted truism that most cases are won or lost or may be settled on better or worse terms, according to whether they are well or are badly prepared. In practice, however, it is equally a general experience, not so much that cases are badly prepared (although this happens in fact quite frequently) as that a very considerable number are not well prepared or not as well prepared as they should be, exposing the litigant to becoming the loser instead of the winner or to accepting worse terms of settlement or other disposal that he ought fairly to accept. The overwhelming reason for this is that the three basic factors in the pre-trial preparatory stage, namely, the ascertainment of the facts, the observance of time-limits and the incidence of costs, militate against each other and pull in different directions. In the shadow of a potential settlement parties and their lawyers fear the dangers of over-preparation rather than of under-preparation. They are disinclined to spend time, money and energy in the preparation of cases, which if and

when settled will result in such expenditure having been wasted.

Perhaps the greatest enemies in the preparatory stages of an action are first, the state of inertia, so that many, if not most, cases are not properly or timeously prepared and secondly, the factor of "time" so that too many cases are defeated for failure to comply with time-requirements of statutes, rules and orders of the court. In the context of the adversary system the preparation of a case is in the hands of the practitioners, who have responsibilities and duties not only to their respective clients but also to the court to ensure that cases are properly prepared and conducted. They fail to match their obligations in this respect if they succumb to inertia or do not comply with time-requirements. The system of English civil justice can and should be reformed not only by procedural and institutional changes, but also by radical changes in the habits, attitudes, practices and performance of the legal profession, and such changes are imperative and urgently required.

In the High Court, the practice of which is substantially followed with appropriate modifications in other courts and tribunals, the main steps and matters that must be taken and dealt with in the pre-trial preparatory stages may be marshalled in the following order, namely,

- (a) Commencement of Proceedings.
- (b) Parties and Causes of Actions.
- (c) Pleadings.
- (d) Discovery, and
- (e) Directions for Trial.

Since it is not within the scope of these lectures to describe these stages in full detail, I propose to dwell on a number of

features which are characteristic of English civil justice especially as contrasted with other systems.

1. Commencement of Proceedings

In the High Court, the practice and procedure regulating the beginning of proceedings follows five basic principles governing this stage, namely (1) the sealing by a Court Officer of an originating document as an authentic Court document²; (2) the statement in the originating document of the nature and extent of the claim made³; (3) the service of the originating process⁴; (4) the provision of a reasonable opportunity for the defendant to give notice of intention to defend or otherwise to answer the claim⁵; (5) the imposition of a sanction for default of notice of intention to defend or other answer.⁶

In England, the plaintiff has the right and the initiative to invoke the jurisdiction of the court by the issue of original process,⁷ and, unlike the position prevailing in some European countries, the issue of original process is the act of the party and is not a judicial act, so that the plaintiff does not require the prior leave of the court.⁸ This, however, is subject to exceptions,⁹ of which the two most important are the requisite leave for the issue and service of original process

² See R.S.C. Ord. 6, r. 7(3).

³ See *ibid.* r. 2.

⁴ See R.S.C. Ords. 10 and 11.

⁵ See R.S.C. Ord. 12.

⁶ See R.S.C. Ord. 13.

⁷ See Supreme Court Act 1981, s.64.

⁸ *Clarke v. Bradlaugh* (1881) 82 Q.B.D. 63, 69, *per* Brett L. J.

⁹ See R.S.C. Ord. 32, r. 9.

out of the jurisdiction of the English court¹⁰ and the requisite leave to apply for judicial review.¹¹

The plaintiff must himself duly complete the particular form of originating process he has chosen, which must contain, for example, the full names and addresses of himself and of the defendant or defendants and a concise or full statement of the nature of the claim made or the relief or remedy required.¹² Unlike the position in European and some other countries, for example, Federal Courts in the United States which employ a single mode of beginning an action, the High Court provides for four such modes¹³ I would suggest that four modes are three too many and that for the sake of simplicity they should be reduced to a single mode, which should be made to serve all the functions desired by the other modes. Upon the completion of the originating process the plaintiff must present it with the requisite copies, either in person or by post, to the appropriate Court Office, and if it is in order the Court Officer will duly seal it and it will thereupon be treated as issued as of that date.¹⁴

The date of issue is crucial, because it will determine whether the action is begun within the relevant period of limitation in respect of the claim made. It will also mark the time when the jurisdiction of the court is invoked, though in England the court has power in exceptional and urgent cir-

¹⁰ R.S.C. Ord. 6, r. 7(1), and Ord. 11. See also Ord. 75, r. 4 (Admiralty actions).

¹¹ R.S.C. Ord. 53, r. 3.

¹² R.S.C. Ord. 6, r. 2.

¹³ R.S.C. Ord. 5, r. 1.

¹⁴ R.S.C. Ord. 6, r. 7(3).

cumstances to make an order, for example on a Saturday or a Sunday or at night, before the issue of the writ on the undertaking to issue it as soon as practicable thereafter.¹⁵

The service of the originating process on the defendant is a necessary step in the further progress of the action. This has always been a fundamental rule of English civil justice. In the High Court, however, as in the former Superior Courts of Common Law, the responsibility for effecting due service of the original process on the defendant is that of the plaintiff, whereas in European countries, and indeed in England in the County Courts, the service of process is effected by a Court Official, which substantially avoids controversies or disputes concerning service. I would suggest that, for the sake of uniformity, service of High Court process should also be effected by a Court Official, using the County Court machinery for this purpose, unless the plaintiff himself chooses to effect service of original process.

The permissible grounds for service of English civil process out of the jurisdiction have been severely criticised by European scholars, as being too extensive and extravagant, especially the ground that such service is permitted if a contract is made in England or by its terms or by implication is to be governed by English law.¹⁶ These grounds have been modified to meet the requirements of the European Convention on Jurisdiction and Enforcement of Judgments for service of English process within Member States of the European Economic Community,¹⁷ but they have substantially been retained for service in other overseas countries. For my part, I think the English rules are reasonable and

¹⁵ See R.S.C. Ord. 29, r. 1(3) (application for injunction).

¹⁶ See R.S.C. Ord. 11, r. 1(1) especially r. 1(1)(d).

¹⁷ See R.S.C. Ord. 11, r. 1(2), which come into force on January 1, 1987.

practical, and as a matter of principle, they are justified on the basis of the concept that each ground taken separately shows that the transaction or event in question has some territorial connection with England.

Service of the writ or originating process must be effected not later than one year from the date of its issue,¹⁸ though the court has power by order to renew it. Such renewal, however, will not be granted unless a sufficient or good reason is shown, although the rule conferring such power does not contain any such restriction.¹⁹ This principle has in effect devitalised the power of the court to renew the writ for service and circumscribe the exercise of its discretion too narrowly. In my view the discretionary power of the court to renew the writ for service should be unfettered and should be exercisable having regard to all the circumstances of the case, and particularly to its merits. If it is thought that one year for service of process from the date of its issue is too long, as I think it is, the solution would be to reduce the time for service to six months, with a wide discretionary power of renewal in deserving cases.

After service of the writ or originating summons on the defendant, he is afforded a reasonable time to acknowledge service and to state whether or not he intends to contest the proceedings. The time for such acknowledgement is appropriately extended in the case of service out of the jurisdiction.²⁰ The notice of intention to defend the proceedings does not operate as a submission to the jurisdiction of the

¹⁸ See the Prescribed Form No. 1 in Appendix A to the R.S.C. See R.S.C. Ord. 6, r. 8 and *Heaven v. Road and Rail Wagons Ltd.* [1961] 2 Q.B. 355.

¹⁹ R.S.C. Ord. 12.

²⁰ See *Extra Jurisdiction Tables* set out in *Supreme Court Practice*, Vol. 2, para. 902. This practice is given authoritative recognition by R.S.C. Ord. 11, r. 1(3).

court nor as a waiver of any irregularity in the writ or the service,²¹ but the defendant is entitled before the service of his defence to object to the jurisdiction or to apply to set aside the writ or the service for any irregularity, as, for example, when service is effected after the time for service has expired.²²

As a matter of principle, it would seem plain that the defendant should not be permitted to frustrate the course of justice simply by not responding in due time to the service of the writ on him, and therefore on failure to acknowledge service or to state his intention to contest the proceedings, the court is entitled to proceed in his absence and a sanction is provided entitling the plaintiff to enter a default judgment against him, which is one of the measures for disposing of an action without a trial. This will be dealt with later.²³

2. Parties and Causes of Action

The essential ingredients in the constitution of civil proceedings are the parties to the proceeding and the claims made in it. These are two separate but closely related subjects, as appears from the pertinent question that may be posed in any proceeding: "Who may make what claim against whom?"

Before 1875, or more strictly before 1852, the English system both at common law and in equity was disordered, defective and deficient in the practices and procedures relating to both parties and claims. These were encrusted in incredible technicalities; they caused inordinate delays; they compounded the complexities of the judicial process;

²¹ R.S.C. Ord. 12, r. 7.

²² R.S.C. Ord. 12, r. 8.

²³ R.S.C. Ord. 13. The prescribed form of the Writ (Appendix A Form No. 1) explicitly warns the defendant of this eventuality.

and they frequently led to the defeat of justice. The release from the tentacles of technicalities regarding parties and claims and the liberalisation of the system from its complexities and constrictions in these respects began with the procedural reforms of the middle of the last century.²⁴ It was left to the Judicature Acts of 1873–1875 and the subsequent changes that have been and are being made almost to this day to repair, restore and renovate the fabric of English civil justice so far as concerns the subjects of parties and claims. It may therefore be claimed that at present, subject, however, to further necessary changes being made, some of considerable importance, the English system relating to parties and claims is as flexible, functional and free from technicalities and complexities as any other procedural system.

First, as regards parties. It would be out of place to deal with the complex problems relating to parties both at common law and in equity before the Judicature Acts 1873–1875. One or two illustrations of the then prevailing technicalities may be enough. At common law, for example, the misjoinder of a party or the non-joinder of necessary and proper parties could prove fatal by a plea in abatement or demurrer for want of parties. For the constitution of an action and ejectment for the recovery of land, it became necessary to invent two fictitious characters, the renowned John Doe and Richard Roe. In equity, too, artificial procedural devices were also employed. Thus, for example, whereas all the parties who might be affected by the decree were required to be before the court, yet since what happened to one co-plaintiff, such as death or marriage, could disentitle all the others to any relief, the artificial practice was developed of having a single plaintiff, preferably an

²⁴ See, *e.g.* the Common Law Procedure Acts 1852, 1854 and 1860.

infant, and the others made defendants, who should have been co-plaintiffs, and if any one of them died or married, the action would have to be reconstituted either by amendment or more generally by a bill of revivor.

The overriding principle which has prevailed since 1875, though to some extent since 1852, is that all necessary and proper parties, but no others, should be before the court at the same time to enable the effectual and complete determination and adjudication to be made of all the issues and questions between the parties.²⁵ To this end, no action will be defeated by reason of the misjoinder or non-joinder of any party. The joinder of parties is permitted as of right in a wide area of circumstances, or otherwise with the leave of the court.²⁶ Moreover, the court has extensive discretionary powers to add, substitute or strike out parties who are not proper or necessary, and for these purposes the court may act of its own motion.²⁷ Relief or remedy may be claimed by or against necessary and proper parties jointly, severally or in the alternative.²⁸ The death or bankruptcy of a party will not cause an action to abate where the cause of action survives; and where there has been a change of parties brought about by reason of death, bankruptcy, assignment, transmission or devolution of interests or liability, the action can be reconstituted and ordered to continue.²⁹ Accordingly, problems relating to parties have ceased to cause major impediments in the judicial process, but even in this respect there are some desirable changes which ought to be made to improve and enhance the system of justice.

²⁵ See R.S.C. Ord. 15, rr. 4 and 6.

²⁶ See R.S.C. Ord. 15, r. 4.

²⁷ See R.S.C. Ord. 15, r. 6.

²⁸ See R.S.C. Ord. 15, r. 4.

²⁹ See R.S.C. Ord. 15, r. 7.

Thus, the rule that enables a person not a party to intervene and be heard is perhaps too narrowly applied, since such a person has to show that he is or will be directly affected, legally or financially, by the result of the action.³⁰ It should be enough to allow him to intervene if he shows a sufficient interest in the proceedings, however widely this term may be interpreted, so that the court may be entitled and enabled to see the problems before it in a much wider context and perspective than may be presented by the immediate parties to the litigation.

Next, the law and practice relating to relator actions³¹ under which a person must first obtain the consent of the Attorney-General to bring certain actions on his relation, such as to restrain interference with a public right, or to abate a public nuisance, or to compel the performance of a public duty, should be extended to enable such actions to be brought without the prior consent of the Attorney-General when a person can show that he has a sufficient interest in the proceedings, however widely this term is interpreted.

Further, the rule which authorises representative proceedings,³² which in the United States are popularly known as "class actions" has almost undoubtedly been restrictively interpreted in England, so that one of the most beneficial devices for enabling an action to be brought by and against numerous persons, suffering the same wrongdoing by the same wrongdoers, has been almost deprived of its usefulness. There is an urgent need, recognised on a world wide scale, for extending the ambit of representative or class

³⁰ See *Gurtner v. Circuit*, [1968] 2 Q.B. 587, C.A.

³¹ R.S.C. Ord. 15, r. 11.

³² R.S.C. Ord. 15, r. 12; *Market & Co. Ltd. v. Knight S.S. Co. Ltd.* [1910] 2 K.B. 1021, C.A.; *Smith v. Cardiff Corp.* [1954] 1 Q.B. 210, C.A.

actions, particularly for the purpose of safeguarding the public interest. In England, it may be necessary to introduce machinery to authorise proceedings by or on behalf of a representative group or class of persons, who have suffered the same or similar wrong or breach of duty, especially in the field of consumer goods and services or the protection of the environment or the prevention of pollution.

Still further, it would be desirable to examine afresh, after nearly 40 years, the many privileges enjoyed by the Crown as a civil litigant, so as, as far as possible, to equate the position of the Crown and the subject in civil proceedings.³³

Secondly, as regards claims. The Judicature Acts 1873–1875 and the reforms introduced since then have transformed the machinery of making claims which formerly prevailed. The overriding principle is that, so far as causes of actions are concerned, all the disputes or questions between the necessary and proper parties should be determined and adjudicated upon in one action or proceeding so as to avoid the multiplicity of proceedings.³⁴ To this end, the joinder of causes of action is permissible, cumulatively or in the alternative, as of right on a wide basis or

³³ See the Crown Proceedings Act 1947, especially Parts II to IV and R.S.C. Order 77. See also Jacob, *The Reform of Civil Procedural Law* (Sweet & Maxwell, 1982), p. 27.

³⁴ See Supreme Court Act 1981, s.49. These objectives were more extensively but more explicitly formulated in the celebrated s.25(10) and the seven subsections of s.24 of the Judicature Act 1873, which were replaced respectively by s.44 and ss.36–43 of the Supreme Court of Judicature (Consolidation) Act 1925. It is doubtful whether their replacement by the present abbreviated and somewhat truncated version makes any improvement, especially as the words “as hitherto” in s.49(2) have the effect of bringing back into operation the very provisions which they have replaced.

otherwise with the leave of the court.³⁵ Counterclaims may be made against the plaintiff³⁶ or against the plaintiff and an added party³⁷; third party proceedings may be brought to make claims for indemnity, contribution or relief or remedy relating to or connected with the original subject matter; fourth and subsequent party proceedings may further, as it were, elongate the string of parties; and claims may be made between co-defendants.³⁸

In relation to the constitution of the action, both as regards parties and causes of action, the court has extensive powers to exercise complete control to ensure that the joinder of parties and of causes of actions should not cause embarrassment or delay the trial or otherwise cause inconvenience.³⁹ In proper cases, the court may order separate trials as between specified parties or in relation to separate causes of actions or claims or order a counterclaim to be tried separately from the main claim⁴⁰ or to consolidate two or more actions or to order that they be tried together or one immediately following the other or make such other order as may be expedient.⁴¹

One important, fundamental question remains which relates to the *content* of claims, namely, whether the concept and practice of that prevailing today in regard to "a cause of action" should not be replaced by what may be termed "cause of claim" or complaint.

The dominating feature of the common law until 1852 as

³⁵ R.S.C. Ord. 15, r. 1.

³⁶ R.S.C. Ord. 15, r. 2.

³⁷ R.S.C. Ord. 15, r. 3.

³⁸ R.S.C. Ord. 16.

³⁹ R.S.C. Ord. 15, r. 5.

⁴⁰ *Ibid.*

⁴¹ R.S.C. Ord. 4, r. 9.

regards claims was that they had to be expressed in the proper and pertinent "form of action," which has been defined as the particular mode of framing the writ and pleadings appropriate to the injury which the action is intended to redress.⁴² It became the rule of the common law that the plaintiff must at his peril select the form of action suited to the facts of his case; if he could not do so, he would go without a remedy or would have his action dismissed *in limine*. When these forms of action became limited in number and crystallised in form, they greatly hampered not only the expansion of the common law but also the administration of justice. In 1852, they were no longer required to be specified in the writ,⁴³ and the Judicature Act 1873 abolished them.⁴⁴ Yet Maitland has warned that though the forms of actions have been buried they still rule us from the grave,⁴⁵ and Lord Diplock has added that this indeed will happen if we forget that the name of the form of action to identify a cause of action is merely a convenient and succinct description of a particular factual situation which entitles one person to obtain from the court a remedy against another, which is the basic meaning of the term "cause of action."⁴⁶

Since the Judicature Acts, which did not affect causes of

⁴² See First Report of the Common Law of Commissioners 1851, (Cmnd. 1389) p. 32. See also Jacob, "Practice and Procedure" in *Halsbury's Laws of England* (4th Ed.) Vol. 37, paras. 83 and 107.

⁴³ Common Law Procedure Act 1852, s.3.

⁴⁴ Supreme Court of Judicature Act 1875, s.16, Sched. 1, Ord. III, r. 2.

⁴⁵ F. W. Maitland, *Forms of Action at Common Law* (Cambridge University Press, 1936).

⁴⁶ *Letang v. Cooper* [1965] 1 Q.B. 232, at p. 43. Diplock L.J. explained the historical and terminological connections between "forms of action" and "causes of action."

action, the dominating feature of the English system of civil justice as regards claims made in the courts is that they have to be expressed so as to disclose a reasonable cause of action.⁴⁷ As a matter of pleading, this requirement means that the plaintiff must state all the material facts on which he relies which in the aggregate and read as an integral whole would show that he has a legal right or claim entitling him to relief or remedy from the court against another person.⁴⁸ This requirement presupposes that at the time of making his claim the plaintiff knows full well what are the entire facts on which he can rely to make such a claim. No doubt in many, perhaps even in a majority of cases, those facts are within his knowledge at that time; but equally, there is little doubt that in many, and certainly a significant number of case, the plaintiff does not or may not know what those facts are at that time. He can only find out or discover those facts as a later time either from the defendant or from other sources or from both such sources. This requirement therefore that he must at the very commencement of the proceedings state the facts on which he relies to show a reasonable cause of action may operate to defeat justice.

For this reason, the concept and practice relating to "cause of action" may be considered too high a price to pay in the administration of civil justice; the plaintiff is required to jump too high a hurdle to reach out to justice. If this is right, it should be sufficient to require the plaintiff to set forth a short and plain statement showing that he is entitled to relief and a demand for judgment for such relief. This proposal is, as everyone knows, drawn directly from the American Federal Rules of Civil Procedure which have

⁴⁷ R.S.C. Ord. 18, r. 19(1)(a).

⁴⁸ R.S.C. Ord. 18, r. 7(1).

entirely eliminated the expression "cause of action."⁴⁹ If adopted in England, it would of course greatly alter the present system based on causes of action and the pleading of material facts, and it would have to be accompanied by a greatly enlarged process of discovery. It would mean carrying on the historical process of replacing "forms of actions" by "causes of actions," and moving to the state of replacing "causes of actions" by "causes of claims." It would not be surprising if this proposal raised some criticism and perhaps loud lamentations about the fate and the future of English civil justice. But the question that cannot be stilled is whether, if a person does in truth and in fact have a lawful claim against another, should not the procedural rules be so structured as to entitle him to obtain the appropriate relief or remedy from the courts? In the terms of Justinian's definition of justice, should he not be enabled to be given his due,⁵⁰ rather than to enable the other party to withhold his due from him? For my part, with Jeremy Bentham,⁵¹ I am in favour of the option that if a person has in truth and in fact a lawful claim against another the judicial process should enable him to effectuate such a well-founded claim, and to obtain the appropriate relief or remedy from the court.

⁴⁹ *Federal Rules of Civil Procedure*, Rule 8(a)(2) and (3). This provides that "a pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief and (3) a demand for judgment for the relief to which he deems himself entitled. . . ."

⁵⁰ "Justice is a set and constant purpose, giving to everyone his due," *Institutes of Justinian*, Book I, Title I (see R. W. Lee, *Element of Roman Law* (Sweet & Maxwell, London, 1944) pp. 31, 40). This definition is said to have been derived from Ulpian (*ibid*).

⁵¹ See Bentham, *Principles*, p. 20, in which he defined the ultimate aim of civil justice to be the "effectuation of well-grounded claims."

3. Pleadings⁵²

The system of pleadings has played a predominant role in the machinery of English civil justice from the earliest days of the common law to the present time. Its history affords an outstanding illustration of the capacity of the fabric of English civil justice to absorb fundamental changes while remaining substantially the same as before, which is the secret of its historical continuity from the old order to the new.

The first outstanding feature of pleadings which must be underlined is that before the Judicature Acts 1873–1875, there were at least two systems of pleadings in England, the one practised in the common law courts and the other in the Court of Chancery. They differed in form, in content and in function. Yet they remained in operation, separate and distinct until their worst elements were extracted and their best elements welded together by the Judicature Acts 1873–1875, and the rules of court into the present single system of pleadings in the High Court, which provides the prototype of pleadings in the other courts and tribunals.

At common law, originally the pleadings took the form of an oral debate or altercation in court between the advocates of the parties and the judge. There was a great deal of technicality in this process, and it was dangerous, if not fatal, for a party to make a mistake, even in form. The primary function of the pleadings was to produce a precise, clear and certain issue of law or of fact which was to be determined, if it was an issue of law, by the court, and if an issue of fact, by the verdict of a jury. This remained the primary function when the system of oral pleadings changed into the system

⁵² For the history of the system of pleadings, see Holdsworth, *A History of English Law* Vol. III, 627–653; Vol. IX, 262–335, and (equity pleadings), 376–408.

of written pleadings, exchanged alternately between the parties until an issue of law or fact was reached.

In the common law system, the allegations made by the parties consisted essentially of propositions or conclusions of law, which each of the parties undertook to prove at the trial. This mode of pleading inevitably led to the system becoming extraordinarily technical and complex. It became encrusted with fictions and formalism, with subtleties, refinements and quibbles which were far removed from the merits of the case and too often defeated justice. Notwithstanding that the system of pleading was being disfigured by tautology, verbosity and length,⁵³ it was raised to the level of an "art" or a "science," to the law of special pleading which has been described as "the most exact, if the most occult, of the sciences."⁵⁴ It became a distinct branch of the law, and the class of special pleaders a distinct order in the legal profession.⁵⁵ Nevertheless, the system of pleadings was spoken of with the utmost respect and reverence, even adulation, and the belief was widespread that it was so logically and scientifically perfect that to reform it would inflict damage on the common law.⁵⁶

In equity, the system of pleading took the form of the plaintiff addressing a Bill to the Chancellor in which he stated his cause of complaint and prayed process to compel the defendant to appear. The defendant was required to put in an answer which was generally given on oath and he could raise exceptions to the Bill. The Bill in Chancery consisted of nine parts, of which the three more important were the *narrative part* which set out circumstantially and at full

⁵³ *Ibid.* p. 309.

⁵⁴ See Pollock and Maitland, *The History of English Law*, Vol. II, p. 609.

⁵⁵ See Holdsworth (*ibid.*) p. 307.

⁵⁶ *Ibid.* p. 311.

length the whole of the case of the plaintiff, including all the evidence and the documents relied on, followed by the *charging part* which repeated the narrative by charging its truth against the defendant, and then came the *interrogating part*, which repeated the original allegations in the form of questions addressed to the defendant. The equity system of pleadings inevitably led to its becoming slow and elaborate, extraordinarily technical and complex and extremely lengthy. The Bill in Chancery was a document which was prolix, verbose, repetitive, diffuse, lacking in clarity and precision; it did not distinguish between fact and evidence nor between the nature and extent of the claim and the method of proving it.

After the first quarter of the nineteenth century, there was mounting recognition that the two systems of pleadings, at common law and equity, were damaging the fabric of English civil justice, which was in early need of repair and restoration. Efforts were in fact made to improve both systems, but they fell short of achieving radical changes. It was left to the Judicature Acts of 1873 and 1875 and the rules of court to make a fundamental breakthrough to reform the system of pleadings. In place of two separate systems, a single system was introduced for the integrated Supreme Court of Judicature, which has basically prevailed ever since. The common law system of pleading propositions of law or of mixed averments of law and fact and the equity system of pleading evidence were both jettisoned. In their place, the pleadings are required to state only the material facts relied on by the parties and they are not permitted to contain the evidence by which the facts are to be proved or to state propositions of law based on those facts.⁵⁷

⁵⁷ R.S.C. Ord. 18, r. 7(1).

“Fact-pleading” has replaced “law-pleading” and “evidence-pleading.” Prolivity and undue length were abjured by the requirements that the pleadings are to be in summary form and as brief as the nature of the case permits.⁵⁸ Repetition was scrapped and clarity and precision promoted by the requirement that each allegation must be contained in a separate paragraph.⁵⁹ The whole system has been rendered more simple and direct, clearer and less technical and complex.

Nevertheless, the modern system of pleadings bears a close affinity to the former common law system and largely fulfils the same functions. The primary function of pleadings remains to define with clarity and precision the issues or questions in dispute between the parties on which alone the court can adjudicate between them. Some of the other functions also remain: for example, that the pleadings must give fair and proper notice to the opposite party of the case he has to meet; that they should not take the opposite party by surprise, at or even before the trial; that they should set the limits of the action both for the parties and for the court; and that they should provide a permanent record of the issues for the purposes of the doctrine of estoppel.⁶⁰ Many of the former rules of pleading have become or have been rendered obsolete, such as pleading the general issue or the former plea of “not guilty by statute”; but many of the former rules of pleadings are reflected in the modern system, for example, pleading matter arising since issue of the writ and the equity rule that the pleading must be signed by the

⁵⁸ *Ibid.*

⁵⁹ R.S.C. Ord. 18, r. 7(2).

⁶⁰ See Jacob, “The Present Importance of Pleadings” in *The Reform of Civil Procedural Law* (Sweet & Maxwell, 1982) p. 243; *Current Legal Problems* (1960) Vol. 13, 171.

Counsel who settles it. The pleadings in the modern system are perhaps more effective in their operation than in the past, since they manifest and exert their importance throughout the whole process of the litigation. Indeed, it may truly be claimed that the modern system of English pleadings promotes the fundamental right to a fair trial.

The rule against pleading evidence is to some extent mitigated by the rule that requires necessary particulars to be pleaded.⁶¹ In everyday practice, the request or order for further and better particulars of pleadings is very frequent, and "the particulars game," as the Americans used to call it, is played with great zeal and persistence, each party endeavouring to obtain as much material as possible from the opposite party while at the same time concealing as much as possible of his own case. The dividing line between particulars and evidence may sometimes be difficult to draw and it may be that the right course is to end this game altogether by introducing the more open system of pre-trial disclosure of the admissible evidence relied on by both parties.

The rule that both parties and the court are bound by the pleadings is mitigated by the liberal powers of amendment in order to enable the "real controversy between the parties to be determined."⁶² The court has the power to order amendments to be made to pleadings "of its own motion," but this power is rarely used.⁶³

One last word of caution. I think we should be careful not to be mesmerised by our present system of pleadings and feel, as did the lawyers and judges before 1875 and certainly before 1830, that the system does not need radical change as

⁶¹ R.S.C. Ord. 18, r. 12.

⁶² R.S.C. Ord. 20, r. 8.

⁶³ *Ibid.*

this might inflict damage on the law. The rule that all material facts must be pleaded presupposes that each party already knows what they are, when in truth, as is often the case, at the time of the pleading the party may not know all the material facts and may only suspect what they are. This doubt raises the question whether we should, as the Federal courts and most of the State Courts in the United States have done, move from the system of "fact-pleading" to the system of "notice-pleading." Under such a system a party is entitled to state broadly the nature of the claim made or the defence raised without being required to plead facts or particulars.⁶⁴ The system of pleading facts produces precise issues or questions for judicial decision, while the system of "notice-pleading" puts forward the claim itself made or the defence raised for decision; one is bounded by facts already known or alleged, the other looks beyond to facts to be discovered to support the claim or defence made or raised. Notice-pleading therefore inevitably requires a wide and extensive basis for discovery processes in order to ascertain what are the facts relating to the claim or defence made or raised. Nevertheless, it may be claimed that such a system of pleading would get closer to the attainment of justice, in the sense of enabling the judicial determination, as well as any pre-trial settlement, to be made on the true merits of the case rather than on the narrower factual matrix constructed by the pleading of the parties.

4. Discovery⁶⁵

In the system of English civil justice, discovery is of great, even crucial importance at the stage of pre-trial. It is the

⁶⁴ See in r. 86, above.

⁶⁵ See *Halsbury's Laws of England* (4th Ed). Vol. 13.

generic term to describe the process for the disclosure, before the trial, by the parties to each other and in its widened form by persons who are not parties, of all material evidence relevant to the claim or defence, whether it be documentary,⁶⁶ oral⁶⁷ or tangible.⁶⁸

The process of discovery was hardly known to the common law; it was the invention of equity. Indeed, the overriding purpose of the Bill in Chancery was, as it was said "to scrape the conscience of the defendant."⁶⁹ The original allegations first made in the Bill by way of narrative and charge were converted, as Lord Bowen put it, "into a chain of subtly framed inquiries addressed to the defendant, minutely dovetailed and circuitously arranged so as to surround a slippery conscience and to stop up every earth."⁷⁰ The common law courts have no power to order pre-trial discovery, and accordingly, a party in a common law suit had perforce before the trial to have recourse to the Court of Chancery for the disclosure of relevant documents or answers to interrogatories or the inspection of property. This situation prevailed until the middle of the nineteenth century when the position was somewhat ameliorated by the Common Law Procedure Acts which conferred powers to order limited discovery of documents and answers to interrogatories, but it was transformed by the Judicature Acts 1873 and 1875 and the rules of court which made the process of discovery available in all Divisions of the High

⁶⁶ R.S.C. Ord. 24.

⁶⁷ R.S.C. Ord. 26.

⁶⁸ R.S.C. Ord. 29, rr. 2 and 3.

⁶⁹ See *per* Lord Bowen in *Progress in the Administration of Justice during the Victorian Period in The Reign of Queen Victoria: A survey of Fifty Years of Progress* (1877), Vol. I, pp. 281, 329, edited by T. H. Ward and reprinted in *Select Essays in Anglo-American Legal History* (1907), Vol. I, pp. 516-557.

⁷⁰ *Ibid.*

Court. Since then, there have been continuing changes and developments in the machinery of discovery, which has been greatly simplified and in some respects widened and applied to the procedures in County Courts and in a modified form in many tribunals.

The process of discovery operates as a powerful procedural instrument to produce fairness, openness and equality in the machinery of English civil justice. It enables each party to be informed or to be capable of becoming informed of all the relevant material evidence, whether in the possession of the opposite party or not; it ensures that as far as possible there should be no surprises before or at the trial; it reveals to the parties the strength or weakness of their respective cases, and so produces procedural equality between them; and it encourages fair and favourable settlements, shortens the lengths of trials and saves costs.

The range of the discovery of documents is extensive and includes the disclosure by the parties of "the documents which are or have been in their possession, custody or power relating to the matters in question in the action."⁷¹ For this purpose, relevance is tested and limited by the pleadings of the parties, but it has been given a very wide definition, as meaning all documents that contain information which may, directly or indirectly, enable the party seeking the discovery to advance his own case or damage that of his adversary, or which may fairly lead him to a train of inquiry which may have either of these two consequences. In short, every document which will throw any light on the case is relevant and must be disclosed, and it need not necessarily be admissible in evidence.⁷²

⁷¹ R.S.C. Ord. 24, r. 1(1).

⁷² *Compagnie Financier etc. v. Peruvian Guano Co.* [1882] 11 Q.B.D. 55, *per* Esher M. R. at pp. 62, 63.

In most actions in the High Court, each party is under the initial obligation to make such discovery without an order of the court,⁷³ but if he fails to do so, and in all other actions and also in the County Courts, the court may order the parties to make such discovery, where it is “necessary for the fair disposal of the action or saving costs.”⁷⁴ The form in which the discovery of documents is made, by list, verified by affidavit, if so required or ordered, obliges each party to declare that he has made full and frank disclosure of all relevant documents,⁷⁵ but if he should default in doing so the court may order him to make further discovery⁷⁶ or if appropriate to disclose further particular documents.⁷⁷ The rules and forms are so framed as to ensure that, in the hands of skilled and diligent lawyers, the adversary will be compelled to make full disclosure, so that there will be no room at any stage for surprises relating to any documentary evidence, as compared with the oral evidence of witnesses.

In the ordinary way, the discovery of documents will take place only as between the parties to pending actions, and not as against a stranger. The discovery process, however, has been extended to an action for discovery only as against the person who is not a mere witness but who however innocently “has got mixed-up in the tortious acts of others so as to facilitate their wrongdoing” without incurring any personal liability, and such a person comes under a duty to assist the person wronged by giving him full information and disclosing the identity of the wrongdoers.⁷⁸ The dis-

⁷³ R.S.C. Ord. 24, r. 2.

⁷⁴ R.S.C. Ord. 24, rr. 3 and 8.

⁷⁵ R.S.C. Ord. 24, r. 5, and Form 26 in Appendix A.

⁷⁶ R.S.C. Ord. 24, r. 3(2).

⁷⁷ R.S.C. Ord. 24, r. 7.

⁷⁸ *Norwich Pharmaceutical Co. v. Commrs. of Customs and Excise* [1974] A.C. 133.

covery process has further been extended in claims for personal injuries or death, to obtaining an order for discovery before action commenced by a potential plaintiff in likely proceedings against a potential defendant and in pending actions from a person not a party.⁷⁹ There would seem to be no logical, practical or procedural reason why these latter powers should be limited to personal injury claims and actions, except that they happened to be recommended by the Committee on Personal Injury Litigation, but surely they ought to be extended to all classes of actions.

The discovery of oral evidence may be obtained before the trial either by compelling a party to answer interrogatories or by taking the deposition of a witness.

The court has power, before the trial, to allow one party to administer written interrogatories to another to be answered on oath, and such written answers may be put in evidence at the trial.⁸⁰ The range of what interrogatories may be allowed is expressed widely to include those that relate to any matter in question between the parties in the action. In practice, however, at least since the war, the art and skill of framing interrogatories have fallen into disuse, so that this source of pre-trial oral evidence is rarely resorted to or allowed and it has virtually dried up.

The court also has power, before the trial, to allow the evidence of a witness to be taken by deposition which, subject to proving the unavoidable absence of the deponent, may be put in evidence at the trial.⁸¹ Since this power cuts directly across the basic requirement that the evidence of witnesses must be proved by their examination orally and

⁷⁹ Supreme Court Act 1981, ss.33(2) and 34(2), and see R.S.C. Ord. 24, r. 7A.

⁸⁰ R.S.C. Ord. 26, rr. 1 and 7.

⁸¹ R.S.C. Ord. 39, r. 1.

in open court, it is narrowly expressed and may be exercised only "where it appears necessary for the purposes of justice," as for example, where the witness is and intends to remain out of the jurisdiction of the English court or intends to leave the country before the trial or owing to age or infirmity or illness or other such reason will be unable to attend the trial. In practice, therefore, except for a witness who is or is about to go abroad, this source of pre-trial oral evidence is infrequently used and such deposition is extremely rarely obtained.

The discovery of tangible evidence may be obtained before the trial under the powers of the court to order the inspection of any property in the possession of a party which is the subject matter of the action or as to which any question may arise or to order a sample of such property to be taken, any observation made or experiment to be tried on or with such property.⁸² The process of tangible discovery has been extended to obtaining such orders, before an action is commenced, by a potential plaintiff in likely proceedings against a potential defendant in all classes of claims⁸³; but such orders in relation to property which is the property or in the possession of a non-party may be made only in pending actions for personal injuries or death.⁸⁴ This is a strange anomaly which is quite inexplicable and insupportable and should be removed.

An important extension of tangible discovery which was created under the inherent jurisdiction of the court is a power to stay an action unless and until the plaintiff who is claiming damages for personal injuries submits himself or

⁸² R.S.C. Ord. 29, rr. 2 and 3.

⁸³ Supreme Court Act 1981, s.33(1), and R.S.C. Ord. 29, r. 7A(2).

⁸⁴ Supreme Court Act 1981, s.34(3), and R.S.C. Ord. 29, r. 7A(2).

herself to a medical examination of a reasonable character which is reasonably required.⁸⁵

There are two important limitations in the process of discovery before trial in the system of English civil justice.

The first is that the law recognises the right, sometimes inaccurately called "the privilege" of a party, in specified circumstances, to withhold both from the opposite party and the court the production of a document or the answer to a question, however relevant or pertinent it may be as evidence.⁸⁶ Such a right or privilege is recognised by all legal systems, with variations in the specified circumstances as between each other. The more important instances of such privileges in England are (1) legal professional privilege, which primarily protects communications between solicitor and client and secondarily protects communications between solicitor and strangers given or obtained for the purposes of pending or contemplated litigation; (2) public interest privilege, which of course includes Crown or State privilege; (3) privilege against incrimination of self or spouse under English law; (4) privilege for communications used to obtain legal aid. In some countries, for example, in France, such privilege is not limited to the legal profession but extends to the sacerdotal, and in some Commonwealth countries to the medical profession. It is plainly for consideration whether we should not in England examine the extension of this privilege to other professions besides the legal profession.

⁸⁵ *Edmeades v. Thames Board Mills Ltd.* [1967] 2 Q.B. 67.

⁸⁶ See R.S.C. Ord. 24, r. 5(2). The recognised grounds of "privilege," *i.e.* the withholding of the production of documents or evidence also includes privilege arising in respect of "without prejudice" negotiations.

The second, more important, limitation in the English process of pre-trial discovery is that which confines or restricts it to the issues or questions raised in the pleadings, which themselves are limited by the facts contained in them. It is the basic rule of English discovery that it must not extend beyond such issues or questions and the facts pleaded: to do so would be to embark on what is sportively called "a fishing expedition." In the English system, a party is not allowed, as it is called, to fish for a new case or defence; he is not permitted to try to ascertain, to find out, to discover facts and documents which may help or prove a cause of action or defence not yet pleaded. He has staked his all on the facts which he has pleaded; if there are in truth other facts which would show or prove he has a well-founded claim or defence, he is not entitled to discover them or to frame or to re-frame his case on their basis. The party who knows these other facts and can disclose them is nevertheless entitled to keep them secret. If, as Jeremy Bentham asserted, one of the mischiefs of civil justice is the frustration of well-founded claims, one of the main instruments to give effect to this mischief is precisely the rule against fishing discovery.

If this is so, it naturally gives rise to the fundamental question whether this restrictive rule operates to defeat justice and ought therefore to be abrogated. It is plainly an artificial and technical rule, in the sense that it excludes the discovery and use of available relevant facts on the mere ground that they have not already been pleaded. In this sense, it may be likened to the common law system of pleadings before the Judicature Acts 1873 to 1875 which had, as we have seen, the same effect of defeating justice and which had accordingly to be completely replaced. We should not today be so hypnotised by the evocative expression of "fish-

ing” as to be deterred from abolishing the rule forbidding such discovery. We have to remember that, apart from the privileges against the production of documents or other material evidence and particularly the privilege against incrimination of self or spouse, in the English system of civil justice, as contrasted with criminal justice, there is no right to silence, either for the plaintiff or the defendant. In the continental systems, they know no such limitation arising from what we call “fishing” against the discovery of all material and relevant facts and documents. In the American Federal system and in most of the American States, the process of fishing discovery has been fully legitimated, for there it is permissible for a party to employ the discovery processes,⁸⁷ both oral and documentary, to ascertain and discover facts which until then were unknown and which will establish or support the claim and, as Bentham would put it, effectuate a well-founded claim. This development was of course closely connected with the replacement of Fact-Pleading by Notice-Pleading, under which the initial complaint is merely a short and plain statement of the claim showing that the plaintiff is entitled to relief. The system of English civil justice needs to look towards fundamental changes in procedure by introducing the system of Notice-Pleading and at the same time abolishing the rule against fishing discovery. This is necessary in order to extend the reach of justice and to improve its quality.

⁸⁷ See *Hickman v. Taylor*, (1947) 329 U.S. 495; 67 S.Ct. 385. “The deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honoured cry of ‘fishing expedition’ serve to preclude a party from inquiring into the fact underlying his opponent’s case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession,” (*per* Justice Murphy delivering opening of the U.S. Supreme Court).

In the result, it will be seen that at the stage before the trial, the system of English civil justice is extremely effective in producing the fullest range of material documentary evidence, but only within the limits of the pleadings of the parties; it is however exceptionally deficient in producing the relevant oral evidence of the parties and their witnesses and is somewhat hesitant in producing the relevant material tangible evidence in all classes of actions. By contrast, in the continental systems, the whole of the evidence of parties and their witnesses would have been obtained before the final day of reckoning or judgment, including all the oral, documentary and tangible evidence which the court, in its search for the truth, would have gathered so that on that final day both the court and the parties will be fully apprised of the entirety of the relevant evidence. In Canada, at the pre-trial stage, each party is entitled to examine each other, and with the leave of the court, any other witness, under their system of what is called "Examination for Discovery,"⁸⁸ which has the effect of revealing the whole of the cases of the parties, thus enabling them to effect a greater volume of settlements and to do so on a fairer basis by knowing what the material evidence would likely to have been at the trial. In the American Federal and many state systems, the processes of discovery are employed, in some instances perhaps extravagantly, to ascertain the entirety of the evidence which will be available to be adduced at the trial by each of the parties, and which will be known and may be used both by the parties and the court before the trial. In England the fabric of civil justice stands in need of repair and improvement in its discovery processes so as to

⁸⁸ See, *e.g.* Ontario Rules of Civil Procedure, Rule 31, as amended (Reg. 786/1984).

make the entirety of the admissible evidence available before the trial to both or all the parties and to the court.

5. Directions for Trial

In the English system of civil justice, unlike those of the European countries, an indispensable feature in the life of an action before the trial is that the court is frequently called upon by one or other of the parties to make orders and to give directions designed to enable them to prepare for trial, though it should be stressed that such orders and directions have the important incidental effect of assisting the parties towards reaching a settlement on a more realistic appraisal of their respective cases. By the very nature of the pre-trial phase of the action, there is an extensive variety of applications for such orders and directions which may be necessary in a particular case, including, for example, matters affecting the parties and the constitution of the action, pleadings, particulars, amendments, discovery and production of documents, inspection of property, admission of facts and documents and a host of other pre-trial processes. Other important orders and directions which have to be sought preparatory to the trial may relate to the methods and matters of the evidence to be proved at the trial, including for example, the adducing of expert evidence and the disclosure of experts' reports, the limitation of expert evidence and of plans, photographs and models, the admissibility of hearsay evidence, and the facts that may be proved by affidavit, or by statement on oath of information or belief or by the production of documents or otherwise. The crucial matters requiring such orders and directions are the place and mode of trial, including an estimate of its importance and length. The effective and speedy disposal of this immense variety of pre-trial business pres-

ent extremely difficult and daunting problems in judicial administration.

The major solution to cope with this problem was the invention of the "Summons for Directions" in 1883. Before then, the practice which prevailed in the former common law courts and in the new High Court was that every pre-trial application at Chambers was required to be made by a separate summons which led to a separate order or direction. In 1883, there was introduced a single composite general summons for directions which could be issued at any time for almost every pre-trial order or direction. Since then, however, there have been many changes and much debate about the "Summons for Directions," in its timing, its value and its functions, and the debate still continues because there are serious doubts whether the expectations of its efficacy and usefulness are being fulfilled, and more fundamentally because there are serious questions whether its functions should be different from what they are.

As regards timing, the thrust of the changes made since 1883 has been to extend the time for the issue and the hearing of the summons for directions until after the pleadings are closed and mutual discovery of documents should have been made, presumably in order that the court should know what are the issues in the action and whether the relevant documents have been disclosed.

As regards functions, the thrust has been to use the summons for directions as the occasion for a general stocktaking for the preparation for the trial. It is thus intended to be the prime instrument to enable all the interlocutory stages to be taken and completed, to clear the decks for the trial and to ensure that the case, as it is said, is "readied" for trial.

As regards value, the thrust is to enable the court to give all such directions "as to the future course of the action as

appeared best adapted to secure the just, expeditious and economical disposal thereof." For this purpose the Peel Commission recommended that "the Master should intervene actively and should use his influence on the parties to be reasonable and accommodating."⁸⁹ The Evershed Committee proposed that the summons for directions should be strengthened to achieve a "new approach" and that the Master should be "robust" in using his powers, for example, to secure admissions and agreements and to obtain reasonable information and the production of documents.⁹⁰

In truth and in actual practice, however, the general summons for directions has come to be virtually a non-event. On the hearing of the summons for directions, even after the close of pleadings and the completion of discovery, the Master knows nothing about the case, except what is revealed by the facts alleged in the pleadings; he cannot and does not conduct a general stocktaking beyond what the parties wish; and he has no effective powers to intervene or to be robust, in face of the evident reluctance of the parties to be reasonable or accommodating. The result is that, in summons after summons, the orders and directions follow substantially the same pattern, with more repetition than variation. In 1968, this was recognised by the Winn Committee who stated that in personal injury actions, the summons for directions was "a useless and wasteful step,"⁹¹ and

⁸⁹ See Report of the Royal (Peel) Commission on the Despatch of Business at Common Law, (1934-36) Cmnd. 3065, para. 235.

⁹⁰ See Final Report of the (Evershed) Committee on Supreme Court Practice and Procedure, (1953) Cmnd. 8878, paras. 242, 244. For the "new approach," see, *ibid.* s.1.

⁹¹ See (Winn) Report of the Committee on Personal Injuries Litigation (1968) Cmnd. 3691, para. 351, and see Appendix 16 for draft Rule.

their recommendation, supported by the Cantley Committee in 1979,⁹² that it should be replaced by automatic directions taking effect by rule was implemented in 1980.⁹³ the Oliver Committee stated that in witness actions in the Chancery Division the summons for directions is "nothing more than a formality,"⁹⁴ and their modest recommendations for standard directions was implemented in 1982.⁹⁵

Against this background, it would seem plain that the problem of the summons for directions and indeed directions for trial generally has been blown wide open and calls for a thorough review and re-examination. Such reconsideration should not wait upon other procedural changes, but should be undertaken forthwith. In this context, some fundamental questions cry out for effective responses, as for example, whether a general summons for directions is necessary or even desirable, whether the court should play a more active role at the stage of pre-trial, whether a pre-trial review is desirable to shorten and stream-line the trial, and whether the functions of pre-trial directions should be merely to enable the parties to prepare for trial or should also be to assist them to avoid a trial. Having raised these questions, it is only fair and proper that I should offer some suggestions for their resolution.

First, as to the need of a general summons of directions. Such a summons, even in non-personal injury actions, simply produces substantially the same or similar standard orders and directions, there is no general stocktaking, no

⁹² See (Cantley) Report on Personal Injuries Litigation Procedure (1979) Cmnd. 7476, para. L.

⁹³ See R.S.C. Ord. 25, Rule 8.

⁹⁴ See (Oliver) Report of The Review Body on the Chancery Division of the High Court, (1981) Cmnd. 8205, para. 79.

⁹⁵ See R.S.C. Ord. 25, Rule 9.

robustness, no narrowing of issues and no judgment as to the nature and extent of the discovery made. If this be the case, as I believe it to be, the general summons for directions should be abolished and should be replaced by automatic directions taking effect by rule, on the lines of those applying in personal injury actions with appropriate modifications. In the ordinary run of actions, apart from personal injuries, there is nothing that can be provided for by orders of directions made on a summons for directions that cannot be provided by standard automatic directions, and indeed these would be more efficacious since they would take effect by rule and would be likely to accelerate the pre-trial stages, particularly the crucial stage of setting down. Provision would of course have to be made, as in the case of personal injury actions, to enable the parties to apply for further or different orders or directions.

Secondly, as to court control of pre-trial directions. There is a growing acceptance of the view that the adversarial system of English civil justice should yield to allowing or even requiring the court to play a more active role at the stage before the trial. It is in the public interest that it should do so, even if in doing so it may trespass on the principles of party control and party autonomy in the conduct of civil proceedings. At the pre-trial stage, the active role of the court does not imperil or diminish its impartiality and neutrality nor its remoteness from the disputes between the parties. It would operate to foster and protect its own process and prevent or reduce the abuse of process, even by non-use. It would increase the quality of justice which the court administers.

In this context, consideration should therefore be given to the following three ways in which the active role of the court before the trial may be introduced or increased, namely, in

monitoring the progress of the proceedings, in conferring powers on the court to act of its own motion to give and make pre-trial directions and orders,⁹⁶ and in controlling the conduct of the action. This last proposal may perhaps be the most controversial, especially as to the nature and extent of the pre-trial control which the active court may be called upon to exercise.

Thirdly, as to the pre-trial review. If the general summons for directions is to be abolished, it may become desirable to introduce a new machinery for the pre-trial review of an action. As its name implies, this would be timed to take place shortly before the trial, as for example, within 14 days of a certificate of readiness lodged by either party. The object of such review would be a kind of pre-run or skeleton rehearsal of the trial, so that it would be a detailed review of the issues and the material evidence relied on by the parties. The value of such a review would be to reduce the number and shorten the length of trials. At present, a very high proportion of actions which are set down for trial are settled. In 1964, for example, in the Queen's Bench Division, the proportion was over 80 per cent., and of these over 20 per cent. were settled at the door of the court or during the trial; indeed there were more actions so settled than were in fact tried.⁹⁷ If the machinery of the pre-trial review were to increase the proportion of settlements of actions that are set down for trial by a factor of 20 or 15 or even 10 per cent, which I venture to think is more than likely, it would produce an enormous saving in time, labour and costs, and if it increased the present rate of settlements of actions after attendance at court, it would eliminate the quite incredible

⁹⁶ See, *e.g.* County Court Rules 1981, Ord. 13, r. 2(1).

⁹⁷ See Judicial Statistics, Annual Report 1984, Cmnd. 9599, Table 3.4.

and unacceptable waste of the time and the costs of bringing the parties, witnesses, experts and lawyers to the court, not to speak of the waste of public funds and judicial time. No doubt, pre-trial reviews would be likely to increase the time, effort and costs of the parties, and to consume additional judicial time, but I would think that such increases would be greatly outweighed by the savings that they would produce.⁹⁸

Fourthly, as to the promotion of settlements. The basic defect of the pre-trial directions and particularly of the general summons for directions is that they are aimed at the adjudicative process of the court and they almost ignore the settlement process. This indeed is a major defect in the fabric of English civil justice as a whole. In truth, the settlement process accounts for a much greater volume of civil disputes and actions than the adjudicative process. Apart from the fact that it can be undertaken even before proceedings are commenced and by non-lawyers, though by persons with much skill and expertise in conducting negotiations, the settlement process is less expensive both for the parties and the court, and moreover it is socially a much healthier process, since it accords with the wishes and presumably the interests of the parties. The functions of the pre-trial directions, and of the pre-trial review if this should be introduced, should be two-fold, namely, to promote a settlement if at all possible or otherwise to prepare for a trial. This was the view point urged by the Oliver Committee about the pre-trial review, that the court should press on the parties any possibility of settlement and narrow down the remaining issues in dispute.⁹⁹ Of course there are many experi-

⁹⁸ See County Court Rules 1981, Ord. 17; and see Oliver Report, *supra*, paras. 131-134.

⁹⁹ See *ibid.* para. 133.

enced lawyers, solicitors and barristers, who are adept and adroit in settlement negotiations and do not need and may even resent encouragement to settle; but there are many others who are not so competent or skilled or expert who may very likely welcome such assistance from the court and even regard it as a life-line in their predicament. And of course it may be undesirable for the trial judge to engage in promoting a settlement, but this can be done when a pre-trial review is being heard by a Master or Registrar and can thus be kept secret from the trial judge.¹

Indeed, quite apart from a pre-trial review, it may be valuable to introduce, on a voluntary basis at any rate, a machinery for an application to the court by either party to examine the possibility of a settlement, what may be called "a settlement summons," at which the Master, with all cards on the table, may use his influence and independence to promote a settlement between the parties.²

Machinery of Pre-Trial—System of Masters

By its very nature, the machinery of the pre-trial process differs sharply from the proceedings at trial in many crucial respects. Thus, unlike the trial, the pre-trial process is discontinuous in the sense that a separate application must be made to the court for the order or orders sought and, moreover, the hearing of the application may be adjourned from time to time, as for example, to allow further evidence to be introduced or the application is part heard or other good ground. Ordinarily, the application is heard *inter partes*, but for many purposes it may be made *ex parte*, though of course any party affected by an order so made may apply to set it

¹ See Jacob, *Reservations to the Winn Report*, Cmnd. 3691 (1968) above, p. 153.

² *Ibid.*

aside.³ The evidence on a pre-trial application is almost invariably by affidavit and only very exceptionally by the oral examination or cross-examination of a witness. The proceedings are conducted in Chambers, that is, in private with the press and the public excluded and only the parties and their lawyers being present, though there is power for the judge to adjourn the proceedings or to give judgment in open court.⁴ In the High Court, the right of audience is not restricted to barristers but extends to solicitors and their legal executives and other clerks. The costs of each application are not ordinarily made immediately payable but are left to be dealt with according to the outcome of the case. Any order made by a Master or Registrar may be appealed against as of right to the Judge in Chambers, though an appeal from the judge to the Court of Appeal against an interlocutory judgment or order will lie only with the leave of the judge or the Court of Appeal, save in specified cases, such as the grant or refusal of an injunction.⁵

The most striking feature of the English pre-trial process is that, save for a few exceptions, the proceedings are conducted not before a judge but before a junior judicial officer, called the Master or Registrar.⁶ Before 1837, the judges of the three superior common law courts themselves dealt with pre-trial applications, which were then comparatively few in number and in variety. In 1837, Parliament abolished a great number of administrative and a few quasi-judicial offices and in their place created the Masters of the three

³ See R.S.C. Ord. 32, r. 6.

⁴ See R.S.C. Ord. 32, r. 13.

⁵ See Supreme Court Act 1981, s.18.

⁶ See R.S.C. Ord. 32, see Jacob, "The Masters of the Queen's Bench Division" in *The Reform of Civil Procedural Law* (Sweet & Maxwell, London), p. 349.

Common Law Courts to assist the judges in their pre-trial work.⁷ In 1867, Parliament took the bold leap forward to transform the position of the Master from being an assistant to the judge into becoming a separate, distinct and independent judicial officer.⁸ This was achieved by enabling the judges to make rules of court empowering the Masters to transact all such business and exercise all such authority and jurisdiction as may be transacted and exercised by the judge in Chambers, except in specified matters and proceedings. Needless to say, the requisite rules of court were immediately made and they have continued with considerable expansion to this day. They operate to confer on the Masters original jurisdiction in respect of the matters and proceedings that come before them. For these purposes in the High Court, the Master is the equivalent of the judge in Chambers and his decision, order or judgment is made or given in his capacity as “the court” itself.⁹

The jurisdiction of the Masters, which has from time to time since their creation been greatly expanded, is very extensive indeed and covers almost the entire range of pre-trial proceedings, with the important exception of applications for an injunction, other than in agreed terms, and it also extends to almost all post-judgment proceedings. They have power to make final as well as interlocutory orders and to give final judgments which are as operative and enforceable and which must be complied with as if made of given by a judge.

The Masters have thus become the predominant judicial instrument for dealing with pre-trial and post-judgment

⁷ Superior Courts (Officers) Act 1837.

⁸ Judges' Chambers (Despatch of Business) Act 1867.

⁹ See R.S.C. Ord. 32, rr. 11, 14 and 23.

procedures. They fulfil many important and even crucial functions in the English judicial system. They provide a more speedy, economical and convenient machinery for pre-trial and post-judgment applications; they perform the greater volume and variety of the judicial work at the stages of pre-trial and post-judgment proceedings which would otherwise require to be performed by a Judge, so conserving "judge-power" for more important work and making more efficient use of "judge-time"; and at the stage of pre-trial, they determine all the important procedural questions, which thus enables the parties to make a realistic appraisal of the strengths and weaknesses of their respective cases, and if a trial should ensue, enables the trial judge to concentrate on the real substantive merits of the case and not to be distracted by procedural side-issues. It may therefore be claimed that the Master system is exceptionally valuable in the English judicial process.

This claim may indeed be even greater when it is realised that the Masters have power to assess damages and interest, and with the consent of the parties, to try actions and issues in the same way as a judge himself, except that they have no jurisdiction to deal with a contempt of court. For these purposes, the Masters sit, not in Chambers but in open, public court as a judge would do; and in such cases an appeal lies from the decision of the Master direct to the Court of Appeal as in the case of a trial or hearing by a Judge.

It should perhaps be stressed that the Master has no direct role or function to play in connection with the trial itself. He does not form part of the trial court, nor does he sit with the judge, nor do he and the Judge communicate with each other in anyway whatever about any case. He does not take down the evidence of a witness before the trial

or examine any witness or collect or collate the evidence so taken or place it in the form of a "dossier" before the trial court for a final determination of the action. In these respects, the English Master system differs fundamentally from the role of the "investigating judge" in some of the continental systems, who carries out the pre-trial procedures on behalf of and as a member of the ultimate trial court, in whose final decision he takes his full part.

With a few exceptions, the English Master system operates throughout the whole court process. The Queen's Bench Masters in London, who provide the prototype, have their counterparts in the Masters of the Chancery Division and the Registrars of the Family Division, and the Admiralty Registrar and the District Registrars outside London. In the County Courts, pre-trial applications, other than for an injunction are also dealt with by the Registrar. On the other hand, in the Commercial Court and before Circuit Judges sitting as Official Referees, pre-trial applications are heard by the judges themselves. On such applications, the parties are less controversial and more amenable to suggestions from the Bench, especially when they know or believe that the Judge dealing with the pre-trial application is likely to be the trial Judge.

One of the advantages claimed for the Master system is that the pre-trial applications are not heard by the trial Judge, who would thus come fresh to the trial, without his mind being clouded by the hearing and disposal of such applications.

The practice in the Commercial Court and before Official Referees cast doubt on this claim and the question may be raised whether pre-trial applications should be heard by a Judge who will ultimately be the trial Judge, precisely because he would be able directly to control and manage

the progress of an action and would be familiar with the case if it should come on for trial and thus would be in a position to shorten the length and reduce the costs of the trial to a significant extent.¹⁰ Except in relation to what may be described as routine pre-trial applications, this is a question which should be addressed at some time, but for the present, the Master system is deeply entrenched and is working with apparent satisfaction as an indispensable part of the judicial apparatus.

B. Disposal without a Trial

The system of English civil justice provides an extensive range of methods and measures for the disposal of actions without a trial.¹¹ These procedures are essential to the efficient functioning of the administration of civil justice, for they have the effect of eliminating the great majority of actions in an expeditious and summary manner, and without them, the courts would not be able to cope with the volume of actions which would otherwise require to be tried by the judges. In view of the constraints of space and time, it will only be possible to outline the main features of these procedures.

Settlement or Compromise

English law encourages the settlement or compromise of civil disputes, even after action brought. Under the privi-

¹⁰ This question was examined and answered in the negative by both the Peel Commission, *supra*, para. 245, and the Evershed Committee, *supra*, paras. 239–245, but it needs to be examined again in view of the considerable changes in procedure since then.

¹¹ See Jacob, "Pre-Trial Remedies in England" in *The Reform of Civil Procedural Law* (Sweet & Maxwell, 1982) p. 259.

lege of "without prejudice," the parties may freely and frankly carry on negotiations which if unsuccessful must not be brought to the attention of the trial judge¹² except if it is so stipulated on the question of costs, until all questions of liability and quantum or relief or remedy are determined.¹³ If such negotiations are successful they will lead to a binding settlement or compromise, the terms of which will replace the original claims or defences of the parties and which will themselves become enforceable. It is true that difficult technical questions may arise according to the form of words used to express the settlement agreement, and it behoves practitioners to beware of entering into an agreement to terminate one piece of litigation only to give rise to another.¹⁴

Under the principle of "party control," the parties are entitled to settle or compromise the proceedings at any time and on any terms they choose without the intervention, control or approval of the court, save in the case of claims by or on behalf of minors or mental patients for which the approval of the court must be obtained for the proposed settlement.¹⁵ Indeed, in the Queen's Bench Division of the High Court, in many classes of actions, they do not even have to obtain a judicial officer to make the order; they can simply endorse their consent on a "Consent Summons," which is presented to the appropriate Court Officer who will issue the consent order.¹⁶

In all European countries, the court is under a duty at all

¹² See *Worral v. Reich* [1955] 1 Q.B. 296; *Causton v. Mann Egerton (Johnson) Ltd.* [1974] 1 W.L.R. 162; [1974] All E.R. 453, C.A.

¹³ *Cutts v. Head* [1984] Ch. 290, C.A., and see R.S.C. Ord. 22, r. 14.

¹⁴ *McCallum v. County Residences Ltd.* [1961] 1 W.L.R. 657; [1965] 2 All E.R. 264, C.A.

¹⁵ See R.S.C. Ord. 80, r. 10.

¹⁶ See R.S.C. Ord. 42, r. 5A.

stages of proceedings to promote the settlement or compromise between the parties and to assist them to arrive at such a conclusion. This is no mere formal role but on the contrary it is a very activist part which the court plays, and it would seem with rewarding success. This duty is derived from the concept that conciliation is itself a function of the court, and the termination of an action by conciliation is as much the production of a just result as by adjudication. Curiously enough, in the Federal Courts and in many State Courts in the United States, the pre-trial procedure is invariably used as the occasion for examining the potential of settlement,¹⁷ in which the court plays a very active conciliatory role in promoting a settlement or compromise between the parties, and there also the results are quite rewarding.

In England, however, save for important exceptions in respect of matrimonial proceedings, claims for unfair dismissal before industrial tribunals and proceedings alleging racial or other discrimination, the court has no process or jurisdiction to engage in conciliation or to assist the parties to arrive at a settlement or compromise and it has a no role to play in promoting such a conclusion. I hope that I may be allowed the liberty of raising my voice once again to assert that conciliation is an important social function as an alternative to adjudication by the court or to settlement arrived at directly between the parties, and that power should be conferred on the court to promote and assist the parties to conclude a settlement or compromise, if necessary on a "settlement summons" issued for that purpose.¹⁸

¹⁷ See, e.g. Federal Rules of Civil Procedure, Rule 16, "Pre-Trial Procedure: Formulating Issues."

¹⁸ See Jacob, *Reservations to the Winn Report* (above, (1968) Cmnd. 3691, p. 153).

Payment into Court and Offers to Settle

The machinery for making a payment into court or an offer to settle provides a procedural device which affords a powerful incentive to the plaintiff to settle his claim on the terms offered at the risk of otherwise rendering himself liable for the substantial costs of the action.¹⁹

In actions for the recovery of money claims, the defendant can, without admitting liability, pay into court a sum of money in satisfaction of the plaintiff's claim. The plaintiff must then decide whether to accept it or not. If he accepts the sum, the action will thereupon be terminated and the plaintiff will obtain payment of the money in court and his costs up to that date. If he refuses to accept the sum, the action will of course continue, and if at the trial the plaintiff should recover more than the amount paid into court, he will be awarded judgment for the larger sum and will recover all the costs of the action; but if he should recover a sum equal to or less than the amount in court, he will obtain judgment only for the lesser sum and recover the costs up to the date of the payment in, and it is the defendant who will recover the costs from that date, including the costs of the trial which will of course be the substantial costs of the action. Such costs will become payable by the plaintiff to the defendant following the principle that "costs follow the event" for the plaintiff will have lost the "event," even though he may have succeeded on the issue of liability and lost only on the amount awarded to him.

An essential feature of this procedure is that neither the fact nor the amount of the payment in may be pleaded and must not be communicated to the trial judge, or if there be

¹⁹ See R.S.C. Ord. 22 and Ord. 62, r. 9.

an appeal, to the Court of Appeal.²⁰ It will become what has been called "a secret plea."

This procedural device has been called "a blunt instrument."²¹ It is indeed a one-sided weapon, since it enables the defendant at no real risk to himself, to make an offer to settle on terms, or, to put it in another way, it gives the defendant a second string to his bow. This operation can produce great injustice, as when the plaintiff succeeds on the issue of liability which may take the greater part of the trial and fail on the issue of the amount recovered, which may have taken a minimal time or even been agreed, and yet if he should recover less than the amount in court, the plaintiff will be liable for all the costs after the payment in. The Winn Committee on Personal Injuries Litigation made far-reaching proposals for substituting a wholly different procedure, enabling offers to settle to be made on the issue of liability separately from the issue of damages, and enable such offers to be made by both the plaintiff and the defendant,²² but unfortunately the Cantley Committee rejected these proposals.²³ The present position is plainly highly unsatisfactory, and it seems necessary that urgent further consideration of this problem should be undertaken, and in one way or another, the blunt edges of this instrument should be honed down to produce a greater quality of justice in the operation of this procedural device.

In procedures in which a payment into court is not feasible, such as third party proceedings, the trial of an issue on liability only, and the claim for provisional damages, provision has been made to enable the defendant to make an

²⁰ See R.S.C. Ord. 22, r. 7; Ord. 59, r. 12A.

²¹ See Winn Report, above, para. 511.

²² *Ibid.* Section XV, (B) Split Costs and Appendices 23 and 24.

²³ See (Cantley) Report on Personal Injuries Litigation ((1979) Cmnd. 7476), paras. 91-99.

offer to settle on terms with substantially the same results as in the case of a payment into court.²⁴

In the case of non-money claims, such as a claim for an injunction or a declaration or a share of property, the machinery of "payment into court" is of course not available, but the defendant can achieve the same beneficial position by making an offer in a letter written "without prejudice save as to costs" to submit to judgment or order on specified terms, so that if the plaintiff accepts those terms the action will end and he will recover his costs up to the date of the letter but if he does not the action will continue and if he should not recover better terms at the trial, the defendant will recover the costs of the action from the date of the letter.²⁵

Default Judgments

In the High Court, Queen's Bench Division, default judgments constitute the largest number of judgments entered without a trial. In 1984, they accounted for just about two-fifths of actions that were begun.²⁶ They may be entered for several kinds of default, as for example, failure to acknowledge service or to give notice of intention to defend, which is by far the most general kind of default for which judgments are entered, failure to serve a defence in due time, failure to

²⁴ These are matter to be taken into account under R.S.C. Ord. 62 r. 9.

²⁵ See *Cutts v. Head* [1984] Ch. 290, C.A.: and see R.S.C. Ord. 22, r. 14.

²⁶ There were 81,813 default judgments for debt out of 190,439 writs issued, *i.e.* 43.0 per cent. (See Judicial Statistics Annual Report 1984, Tables 3.1 and 3.3). In the County Courts, there were 860,839 default judgments, mainly for debt out of 2,142,340 complaints entered, *i.e.* 40.2 per cent., (*ibid.*, Tables 7.1 and 7.4). These figures underline the well-known fact that the court provides the primary and peremptory machinery for debt collection.

comply with requirements with a rule or order of the court, especially as to the time when a specified step or act is required to be taken or done, and failure to attend the trial.²⁷

The underlying theory of English civil justice is that a default judgment may be entered as a sanction for default to do or to comply with what is required by a rule or order of the court. It is the expression of the coercive power of the court for failure to follow any of the rules of procedure.²⁸ The default, however, may also be regarded as the expression on the part of the defaulting party that he has no intention or further intention to contest the proceedings or even that he affirms or admits the claim made against him.²⁹

A characteristic feature of the English system is that in actions for debt or for damages or for the recovery of land or the delivery of goods or any combination of such claims, a default judgment may be entered simply for failure to give notice of intention to defend or to serve a defence. No proof of the claim is necessary nor is an order of the court required. For failure to give notice of intention to defend, all that is necessary is to make and file an affidavit of the service of the writ, and the Court Officer, after satisfying himself that no notice of intention to defend has been received by that court, will enter the default judgment; for failure to serve a defence, all that is needed is the certificate of the plaintiff's solicitor on the back of the proposed judgment that the time for service of defence has expired and no defence has been served. No judicial decision or order is necessary

²⁷ See R.S.C. Ords. 13, 19 and 35.

²⁸ See *per* Lord Atkin in *Evans v. Bentham* [1937] A.C. 480.

²⁹ See *Gibb v. Freyberger* [1919] W.N. 22(A).

for the entry of such a default judgment. The process of entering such a default judgment is not judicial in its character but almost administrative and therefore no appeal lies against such a default judgment.

Nevertheless, the default judgment is, so long as it stands, final and binding and enforceable as a judgment after trial, and it has the character of a *res judicata*, at least on the essential basis of the claim for which the judgment was entered.³⁰

Another characteristic feature of the English system is that a default judgment entered for failure to give notice of intention to defend or for service of defence may be set aside.³¹ The application to set it aside should of course be made promptly but there is no time limit within which it must be made. On such an application the court has a wide and unfettered discretion to make such order as it thinks fit. For this purpose a reasonable explanation is required for the default which lead to the judgment, but, more important, it must be shown that there is an arguable defence to the claim made. The court may grant the application on such terms as it thinks fit, as regards the costs or payment of the whole or part of the claim.

Continental scholars are often puzzled and troubled by the character of such an English default judgment and there may indeed be problems about its recognition in foreign courts. They find it strange that a judgment may be entered against a party without a judicial decision or order, that no appeal lies against such a judgment but that the judgment has the potential of being set aside without limit of time subject to the general exercise of the court's discretion. How, they ask, can such a judgment be final, binding and

³⁰ See *Kok Hoong v. Leong etc. Mines Ltd.* [1964] A.C. 993.

³¹ See R.S.C. Ord. 13, r. 9; Ord. 19, r. 9.

enforceable? The answer is simply that this is precisely the juridical character of an English default judgment.

Summary Procedures

The concept of a “summary” procedure leading to a summary judgment or order may appear at first sight to be contrary to the proper functioning of the judicial process. It conveys the idea of a final judgment or order rendered by the court acting with undue haste and without full investigation or due deliberation. It creates the impression of “precipitation,” which Jeremy Bentham had identified, alongside delay, as one of the “mischiefs” of civil procedure.³² On the other hand, there are some things which are or are shown to be too clear beyond argument, as for example, the liability for a dishonoured cheque or the price of goods sold and delivered or a pleading which does not fulfil its proper function, or an action based on matter already *res judicata*, or a second action for substantially the same remedy or relief as claimed in an earlier action and so forth. In this event, there is plainly no need for a trial, and it is clearly in the interest of the parties and the court, as well as in the public interest, that the action should be brought to an early end without delay and without the costly and elaborate process for preparing for a trial, the outcome of which can be pre-determined.

Summary Judgment

The most celebrated form of summary process is the procedure for summary judgment under Order 14, which Sir Frederick Pollock described as “among the most beneficent

³² See Bentham, *Principles*, pp. 18 and 19.

inventions of modern procedure."³³ The policy of Order 14 is two-sided; on the one hand, it is to prevent any delay in the way of the plaintiff obtaining summary judgment without a trial where his claim is clearly proved and no fairly arguable issue or question is or can be raised by the defendant by way of defence and no ground is shown why there ought to be a trial, and on the other hand, but equally important, it is to give the defendant leave to defend and to proceed in the normal way to a trial where he satisfies the court that he has a bona fide arguable defence to the claim, whether on matters of fact or law or both, or that there ought otherwise to be a trial. On this basis, the procedure under Order 14 represents the synthesis between two great royal pledges in Magna Carta; "To none shall we deny and to none shall we delay justice or right."³⁴

This procedure for summary judgment was introduced to prevent delay in actions on dishonoured bills of exchange³⁵ but the scope of Order 14, widened from time to time, extends to all actions in the Queen's Bench and Chancery Divisions of the High Court except those for which there is a statutory right to trial by jury.³⁶

A summary judgment under Order 14 differs from a default judgment since it is given notwithstanding the expressed intention of the defendant to contest the action, so that the plaintiff is disabled from entering a default judgment, and it is given pursuant to a judicial decision and therefore an appeal lies against it.

³³ *The Genius of the Common Law* (Columbia University Press, New York, 1912), p. 83.

³⁴ See Magna Carta 1215, Clause 40: "To none will we sell, to none will we deny, to none will we delay, right or justice."

³⁵ Summary Procedure on Bills of Exchange Act 1855.

³⁶ R.S.C. Ord. 14, r. 1(2). A similar procedure has been introduced in the County Courts in actions for debt over £500 (C.C.R. 1981, Ord. 9, r. 14).

A procedure somewhat similar to summary judgment under Order 14 is provided for actions for specific performance or other relief in respect of contracts relating to land³⁷ and for actions for an account.

A summary procedure is also provided for proceedings for the recovery of land against trespasses ("squatters") or other wrongful occupiers, even though the names and identities of all or some of them are not known. The form of order obtained in such proceedings is basically *in rem* for the recovery of the land, and is not limited *in personam* to particular named persons.³⁸

In continental countries, there is no equivalent procedure to our summary judgment under Order 14. In claims, however, which are plainly uncontestable, as for example, on a dishonoured bill of exchange, there is the same need to prevent delay, and so in some countries, for example, in Germany and in Italy, in such a case there is a procedure under which the plaintiff may, without first obtaining a judgment, proceed directly to execution, but of course, such execution would be stayed if the defendant shows that he had a good defence on the merits to the claim. This procedure is certainly attractive and in a way, more speedy than our summary judgment, but for my part, I think it is valuable to retain our present practice on the principle that the process of execution should only be allowed to proceed on a judgment first obtained.

Striking out Pleadings

The procedure for striking out pleadings affords another instance of the summary process of terminating an action

³⁷ R.S.C. Ord. 86.

³⁸ R.S.C. Ord. 113.

without a trial. It may be employed by invoking the powers of the court under the rules of the court,³⁹ or the inherent jurisdiction of the court or under both these grounds. Under the Rule, the court may strike out any pleading on the ground that, in the case of a statement of claim, it discloses no reasonable cause of action, or in the case of a defence, it discloses no reasonable defence or in either case that it is scandalous, frivolous, vexatious, or it may prejudice, embarrass or delay the fair trial of the action or is otherwise an abuse of the process of the court; under the inherent jurisdiction of the court, the pleading may be struck out where it is an abuse of the process of the court. If the statement of claim is struck out, the action will be dismissed and if the defence is struck out, judgment will be entered against the defendant.

In practice, this procedure is required to be employed as soon as practicable after service of the pleading which is being attacked. Recourse may be had to this summary process only in obvious cases or where the statement of claim or defence on its face is "obviously unsustainable."⁴⁰ It has been said that the court will not permit the plaintiff to be "driven from the judgment seat" except where the cause of action is obviously bad and almost incontestably bad⁴¹ and the same may be said about the defendant and his defence.

Nevertheless, if the court is satisfied even after a relatively long and elaborate hearing that the pleading does not disclose a reasonable cause of action or defence, the right course is to strike out the offending pleading and terminate

³⁹ R.S.C. Ord. 18, r. 19.

⁴⁰ See *Att.-Gen. of Duchy of Lancaster v. L & N.W. Ry. Co.* [1892] 3 Ch. 274, C.A.

⁴¹ *per Fletcher Moulton L.J.* in *Dyson v. Att.-Gen.* [1911] 1 K.B. 410, 419.

the action by dismissal or judgment as the case may be.⁴² Where, however, it appears to the court that the application to strike out the pleading will involve a prolonged and serious legal argument, the court should refuse to embark upon that argument and should either dismiss the application or order that the question of law raised should be tried as a preliminary issue.

It is important to emphasise that the decision of the court on the procedural question whether or not to strike out a pleading for not disclosing a reasonable cause of action or defence, as the case may be, has the incidental and important effect of creating a rule of substantive law. Many notable and far-reaching principles of law have been produced in this way.⁴³

Summary stay or dismissal

Another procedure for the termination of proceedings without a trial is by the process of summary stay or dismissal or judgment, as the case may be. The power to exercise this summary process is derived under several Rules of Court as well as under a number of statutes, but its most important source is the inherent jurisdiction of the court. By virtue of this jurisdiction, the court has the power, by summary process, to order that the proceedings shall be stayed or dismissed or judgment entered against the defendant, as the case may be. This power may be exercised where the proceedings are an abuse of process, as for example, where they

⁴² See *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.* [1986] A.C. 368.

⁴³ Perhaps the most notable, though it arose under a similar procedural rule in Scots law, was *Donoghue (or M'Alister) v. Stevenson* [1932] A.C. 562 ("the snail in the ginger-beer bottle"), which established the liability in tort of the manufacturer to the ultimate consumer.

are frivolous, vexatious or harassing or where they are manifestly groundless or in which there is clearly no cause of action or defence in law or in equity, or the process of the court is being used for an improper or ulterior purpose or in an improper way or is otherwise being abused.⁴⁴ Unless the court had power to intervene summarily to prevent the misuse of legal machinery, the nature and function of the court would be transformed from a court dispensing justice into an instrument of injustice. According to Lord Blackburn, a stay or even dismissal of proceedings may “often be required by the very essence of justice to be done,” so as to prevent unnecessary expense, trouble and anxiety being occasioned to parties by frivolous, vexatious or hopeless litigation.⁴⁵

This summary power, however, ought to be very sparingly exercised and only in very exceptional cases, and the action ought not to be stayed or dismissed or judgment entered unless the court concludes that the action, beyond all reasonable doubt, ought not to go on. When making a summary order for the stay or dismissal of an action or giving summary judgment without a trial, the court should be equally as satisfied as it would have been after a trial, and perhaps even more so.

The circumstances in which an abuse of process may be dealt with by the summary powers of the court under its inherent jurisdiction are manifold and diverse, and are too numerous and disparate to be particularised. By way of example, they include proceedings which involve a deception on the court or are fictitious or are without foundation

⁴⁴ See Supreme Court Act 1981, s.49(3); *Supreme Court Practice*, Vol. 1, paras. 18/19/8 and Vol. 2, paras. 5204 *et seq.* Jacob, “The Inherent Jurisdiction of the Court,” in *The Reform of Civil Procedural Law* (Sweet & Maxwell, 1982), p. 221.

⁴⁵ *Metropolitan Bank v. Porley*, [1885] 10 App. C. 210, 221.

or serve no useful purpose or are multiple or successive proceedings for the same cause in the same court or even different courts, as where there are pending proceedings in a foreign court or where the English court is not the proper or appropriate suitable tribunal. In these and countless other circumstances, proceedings may be disposed of by summary process speedily and at comparatively little cost at the very early stage of their life.

Other modes of pre-trial disposal

In order to appreciate fully the extensive range of procedures for the termination of proceedings without a trial, it is necessary just briefly to mention some other modes for such disposal. Unfortunately, there are no statistics published or perhaps even kept, as possibly they ought to be, of the numbers of proceedings which are so ended by any particular mode, so that it is not possible properly to evaluate the effectiveness of any of these modes. Nevertheless, from experience and practice, it may be surmised that between them, they account for a significant volume of proceedings which are disposed of without a trial.

Thus, for example, the plaintiff may enter *judgment on admissions* made by the defendant, whether in his pleadings or otherwise, provided the admissions are clear, unambiguous and unconditional.⁴⁶

Again, subject to becoming liable for costs, the plaintiff may *discontinue* his action or *withdraw* any particular claim without the leave of the court within 14 days after the service of the defence or with the leave of the court at a later stage or after an order has been made for an interim pay-

⁴⁶ R.S.C. Ord. 27, r. 3.

ment to him.⁴⁷ Yet the discontinuance or withdrawal without leave is no bar to a subsequent action for the same cause of action, though the later action may be stayed until the costs of the earlier action have been paid. An order giving leave to discontinue an action will ordinarily expressly prohibit the commencement of a fresh action for the same cause. For his part, the defendant is entitled without the leave of the court at any time to *withdraw his defence*, thereby leaving the plaintiff free to enter judgment with costs against him. The principle is that the court has no power to compel the defendant to defend that action against his will.

Further, although there is no general Rule of Court, as perhaps there out to be, providing for an appropriate sanction for *non-compliance with an order of the court*, nevertheless, in such event, the practice of the court is to exercise such a discretionary power on such terms as it thinks fit. So in the case of a default by the plaintiff in complying with the requirements of a rule or order of the court, the court may summarily dismiss the action or in the case of such a default by the defendant it may summarily strike out the defence, if there be one, and enter judgment against the defendant. Such a power is regarded in England as an essential adjunct to the proper function of the judicial process, and many an action comes to such an untimely end without a trial.

In this context, it is important to remember that, under what is probably the most beneficent rule in the Rules of the Supreme Court, the court has broad and ample curative powers to amend or correct any non-compliance with the requirements of the rules, however arising or occurring. Any such non-compliance is not to be treated as a nullity to deprive the court of jurisdiction to deal with it, but it must

⁴⁷ R.S.C. Ord. 21.

be treated as an irregularity, which the court can cure or put right as may be appropriate.⁴⁸ By this rule, a serious "blot on our copybook," as it has been called, has been cleanly erased.⁴⁹

In 1968, in relation to the powers of the court to *dismiss an action for want of prosecution*, a more stringent practice than had formerly been followed was laid down by the Court of Appeal in an emphatic decision.⁵⁰ It was there held that an order for the dismissal of an action for want of prosecution may be made, not only where the plaintiff or his lawyers are guilty of intentional or contumelious conduct, for example, in disobeying an order of the court, or other abusive process, but also where they are guilty of prolonged or inordinate delay which is inexcusable and which has caused or is likely to cause serious prejudice to the defendant or to prevent the fair trial of the action or to create the risk of such a possibility. This general principle, which applies to all stages of an action as well as to all classes of actions, is based on public policy which demands that the business of the courts should be conducted with expedition. It was enunciated by the Court of Appeal precisely with the intention of injecting a new element of expedition in the conduct and preparation of cases before trial, especially in relation to actions for personal injuries. This judicial warning was signalled to the plaintiff's solicitors to "get on" with their cases, otherwise they would be at risk of having the plaintiff's action dismissed for want of prosecution and themselves rendered liable for damages for negligence to the plaintiff as their former client.

In approving this principle, the House of Lords stressed

⁴⁸ R.S.C. Ord. 2, r. 1.

⁴⁹ See *per* Lord Denning M.R. in *Re Pritchard (dec'd.)* [1963] Ch. 502.

⁵⁰ *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 Q.B. 229.

that ordinarily such an order of dismissal should not be made before the expiry of the current period of limitation, since the plaintiff was at liberty to bring a fresh action, which would simply aggravate the prejudice to the defendant from delay and would add to costs.⁵¹

Nevertheless, since the *McAlpine* decision, there has grown what is virtually a new industry in the volume of applications for dismissal of actions for want of prosecutions. The defendant has only to strike at the right moment to succeed in his application; he has nothing to lose but the costs if he fails. What is inexplicable is how any solicitor as an Officer of the Court can conduct litigation on behalf of a client and expose him by a procedural default to having his claim defeated without being heard. The answer may well be that from the point of view of the solicitor the "sanction" of the dismissal of the action with costs against the plaintiff and the possibility of his becoming liable to an action for negligence is just not enough. What therefore seems to be required is something much more, such as that, unless good cause to the contrary is shown, the court should have summary powers to award damages against the solicitor responsible, without the need for the plaintiff bringing a new action to make a claim for such damages and further that unless it is otherwise shown, it should be regarded as a breach of professional duty for a solicitor to be found guilty of such delay in prosecuting an action that the court made an order dismissing it, and that in such event the court should have power to report the matter to the Law Society for appropriate action by them. If public policy demands expedition in the conduct of an action, it equally requires an effective sanction against those responsible for delay resulting in the action being stifled before it is heard.

⁵¹ *Birkett v. James* [1978] A.C. 297.

C. Pre-Trial Remedies

The English system of civil justice provides a rich and wide-ranging variety of pre-trial remedies and measures.⁵² These are designed to deal with the position of the parties pending the trial, to maintain as far as possible the *status quo ante* and to preserve, protect and where necessary enhance the rights and interests of the parties in the inevitable interval between the start of the proceedings and the trial. They greatly increase the importance of the pre-trial stage, and they are on the whole extremely effective, for they provide or are capable of providing early and immediate relief and protection from threatened or actual or continuing wrongdoing or other prejudicial conduct. Their very effectiveness leads more often than not to the settlement or compromise of the proceedings or their disposal without a trial. By these pre-trial remedies and measures, English civil justice manifests its profoundly practical character, and it operates with immense flexibility, versatility and adaptability. Again, due to constraints of space and time, it will only be possible to outline their main features.

Interlocutory Injunction

The most important and most effective pre-trial remedy is the interlocutory injunction.⁵³ The essence of this remedy is speed, to obtain the swift and immediate protection of the court or to preserve the *status quo* where the rights of the plaintiff are threatened or have been or are continuing to be

⁵² See Jacob "Pre-Trial Remedies in England" in *The Reform of Civil Procedural Law* (Sweet & Maxwell, 1982), p. 259.

⁵³ See Supreme Court Act 1981, s.37; R.S.C. Ord. 29, r. 1; Supreme Court Practice, Vol. 1, paras. 29/1/1 *et seq.*

infringed. The order for the injunction is couched in imperative terms, directing and restraining the defendant to do a specified act within a specified time or not to do a specified act. Only very rarely and in exceptional circumstances will an interlocutory injunction be granted in the mandatory form.⁵⁴ The breach of the injunctive order amounts to a contempt of court which may be visited, as we shall see, with dire penalties by way of imprisonment or fine or the sequestration of property, and this sanction accounts for the effectiveness of this remedy. There are no statistics or other hard evidence to show how many interlocutory injunctions are granted annually by the High Court and how many are observed or breached, but the anecdotal evidence is that the number granted is very considerable in all classes of actions and that the great majority of them are duly complied with.

The injunction is an equitable remedy and was originally the creation of the Court of Chancery. Since the Judicature Acts of 1873–1875, however, the jurisdiction to grant an injunction, whether interlocutory or final, has been derived from statute, which confers a discretionary power on the Court in the widest terms, “to grant an injunction in all cases in which it appears to be just and convenient to do so.”⁵⁵

In cases of urgency or emergency, an interlocutory injunction may be granted *ex parte*,⁵⁶ that is, on the application of the plaintiff without notice to the defendant, and may even be granted before the issue of the writ on the undertaking to issue it forthwith thereafter.⁵⁷ In other cases,

⁵⁴ *Locabail International Finance Ltd. v. Agroexport* [1985] 1 All E.R. 901, C.A.

⁵⁵ See Supreme Court Act 1981, s.37(1).

⁵⁶ R.S.C. Ord. 29, r. 1(2).

⁵⁷ R.S.C. Ord. 29, r. 1(3).

the application is made *inter partes*, and if granted the injunction will be expressed to be interlocutory, that is, until further order or until the trial of the action.

The grant of an interlocutory injunction is thus both discretionary and temporary and it has been kept flexible and capable of being used in the multifarious classes of actions in the courts. Such injunctive relief can only be granted by a judge, and not by a Master or Registrar except in agreed terms. In considering whether to grant an injunction, the right course for the judge is to look at the whole case but without embarking on anything resembling the trial of the action on conflicting affidavit evidence in order to evaluate the strength of either party's case. The plaintiff has to show that there is a serious question to try and that he has real prospect of succeeding in his claim, and, in such event, the court must consider whether the balance of convenience lies in favour of granting or refusing the interlocutory injunction, as for example, whether withholding the injunction would do more or less harm to the plaintiff than granting it would do less or more harm to the defendant.⁵⁸

The governing principle is that if the recoverable damages would afford an adequate remedy to the plaintiff, no interlocutory injunction should normally be granted. Equally, if the recoverable damages under the plaintiff's undertaking as to damages would be an adequate remedy for the defendant then there is no reason to refuse the plaintiff an interlocutory injunction provided there is a serious question to try. This principle does perhaps have the effect of giving wealthy institutions or businesses a greater opportunity of obtaining interlocutory injunctions than other

⁵⁸ *American Cynamid Co. v. Ethicon Ltd.* [1975] A.C. 396.

groups of plaintiffs, and it has not been universally acclaimed or followed.

It does, however, underlie an essential requirement for the grant of an interlocutory injunction, that the plaintiff is required to give an undertaking to the court to pay whatever damages the defendant may sustain in case the injunction is later discharged, and in such event the court will order an inquiry as to the damages sustained, for which, if necessary, a judgment against the plaintiff will be entered.

In the High Court, there is a somewhat curious, but serious, difference in the practice between the Queen's Bench Division, where the application for an interlocutory injunction must be made by summons to the judge in Chambers and is heard and determined in private, and the Chancery Division, where the application is made by motion to the Judge sitting in public in open court. This is an anomaly which gives rise to a certain amount of *forum shopping*, especially where responsible practitioners subscribe to the view that it is easier to obtain the grant of an injunction from a Queen's Bench Judge than from a Chancery Judge. This difference in practice, which stems from an historical accident, is difficult to justify and should be abrogated. A common practice should be introduced in both Divisions, as they are both part of the High Court, under which an application for an interlocutory injunction made *ex parte*, should be heard in private, because it is one-sided, but all other such applications should be heard in public before the Judge sitting in open court. Indeed, for the sake of greater uniformity, consideration should be given to establishing a common "Injunction Court" to serve both Divisions and be presided over by Judges of both Divisions.

In lieu of an interlocutory injunction, the court is very often prepared to accept an *undertaking* given by the counsel

or solicitor on behalf of a party in the terms of the injunction sought or the Judge is prepared to grant, and such an undertaking is treated as the equivalent of an injunction.⁵⁹

The grant of an interlocutory injunction operates beyond the immediate parties to whom it is directed, since anyone who has been given notice of the injunction or who otherwise knows of it and of its terms is under a legal obligation, at the risk of committing a contempt of court, to observe its terms and so far as lies within his power to see that they are complied with or at least to refrain from taking any step which would assist or abet or which would amount to a breach of the injunction or undertaking.⁶⁰

Under the Crown Proceedings Act 1947,⁶¹ the court has no power to grant an injunction against the Crown, though in lieu thereof the court may make a declaratory order. In effect, therefore, the Crown is immune from an interlocutory order of the nature of the injunction, since the court has no power ordinarily to grant an interim declaration of right. Surely, this immunity is now very much out of date and contrary to the public interest and it should be removed, at least to the extent of empowering the court to grant an interlocutory injunction against a Minister of the Crown or government department.

Mareva Injunction

A special class of interlocutory injunctions is known as a "Mareva injunction" following the second case in which the Court of Appeal exercised the power to grant such an

⁵⁹ See *Northern Counties Securities Ltd. v. Jackson and Steeple Ltd.* [1974] 1 W.L.R. 1133, 1143; [1974] 2 All E.R. 625, 634.

⁶⁰ See *Seaward v. Paterson* [1897] 1 Ch. 545.

⁶¹ s.21(1), proviso (a).

injunction.⁶² Originally, this power was designed to prevent the defendant within the jurisdiction from removing any of his assets out of the jurisdiction and so out of reach of the plaintiff, but by subsequent judicial decisions this jurisdiction was extended to cover also any dealing with assets within the jurisdiction by a defendant, wherever he may be which had the potential effect of making a judgment against him difficult to enforce or otherwise to defeat the ends of justice. This power has been expressly recognised and perhaps enlarged by statute which provides that the power of the High Court to grant an interlocutory injunction may be exercised to restrain a party to any proceedings "from removing from the jurisdiction of the court, or otherwise dealing with assets located within the jurisdiction," whether or not the party is domiciled, resident or present with the jurisdiction.⁶³

The procedure by way of Mareva injunction is now firmly established and settled. Its objectives are to prevent a defendant from dealing with any of his assets within the jurisdiction whether by removing them out of the jurisdiction or in any other way dealing with them within the jurisdiction, so that they cease to be available or traceable when the ultimate final judgment is given against him. On the other hand, it must be stressed that a Mareva injunction is not a form of pre-trial seizure or attachment of assets and does not give the plaintiff any priority over these assets in the event of the insolvency of the defendant: it is merely a remedy *in personam*, prohibiting the removal of assets out of the jurisdiction

⁶² *Mareva Compania Naviera S.A. v. International Bulk Carriers S.A.*, *The Mareva* [1980] 1 All E.R. 213, C.A.; and see Supreme Court Practice, Vol. 1, parás. 29/1/5 *et seq.*

⁶³ Supreme Court Act 1981, s.37(3).

or dealing with them within the jurisdiction pending the trial of the action. Thus, the Mareva injunction falls short of the procedural devices in European countries to enable the plaintiff to obtain before judgment the attachment of the defendant's assets or the garnishment of debts due to him, as for example, in France by the process of *saisie conservatoire* or *saisie-arret*.

Nevertheless, the Mareva injunction is of great value towards securing for the plaintiff the fruits of his potential judgment, and for this reason its terms should be free from doubt and it should be clear, precise and definite in its operation. The terms of the injunction should therefore particularise the fund, the monies, the accounts, the goods and other assets affected by it, and this is all the more necessary so as to avoid innocent third parties, such as banks, being placed at the risk of committing a contempt of court if they should perhaps unwittingly commit or assist in committing a breach of the injunction.

Indeed, the effectiveness of the Mareva injunction is precisely that once a third party such as a bank is informed of its terms that party must take all due steps to ensure due compliance with such terms and must not in any way assist or abet the refusal or failure of such due compliance. Such a third party will of course be entitled to be paid all reasonable expenses and costs which he had incurred in complying with the injunction. Thus a bank will be entitled to any right of set-off it has in connection with an account which has become the subject of a Mareva injunction.

The prohibition to deal with any of the assets within the jurisdiction under a Mareva injunction is relaxed to the extent of allowing the defendant drawings related to his reasonable living expenses not exceeding a specified sum and also for proper business expenses.

Preservation of Property—Anton Piller Orders

A valuable pre-trial remedy, which operates to enable the parties and particularly their experts to obtain information or evidence for use before or at the trial, is the power of the court to order the detention, custody or preservation of any property which is the subject matter of the action or as to which any question may arise in the action and for the inspection of such a property which is in the possession of a party.⁶⁴ This power may be exercised before the commencement of the action for the purposes of intended proceedings, and also as against a person not a party, but in such case only in actions for personal injuries.⁶⁵ This limitation would seem to be quite anomalous and unjustified and ought to be removed.

Quite apart from the Rules of Court which confer these powers, the court has an inherent jurisdiction to make an order for the detention or preservation of property, the subject matter of a cause and of documents relating thereto. Drawing upon both sources of jurisdiction, a form of order has been devised, which is known as an "Anton Piller Order," following the case in which the Court of Appeal first approved this form.⁶⁶ The Anton Piller Order affords a striking example of the creativity of English civil justice. It provides an extremely valuable and effective pre-trial and very often pre-action remedy to preserve and protect the rights and interests of plaintiffs before the trial. Its greatest use has been in the area of intellectual property or passing off, in which the infringement or what is called the "piracy" of the rights of property of a person can be carried on on a

⁶⁴ R.S.C. Ord. 29, rr. 2 and 3.

⁶⁵ See R.S.C. Ord. 29, r. 7A.

⁶⁶ *Anton Piller K.G. v. Manufacturing Processes Ltd.* [1976] Ch. 55, C. A.

large scale with the wrongdoer remaining untraced and even untraceable. Its effectiveness is greatly enhanced because it can be obtained both speedily and as it were in secret, that is, without the knowledge of the defendant.

The power to grant an Anton Piller Order can be invoked on an *ex parte* application where the plaintiff can show an extremely strong prima facie case that his rights of property in patents, copyright, trade-marks, and other such rights have been and are being infringed, that the damage, actual or potential, is very serious for him, that the defendant has in his possession incriminating documents and things and that there is a real possibility that he might destroy, do away with or conceal or be otherwise unable to disclose or produce such material before an application *inter partes* can be made. In a case of extreme urgency such a application may be made before the issue of the writ on the undertaking to issue it forthwith or as soon as is practicable thereafter. On the hearing of such an application, the court sits *in camera* since it is of the essence of the relief sought that the defendant should not have advance knowledge of the application or the order and so have an opportunity to destroy or do away with the relevant materials. The order takes the form of directing the defendant "to permit" the plaintiff and his advisers, not exceeding a specified number, to enter specified premises of the defendant during specified times of day and to search for such infringing articles and documents relating thereto. It is a veritable "civil search warrant" for specified articles and documents. In the enforcement of the order, the plaintiff's solicitor, as an officer of the court, should attend, and should afford an opportunity to the defendant to communicate with his solicitor, and if so advised to apply to the court to discharge the order; but if permission to enter is refused, no force is to be used, but

application should be forthwith made to the court for non-compliance with the order as amounting to contempt of court.

The order will normally require the defendant to disclose documents and to answer interrogatories, for example, as to who are his suppliers or customers in respect of the infringing articles, and in proceedings for infringement of rights pertaining to any intellectual property or for passing off, the privilege against incrimination of self or spouse has been withdrawn by statute.

Preventing the Defendant leaving England

At common law under the writ of *Ne Exeat Regno*, and under statute,⁶⁷ there is in England a limited power to arrest the defendant who is about to leave the country before the trial. This writ is in the nature of equitable bail, and it may issue only if four conditions are satisfied, namely, (1) that the action is one for which the defendant would formerly have been liable to arrest at law; (2) that a good cause of action for at least £50 is established; (3) that there is probable cause for believing that the defendant is "about to quit England" unless he is arrested; and (4) that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of the action.⁶⁸ The writ is therefore not a writ of execution but its issue is aimed at assisting the plaintiff in obtaining judgment, and in obtaining full information and disclosure from the defendant in the working out of a Mareva injunction or an Anton Piller Order or other like purpose. As a matter of practice, the writ should not be directed to the Sheriff but to the Tipstaff of the court

⁶⁷ Debtors Act 1869, s.6.

⁶⁸ *Felton v. Callis* [1969] 1 Q.B. 200.

to arrest the defendant and bring him before the court as soon as possible. At the same time, the court may order the passport of the defendant to be delivered up and impounded.

In a case in which the conditions for the issue of writ *Ne Exeat Regno* cannot be satisfied, the court may nevertheless grant an *ex parte* injunction to restrain the defendant from quitting the jurisdiction and ordering him to deliver his passport if the justice of the case so requires.⁶⁹

In continental countries, as for example in Germany, a similar remedy is available as against the defendant.

*Interim Payments*⁷⁰

The general rule of law is that an order for the payment of a sum of money by one party to the other can only be made by way of a final judgment or order in the action. This rule could work great hardship or prejudice by withholding monies from a party who is clearly entitled to obtain a final award in his favour. To mitigate this hardship or prejudice, power was conferred by the court first to make orders for *interim payments* in actions for personal injuries, and this power has been extended to make interim payments "on account of any damages, debt or other sum, excluding costs."⁷¹ This power is therefore not limited to claims for personal injuries, but may be exercised in any claim for damages, however arising, whether for tort or breach of contract, and any claim for debt or other payment of a sum of money, however arising, including any claim in respect of

⁶⁹ *Bayer A.G. v. Winter* [1986] 1 W.L.R. 497; [1986] 1 All E.R. 733, C.A.

⁷⁰ See (Winn) Report of Committee on Personal Injuries Litigation, (1968) Cmnd. 3691, Section IV.

⁷¹ Supreme Court Act 1981, s.32; R.S.C. Order 29, rr. 18 to 29. See also R.S.C. Ord. 29, r. 8 (allowance of income *pendete lite*).

the use and occupation of land during the pendency of an action for its possession. The only limitation is that it cannot be made in respect of costs, though this limitation seems quite irrational and ought to be removed.

The essence of an interim payment is that it is a *payment on account* of the total damages or debt or other sum of money which one party will be held liable to pay to the other. It is a form of interim relief during the pendency of proceedings before final judgment. The machinery of interim payment enables the court to award to the plaintiff at an earlier point of time part of what will become due to him at a later time. In this way, it is designed to relieve the plaintiff of undue hardship or prejudice while awaiting the final outcome of the action, to redress the balance during the interval before the trial between the strength of one party and the weakness of the other, to dispose the parties towards a fair and reasonable compromise or settlement of the action, and to induce them to accelerate, and not to delay, the conduct of litigation. It is thus another beneficent invention of modern procedure.

Security for Costs

The defendant may protect himself against the prospect of being unable to recover his costs or to enforce an order for costs should he be successful in the litigation in the following classes of cases, namely, (1) where the plaintiff is shown to be an impecunious limited liability company likely to be unable to pay such costs,⁷² and (2) where the plaintiff is ordinarily resident out of the jurisdiction whether he be a British national or a foreigner.⁷³ On the other hand, the

⁷² Companies Act 1985, s.726(1).

⁷³ R.S.C. Ord. 23, r. (1)(a). There are other grounds which are rarely invoked.

mere poverty or even insolvency of the plaintiff is no ground for requiring him to give security for costs.

On an application duly made by the defendant, the court may order the plaintiff to give security for the costs of the defendant by paying a specified sum into court within a specified time or in any other manner. The court has a wide discretion having regard to all the circumstances of the case, whether to make such an order, and if so to what stage of the action and for what sum. In this respect, the continental practice, as for example in Germany, is different from the English practice, for there security may be ordered not only to the stage of judgment at first instance but also to the stage of appeal and even further appeal.

It should be stressed that the court has no power to order security for costs against the defendant who is merely defending a claim brought against him, though if he makes a counterclaim which is quite separate and independent from the claim brought by the plaintiff he may be ordered to give security for the costs of the counterclaim.

It is useful to observe that in England the court has power to order security for costs in arbitration proceedings.

Security for Judgment

Apart from the operation of a Mareva injunction, there is as yet no general power in England to require the defendant to provide security for the payment of a judgment which may be obtained against him, still less to entitle a potential judgment creditor to attach property or assets of the defendant or in the hands of a third party to satisfy such a potential judgment.⁷⁴

⁷⁴ An important exception is the power of arrest of a ship or other property in an Admiralty action *in rem*, see R.S.C. Ord. 75, r. 5.

In this respect, as indicated earlier, we perhaps fall short of the machinery prevailing in European countries, as for example in France or Germany, where before final judgment, assets belonging to or debts due to potential judgment debtors may be attached or garnished. This problem raises a serious question of policy and we ought therefore to examine its implications and the continental machinery for its operation with close attention.

Other Pre-Trial Remedies

There are several other pre-trial remedies and measures which ought perhaps to be briefly mentioned.

Thus, where it appears necessary for the purpose of justice, the court may order *the examination of witnesses before trial*, as, for example, where a witness is very ill or very old or is about to depart the country or is already abroad and is unwilling to attend the trial.⁷⁵ The evidence of such a witness would be taken on deposition at any place before an examiner appointed for the purpose, and such evidence would be admitted at the trial if it is shown that the witness cannot or will not attend personally. This remedy is by way of exception to the normal rule requiring every witness to be called at the trial to give his evidence orally before a court.

Again, where it is necessary or expedient for the purpose of obtaining before the trial, full information or evidence, the court has wide powers to enable a party to inspect or carry out *the examination of property*, the subject matter of the action.⁷⁶ For this purpose, it may authorise a party to enter any land or building in the possession of the opposite party

⁷⁵ R.S.C. Ord. 39, r. 1.

⁷⁶ R.S.C. Ord. 29, r. 2(1) and 2(2).

or of a person who is likely to be made a party in potential litigation or even of a person not a party, and it may authorise or require a sample to be taken or observation made or experiment to be tried on or with any such property.

On the basis of the principle of finality, that is, of putting an end to litigation once and for all, it is a general and beneficial rule that all disputes and issues between the parties should be tried together and disposed of at the same time. By way of exception, however, in special circumstances or on special grounds, it may be desirable or expedient to isolate one issue or question for determination before the other or others.⁷⁷ In such an event, the court has the power to order *the separate trial of separate issues or questions*, and thus to eliminate or reduce delay and expense in the preparations for, and the trial of, the other issues or questions which may ultimately never arise for trial. So an order may be made for the separate trial of a preliminary point of law or other preliminary issue or question or the separate trial of the issue of liability before the issue of damages, and the decision on such separate trial will lead to a judgment which may well terminate or lead to the termination of the action without the trial of the other issues between the parties.

In an action for wrongful interference with goods, the court may order the immediate *delivery up of specific goods* by the defendant to the plaintiff before the trial.⁷⁸

A useful remedy in disputes relating to property or commercial transactions is the power of the court to order, before the trial, the immediate *sale of property*, other than land, which is the subject matter of the action and which is perishable or likely to deteriorate or depreciate in value or

⁷⁷ See R.S.C. 33, rr. 3 and 4.

⁷⁸ Torts (Interference with Goods) Act 1977, s.4; R.S.C. Ord. 29, r. 4.

otherwise it is desirable to sell forthwith, such as a consignment of fresh food or shares in a company or other like property.⁷⁹ The proceeds of sale will ordinarily be ordered to be paid into court to abide the outcome of the action.

Another useful remedy is the *recovery of property subject to lien*, under which the owner of property which is being detained by another may recover it back forthwith before the trial on payment of its value into court to abide the event in the action.⁸⁰

⁷⁹ R.S.C. Ord. 29, r. 4.

⁸⁰ R.S.C. Ord. 29, r. 5.

3. Trial, Remedies, Enforcement, and Appeals

A. Trial

Nature of Trial

In the English procedural system, the pre-eminent stage of bringing the proceedings to a final judicial conclusion is the trial. This is the occasion for the judicial examination and determination of the issues between the parties by a judge with or without a jury. If the proceedings have not been disposed of earlier without trial, then after the completion of whatever pre-trial preparations were necessary, the parties reach the crowning culmination of the trial. The trial has been graphically described by Sir Maurice Amos as "A Day in Court,"¹ a phrase which, though he said he took it from the Americans, has passed into the English vernacular. It is

¹ "A Day in Court At Home and Abroad" (1926) 2 C.L.J. 340, 342.

the day on which the parties are called to account before the judgment seat; it is the day when they can each have their say and be seen and heard and judged. The process of trial, not only overshadows all the pre-trial procedures, but it also provides the popular, cultural, abiding image which the common people of England have of the majesty of the law administering justice. The dramatic setting of the trial for the forensic battle, with its measured manner of unravelling the conflicting controversies between the parties, with all those taking part having their exits and their entrances, and with the clash of opposing parties leading to a final decision as to who the winner is and who the loser, all contribute to its fascination and excitement as living theatre. It must never be forgotten that the trial is intimately and directly concerned with the real problems of real people, for the great majority of whom, it is a strange and traumatic experience, which in anticipation, whether as parties or witnesses, they regard with dread and apprehension and in retrospect they would wish never to repeat again. The model of the High Court trial, with the judge wigged and robed presiding on a dais and counsel wigged and gowned before him representing the adversaries, in which the proceedings are conducted in an orderly, respectful and authoritative manner, whether with or without witnesses, creates an indelible impression on the minds of the parties, the press and the public.² By analogy, they relate this model to every other court or tribunal, even though the judge or judges and the lawyers may be in everyday dress.

² Speaking of early law, Sir Henry Maine said "Courts of Justice have an immense ascendancy over men's minds" (see *Early Law and Custom* (John Murray, London, 1901), p. 385). I believe this to be still true today.

Features of Trial

The main characteristic features of the English trial, which prevail in almost all common law countries are its publicity, orality and continuity.

The first feature is that the trial takes place in public, in "open court" as it is called.³ The press and the public are entitled to be present, notionally representing the whole community, and they can see for themselves that whatever the contentions may be between the parties, the trial itself will be conducted with fairness, impartiality and even-handedness towards both sides.

The second feature is that the trial is ordinarily conducted orally, so that everything which is relevant and material is spoken or read out aloud for all to hear and know and thus passes, as it were, into the public domain, and nothing which is relevant and material, unless on legal grounds, is withheld by being kept silent and secret. If any document is read or taken as read by the judge, it will still be treated as having been "heard" by him.⁴ Closely bound up with orality is the feature of the "immediacy" of the trial, when there is the direct immediate communication and confrontation between the judge, the counsel and the witness.

The third feature is that the trial consists of a single continuous concentrated event, however short or long the hearing may take, whether it be hours, or days or weeks or months, so that once the trial begins, it will continue unin-

³ See Supreme Court Act 1981, s. 67; R.S.C. Ord. 38, r. 1; and see *Supreme Court Practice*, Vol. 2, para. 5274.

⁴ See *per* Hamilton L.J. in *R. v. Local Government Board, ex p. Arlidge* [1914] 1 K.B. 160, 191, "In my opinion, the question whether the deciding officer 'hears' the appellant audibly addressing him or 'hears' him only through the medium of his written statement is in a matter of this kind one of pure procedure . . . there is nothing universally essential in the judge seeing and hearing the witness for himself."

errupted until its conclusion without any break or adjournment, save in exceptional circumstances. It is the occasion when, for the first time, the whole of the evidence of the parties, both oral and documentary, will be unfolded before the court and the factual and legal arguments will be presented to and debated before the trial judge. Immediately after the conclusion of the hearing, unless he chooses to reserve his judgment by reason of the length or complexity of the case or other such like reason the trial judge will ordinarily give an extempore, oral, final judgment, stating the reasons both on fact and on law for his decision.

By contrast, the civil law countries of Europe do not, in the main, have the concept or the practice of the English trial or any equivalent of the English "Day in Court."⁵ The typical process of civil proceedings in civil law countries takes the form of a fragmented, discontinuous series of attendances before the court in which the oral and documentary evidence of the parties and their witnesses is introduced and reduced to writing, together with written communications between the parties and the court which will include the contentions and legal arguments of the parties. In civil law countries, by the time the preparatory phase of the proceedings is concluded, the whole of the evidence of the parties will have been taken and recorded. Each party and the court will have kept its own file. At the conclusion of the preparatory phase, a closing order will be made and the parties will send their files to the court, which will then have three files at its disposal. The date of "trial" will be fixed either by the examining judge or the

⁵ "In a very general way it can be said that what common lawyers think of as a trial in civil proceedings does not exist in the civil law world. . . . There is no such thing as a trial in our (common law) sense; there is no single concentrated event." (J. H. Merryman, *The Civil law Tradition* (Stanford University Press, 1969), p. 121.)

President of the Court. The "trial" itself will ordinarily take place in public but its essential features are that the examining judge or President of the Court or another judge charged with this purpose will present a report to the court before the arguments of the parties, without giving his opinion. Thereafter, the advocates of the parties will be heard in turn after which the presiding judge will declare the argument closed and the court will adjourn to consider its judgment which will be delivered in writing at a later date. In the result, the procedure at the continental "trial" becomes somewhat of a ritual, not a dramatic or decisive occasion.

Modes of Trial

The English system recognises several modes of trial or final hearings. The differences are based in part on how the court or tribunal is constituted or on whether the trial or hearing takes place with or without witnesses or on separate or preliminary issues or questions or other such criteria. These differing modes add greatly to the flexibility of the English trial process, and they ensure, as far as possible, that the most appropriate mode is chosen to suit the particular circumstances of any case or classes of cases. Whatever the mode may be, however, the conduct of the English civil trial may be said to be characterised by quiet dignity, unobtrusive solemnity and undemonstrative but respectful authority. There are no doubt lapses and exceptions both among the Bar and the Bench, but these occasional failings simply highlight the typical scene. The tension and anxiety of the occasion for the parties and the witnesses, which undoubtedly exist, are to some extent mitigated by the somewhat relaxed atmosphere in which the proceedings of the trial are conducted.

So far as the constitution of the court or tribunal is con-

cerned, there are four main modes of trial, namely, by judge alone, by judge with a jury, by judge with assessors,⁶ and in the case of hearings before tribunals and magistrates by a collegiate body of two or more members.

Trial by Judge alone

With the virtual obsolescence of trial by jury and the rarity of trial with assessors, the predominant mode of the English civil trial is before a single judge, with appropriate variations on this theme. Thus, in the High Court, the judge will ordinarily be the one assigned to the Division in which the action is proceeding. In the case of the specialist courts, such as the Commercial or Admiralty or Patent Courts, the judge will either have been nominated or have the relevant expertise. In Official Referees' business,⁷ the judge will be the Circuit Judge, who occupies a somewhat anomalous position of sitting in the High Court and doing High Court work with all the same jurisdictional powers and duties of a High Court judge, including the power of committal for contempt, but without getting the recognition of being one.⁸ By consent of the parties, which is an exceptional juridical source of court jurisdiction, power is conferred on a Master or Registrar to try an action or issue in which event he will be clothed with all the authority of a High Court judge except the powers of committal, though presumably he may have power to impose a fine.⁹ In the County Court, the trial

⁶ See R.S.C. Ord. 33, r. 2.

⁷ See R.S.C. Ord. 36, r. 1. These trials are generally long, detailed, technical or involve scientific investigations more conveniently conducted by specially selected judges.

⁸ See Supreme Court Act 1981, s.68(1)(a); R.S.C. Ord. 36, r. 4.

⁹ See R.S.C. Ord. 36, r. 11.

will be before the Circuit Judge or Registrar, according to the amount involved.

In tribunals other than the ordinary courts of law, the trial or hearing will be before the tribunal as constituted for the particular subject matter it is dealing with, but ordinarily it will be a collegiate body of three with a lawyer as the chairman.

In civil proceedings in the Magistrates' Court, the trial or hearing will be before a collegiate body of two or more, generally three, Magistrates, except that the Stipendiary Magistrate sits alone.

Trial without Witnesses

In a great majority of trials, the hearing will be with witnesses, but there is a considerable volume of trials and final hearings, especially in the Chancery Division, which take place without witnesses, and generally on affidavit evidence. In these cases, there is no substantial dispute on the facts though the court has power to order the deponent of an affidavit to attend for cross-examination.¹⁰

Trial of Separate Issues

Although the general rule of English law is that all the disputes between the parties should be tried together,¹¹ the court has power to order the separate trial of preliminary points of law or other issues or questions of fact or law or

¹⁰ See R.S.C. Ord. 38, r. 2. Under this rule, the evidence of a witness may be ordered to be given by affidavit at the trial and evidence by affidavit is the normal practice in proceedings begun otherwise than by writ, subject to the deponent being required to attend for cross-examination.

¹¹ See *per* Jessel M.R. in *Piercy v. Young* (1880) 15 Ch. D. 475, 479.

both or the separate trial of the issues of liability and damages.¹² These powers are designed to avoid the trial of unnecessary issues or questions; this is achieved by isolating a particular issue or question for separate trial and thus eliminating or reducing delay and expense in the preparation and trial of other issues or questions which may ultimately never arise for trial or which otherwise warrant being separately tried. These powers are often employed in the case of Official Referees' business but are comparatively rarely used in the ordinary run of litigation in the High Court and the County Court since it is thought that the trial of separate issues might have the effect of increasing costs. They are well known and used in continental countries, with much success.

Fixed Dates for Trial

In London, in the Queen's Bench Division, the parties may in an appropriate case be given a fixed date for trial.¹³ This is a matter of great convenience, since they can make definite arrangements for all concerned, the parties themselves, the witnesses including the experts, the counsel and solicitors, to attend the court on the specified date. These dates are faithfully observed, though they may be fixed months

¹² See R.S.C. Ord. 33, rr.3 and 4(2) and *Supreme Court Practice*, para. 33/4/5. The separate trials of the issues of liability and damages in personal injury actions was especially recommended by the Winn Report ((1968) Cmnd. 3691, para. 494(c) and Appendix 21 and encouraged by Lord Denning M.R. in *Coenen v. Payne* [1974] 1 W.L.R. 984; [1974] 2 All E.R. 1109, C.A. but nevertheless this practice is seldom used.

¹³ See *Directions for London*, para. 6(c), [1981] 1 W.L.R. 1296; [1981] 3 All E.R. 61. This system was introduced in 1954.

ahead and no alteration will be granted except for good cause. Otherwise, the parties must keep a watchful eye on the progress of the list of cases awaiting trial, and occasionally they may suddenly find only the day before that their case is listed for trial on the following day. Outside London, there is as yet no procedure for fixing dates for trial, which is somewhat unfortunate and ought to be corrected as soon as practicable.

Speedy Trial

In an appropriate case, where it appears that the action ought to have an early trial, the court may direct or order a speedy trial and this will entitle the parties to obtain a fixed date of trial as soon as practicable.¹⁴ Under this practice, the action would be heard ahead of those awaiting trial and it may be tried by a judge within weeks or even days of the issue of the writ. This underlines the considerable flexibility of the English system to cater for urgent cases as expeditiously as possible.

*Trial by Jury*¹⁵

At common law, the normal mode of trial of issues of fact in the superior courts was trial by jury. This mode of trial began to decline in the middle of the last century, particularly in commercial cases,¹⁶ since when its decline has con-

¹⁴ See *ibid*, para. 8, and R.S.C. Ord. 29, r. 5.

¹⁵ See Lord Devlin, *Trial by Jury* (Hamlyn Lectures, Stevens, London, 1956); W. R. Cornish, *The Jury*, (1968).

¹⁶ See Common Law Procedure Act 1852, ss. 46, 47 (special case without pleadings).

tinued and has accelerated during the war periods.¹⁷ After the Second World War, there arose a marked disenchantment with jury trials, and there began a conscious move to avoid trial by jury. This was largely because of the fundamental changes in the character of civil litigation due to the enormous increase in claims and actions for damages for personal injuries and death. As these came to dominate the case-load of the Queen's Bench Division, both trade unions and insurance companies, who were respectively supporting the receiving and paying parties in these classes of cases, adopted a policy of shunning jury trials. Their desire was to have speedy, simple and inexpensive procedures and above all a measure of certainty and uniformity on the question of damages for different kinds of personal injuries so that they could arrive at what they conceived to be fair settlements and avoid trials or even proceedings. This policy, aided and assisted by their lawyers, both solicitors and barristers, had the effect of vastly limiting the number of jury trials and this in turn led the Bar to change its method of advocacy and to lose the art of addressing juries. Thus it was that by a process of atrophy, the mode of trial by jury was fast fading away. It only needed the final fatal blow to be delivered by the Court of Appeal in 1966,¹⁸ which for all practical purposes abolished trial by jury in civil cases. It survives in

¹⁷ See Juries Act 1918. The limitations on the right to trial by jury were strongly criticised by the Court of Appeal in *Ford v. Blurton* (1922) 38 T.L.R. 801, in consequence of which they were repealed by the Administration of Justice Act 1925. They were however restored by the Administration of Justice (Miscellaneous Provisions) Act 1933, s.6, which had the effect of greatly reducing the number of jury trials. Some increase followed the decision of the full Court of Appeal in *Hope v. Great Western Railway* [1937] 2 K.B. 130, but the war reduced the number again.

¹⁸ *Ward v. James* [1966] 1 Q.B. 273. This decision was also of the full Court of Appeal and of course it had the effect of overruling *Hope's* case, above.

instances in which there is a statutory right to jury trial,¹⁹ but even in these cases the parties forgo their right and are content with a trial by judge alone. Trial by jury in England where once it was the predominant mode of trial has thus virtually become obsolete, and nowadays it takes place only in a minuscule number of cases.²⁰ In the result, like the Cheshire Cat, trial by jury in civil cases has to all intents and purposes vanished leaving behind only its grin, which has remained to mock us.

At its departing, and especially in lectures given under the auspices of the Hamlyn Trust, it is proper to say a lament on trial by jury. In the system of English civil justice, trial by jury has been its most outstanding and most distinctive invention. It was written into Magna Carta and has endured for some 750 years. Down the centuries, it has enjoyed widespread popular approval and confidence among the common people of England, however much some in authority deprecated its occasional unexpected verdicts. It has been the hallmark of English civil justice and the bulwark of liberty which has imprinted itself in the English-speaking countries of the common law. It has been the most celebrated and pre-eminent institution of the judicial process in the whole history of the administration of civil justice anywhere in the world. It has allowed lay people to play a decisive part in the machinery of civil justice. It has been justly admired for its fairness, openness, open-mindedness and uprightness, sometimes in the face of judicial disfavour

¹⁹ See Supreme Court Act 1981, s.69, which replaced the Administration of Justice (Miscellaneous Provisions) Act 1933, s.6. The instances in which there is a right to trial by jury are actions for libel, slander, malicious prosecution and false imprisonment or in which a charge of fraud is made against a party.

²⁰ The Annual Judicial Statistics have for several years ceased to publish the number of jury trials, which is a great pity.

and censure. However inevitable it may have been, the elimination of trial by jury from the English system of the civil process constitutes in my view a serious impairment of the fabric of English civil justice.

Moreover, it needs to be said that it is not possible to exaggerate the deep and widespread influence which the system of jury trials has had and still exerts on the fabric of English civil justice. The overriding functions of the jury were and are to be the judges of fact, and, for this purpose, to observe the witnesses called by the parties and to hear and weigh their evidence, to heed the opening and closing speeches of counsel on both sides, and on the basis of the summing-up of the judge and his directions on the law to find a verdict according to the evidence. These functions provided the basis for the emergence and development of the adversary system; and they enabled the common law of England to avoid adopting the inquisitorial procedures which prevailed on the continent of Europe. It emphasised the inactive, passive role of the judge who remained aloof and remote from the forensic stage, to which he was not allowed to descend or on which to play the part of advocate. It required the English judicial process to be conducted on the fundamental principles of publicity, orality, immediacy and continuity of the trial and the finality of the verdict of the jury. To ensure fairness of the jury, it required the rules of evidence to be exclusionary, as for example in the case of hearsay evidence, and to be strict and constrained and therefore to be part of the substantive law and not of procedural law. It promoted the art of advocacy, which perhaps fuelled the division of the legal profession into two branches and confined the right of audience to the members of the Bar. It ensured the orderly sequence of the trial; and it created the opportunity for the defendant, after the close of

the plaintiff's case, to submit that he had "no case to answer." Above all, in weighing the evidence, the jury had a wide discretion whom or what to believe or disbelieve and to give a general verdict on liability and damages without reasons so that these matters became and continue to this day to be called "jury questions." The essential features and principles of English civil justice may therefore be said to have been shaped, modelled and moulded by the system of trial by jury.

Although the elimination of the civil jury has to be accepted as irreversible, yet a question still remains: whether the administration of civil justice could not today be improved by introducing a lay element in the decision-making processes of the courts, including the High Court. It is hard to over-estimate how valuable such a measure would be, both from the social and juridical points of view. One method would be to increase the occasions and circumstances in which assessors would be required to sit with the judge, either as members of the court or to assist him in making his final decision.²¹ Another method would be to introduce or re-introduce a smaller jury consisting of say, five members, drawn from a panel of lay volunteers, subject to either party serving a jury notice upon the other. No doubt the question is extremely difficult, but as long as the principle of lay participation in the judicial processes is accepted, it should be possible to arrive at a practicable solution, which will increase the popular confidence in the administration of justice. I do not feel it possible to leave the subject of jury trial without raising this question.

²¹ See Supreme Court Act 1981, s.70; R.S.C. Ord. 33, r. 6. For appointment of Elder Brethren of Trinity House, nautical or other assessors in Admiralty actions, see R.S.C. Ord. 75, r. 25(2). For appointment of a scientific adviser in patent actions, see R.S.C. Ord. 104, r. 11.

Sequential Order of Trial Proceedings

A striking feature of the English trial is that the presentation of the cases of the parties follows an orderly process according to established rules of practice.²² This practice underscores the English adversarial system and may itself have been derived from the jury trial, in which there is an obvious need for the clear and simple exposition of the issues, the evidence and the applicable law. The hallmark of the English trial is that each of the parties will present his case to the court in turn, so that there is a clear divide between the case of one party and the other, and the order which they will follow will depend on which party is required to begin.

The trial begins with the opening speech of the party who has the right to begin. Subject to the judge's direction,²³ this will be the party on whom the burden of proof lies,²⁴ generally of course the plaintiff. The opportunity to "open the case" is highly prized by the skilled and competent advocate; it has the great advantage of enabling him to present a clear, logical and chronological statement of the facts and, where necessary, the applicable law. Since the trial judge would ordinarily come to the trial completely fresh without knowing anything about the case except the issues as dis-

²² R.S.C. Ord. 35, r. 7 which has codified the rules and is itself indirectly derived from the Common Law Procedural Act 1854, s.14 which had embodied the former current practice.

²³ R.S.C. Ord. 35, r. 7(1). The description that follows is based on the model of a simple case in the Queen's Bench Division with one plaintiff and one defendant, but there may be many variations on this model, e.g. two or more different defendants separately represented, or third party proceedings, or the sole defendant may elect not to call any evidence or to submit that there is "no case to answer" See *Supreme Court Practice*, Vol. 1, paras. 35/7/2.

²⁴ *Seldon v. Davidson* [1968] 1 W.L.R. 1083; [1968] 2 All E.R. 755, C.A.

closed in the pleadings (if perchance he has read them), the opening address provides the occasion of positive and persuasive advocacy, in favourably retailing the facts to support his case, in demolishing or at least casting doubt upon the grounds of the defence, in outlining the applicable law and generally in seeking to capture the mind of the court, while it is in the receptive stage of learning about the case. Moreover, the right to begin will ordinarily also carry the right to close, *i.e.* to make the final speech, and thus provides a further occasion to win the opinion and judgment of the court.

After the opening speech, the witnesses of the parties will be called to give their evidence in turn. Each party will have to make tactical decisions about marshalling his evidence, which witnesses to call and in what order.²⁵ He will bear in mind that failure to call a particular witness may be criticised by the opposite party, and that the witnesses will ordinarily remain in court and hear the evidence given by the others.²⁶ Each witness, as he or she is called, will have to take the oath or make a solemn affirmation.²⁷ Each will give his or her evidence orally in answer to oral questions, addressed to the witness by counsel.²⁸ The evidence of the witness is not given by way of narrative on his or her part,

²⁵ See *Briscoe v. Briscoe* [1968] P. 501.

²⁶ See *In re Nightingale, Green v. Nightingale* [1975] 1 W.L.R. 80. The judge may order otherwise but this is very rare and he will not exclude the parties, their solicitors or expert witnesses: *Tomlinson v. Tomlinson* [1980] 1 W.L.R. 322; [1980] 1 All E.R. 593. The practice in continental courts of staging a "confrontation" between the witness giving testimony and another witness or person does not exist in civil cases in England but may be employed in criminal proceedings in which the witnesses are kept out of court until they are called to give evidence.

²⁷ See Oaths Act 1978, ss. 1, 5 and 6.

²⁸ See R.S.C. Ord. 38, r. 1.

but by way of the examination of the witness by each counsel in turn. The question will be addressed to the witness directly by counsel and not through the judge, and the witness will be required to answer each question immediately it is asked. In this way, orality and immediacy interact with each other. If any objection is raised as to the form or content of any question, the judge will immediately rule upon it before the witness answers; and after the witness has given his answer, or at a later stage, the judge may himself ask the witness questions to clarify or comprehend the evidence given by him or her.

The *examination-in-chief* is the process by which the evidence of each party is elicited in the first place. The governing rule is that the witness must not be asked "leading questions," *i.e.* those that contain their own answers, since the evidence must be that of the witness, not of counsel. The skilled advocate will ask his questions in such a way as to obtain answers which will, as near as possible, provide the full narrative account which the intelligent witness would have wished to have given himself. Counsel will generally follow the chronological order of events, and will introduce relevant documentary evidence to supplement or substantiate the oral evidence of the witness.

The *cross-examination of the witness* is the process which immediately follows the conclusion of his evidence in chief. This is a process which is not known or practised by the lawyers of any of the continental countries, though it is greatly admired by them. Its object is to search out the truth. This is achieved by depreciating the content, the value or weight given in the course of the examination in chief. It is directed to demonstrate that the witness is unreliable, untrustworthy, inaccurate, forgetful, has a poor memory, is motivated to say whatever will help the party

calling him, in short, that he is not telling the truth, still less the whole truth, and even that he is a brazen liar. The witness has no time to consider what he has to say in answer to the questions which are addressed to him directly and must be answered immediately. The great art and skill of the process of cross-examination is to obtain admissions from the witness which will destroy his evidence and the case of the party calling him or will support the case of the opposite party. At the end of an effective cross-examination of a witness, the content and value of his evidence should have been reduced virtually to nil.

The cross-examination of the witness does not mean that the questions are addressed to him in anger or in temper, but only that they come, as it were, "cross-wise" from the opposite party. In cross-examination, "leading questions" may in general be put to the witness and the cross-examination may extend beyond matters which he has given in evidence in chief. It may be conducted in an apparently gentle, disarming method. In any event, the witness may only be attacked fairly, and if necessary the judge will intervene to protect him from any unfairness, though in a proper case the credit of the witness may be impugned.

The *re-examination of a witness* is the process, if it is employed, which will follow immediately after the cross-examination. It may fulfil a valuable function, since it provides the occasion for restoring or repairing or rehabilitating the credibility of the witness after his cross-examination. It must however be limited to matters that have been raised in cross-examination, and must not be a mere repetition of the examination in chief.

After the plaintiff has called all his witnesses and has put in all the relevant documents and other material he intends to rely on, the defendant's counsel has the opportunity to

open his case,²⁹ but nowadays this practice has become almost obsolete. Instead the defendant's counsel will forthwith call his witnesses in the order he chooses and each of them will be examined in chief, cross-examined and re-examined in the same orderly sequence as in the case of the plaintiff's witnesses.

Immediately after the conclusion of the evidence of the parties, the counsel for the defendant will make his final speech, and this will immediately be followed by the final speech of the counsel for the plaintiff. These final speeches are extremely important in the trial process, since they provide the opportunity for the counsel of each party to review and to analyse the whole of the evidence, to stress the strengths and weaknesses of the case of each party and to make the submissions on the applicable law to the facts which each will contend should be found by the judge.

In the great majority of cases, immediately after the close of the final speeches by counsel, the judge will forthwith give an *ex tempore* oral reasoned judgment, describing the issues arising for decision, weighing the evidence, identifying the facts which had been proved before him, and applying the relevant law to the facts as found by him, he will give judgment to the successful party. Only occasionally, as where the case has lasted a long time or difficult questions of law arise or other considerations which call for further reflection, will the trial judge adjourn the hearing and prepare a written judgment to be delivered at a later date.

Individuality of every Court

A cardinal feature of the English trial is the extent to which the personality of the judge is involved in its conduct. The

²⁹ See R.S.C. Ord. 36, r. 4(4).

trial judge dominates the proceedings in his own individual way, in his own personal and distinctive manner. He is the central character of the entire performance. He will assume full judicial control, authority and responsibility for the whole process of trial from the moment it begins until its final conclusion. The experienced and skilled advocate whether in the High Court or County Court or in any other court or tribunal will or ought to know enough about the character and the personality of the judge or the Chairman or President of the court or tribunal to present his case on the well-tryed principle, "Know your Tribunal." Each court and indeed each case develops its own "atmosphere," its own mood, under the influence of the trial judge and the advocates will or should sense this distinctive flavour and attune themselves to the prevailing atmosphere.

By the very nature of things, English judges differ one from the other according to the personality of each of them. In some instances, it obtrudes too much, in others it recedes too far, and in some it is an unknown and disconcerting factor. It is difficult to say which is the worst trait, the judge who over-speaks or the one that remains over-silent, the one who is quick, perhaps over-quick, or the one who is slow, perhaps over-slow. On the whole, however, there is an apparent uniformity and perhaps conformity with the accepted behaviour of the judges.

As has been mentioned earlier, the trial judge comes fresh to the case. No dossier of the evidence in the case will have been prepared or placed before him and no other judge or judicial officer will report to him on the case or sit with him to try the case. He must learn about the case for himself as it unfolds in the orderly sequence described above. He will maintain close, continuous and concentrated attention to everything that takes place before him. He will immediately

rule upon all questions that arise in the course of the trial, for example, the order of the proceedings, issues arising on the pleadings, applications for amendment or the discovery of further or particular documents and all objections relating to evidence, its admissibility, the propriety of the questions asked and so forth. Where necessary, he will intervene to clarify the answers of witnesses, to seek enlightenment from experts and to obtain assistance on the documentary evidence. He will carry on a dialectical process with counsel on both sides on the meaning, effect and weight to be attached to the evidence given by the witnesses. Above all, he will superintend the whole concentrated trial to ensure that it is conducted fairly and effectively without undue repetition or waste of time.

The judgment of the court is the judgment of the judge who delivers it. This may be, as it ordinarily would be in the oral *ex tempore* form, immediately after the conclusion of the final speeches of counsel, or in the written form at a later date. The judgment is, as it were, individualised and attributed to the judge who delivered it by name; and of course the reputation of the judge may be influenced by its style, sound and structured reasoning.

The description given above of the individuality of the English court applies not only to the trial process itself, but to all the stages of the civil proceedings, and in every court. It applies to the final hearing of proceedings without witnesses, in which affidavit evidence is adduced by both parties, *i.e.* all proceedings begun otherwise than by writ, to all the pre-trial procedures and it applies to all levels of the judiciary, including the appellate judges of the Court of Appeal, to the High Court and County Court Judges, to the Masters and Registrars, the Magistrates and the President or Chairman and other members of tribunals. The English

feature of the individuality of the court stretches over the whole area of the fabric of English justice.

One great advantage which flows from the individuality of every court is that it confers greater freedom on the judge in the decision-making processes. This applies not only to the stage of all pre-trial proceedings but also to proceedings which are conducted without witnesses. These are instances in which the decision-making process is subject to the exercise of judicial discretion, and within the limits of such discretionary powers and acting in accordance with accepted principles the judge may choose to make his own decision without worrying overmuch as to whether it will be upheld or reversed. In this kind of situation many, perhaps most, judges will have constructed for themselves some guidelines to follow. If I may be allowed to reveal a little secret about myself: on the day of my appointment as a Master, I formulated three precepts which I felt I must observe in the conduct of proceedings before me, namely, *patience* to hear everything that was said or read to the last word which may turn out to be the decisive one; *wisdom* to try and understand what was being said and laid before me; and *courage* to do what I thought to be right.

By contrast, on the continent of Europe, the dominating feature is, generally speaking, not the individuality of the court but its anonymity. Each case will be assigned to a specified Chamber of the Court, and three judges of that Chamber will constitute the "Court" for that case. One of them will have the task of taking the evidence of the witnesses, from time to time as may be convenient, and record the evidence in the form of a deposition, which will form the "dossier" to be placed before the other members of the court. At the conclusion of this process of gathering the evi-

dence the parties will appear before the court to present their arguments after which the court will close the case. At some later date, its decision will be announced in the form of the written judgment of the court. It is however a collegiate decision of the judges of the Chamber, not the judgment of any single individual judge who wrote it. The judgment will be attributed not to any single judge but to the Chamber or number of a court. No one really knows who actually prepared the judgment nor whether it was a unanimous decision or whether there was any dissent. For this reason, in the English tradition, judges are known and have for centuries been known by name, whereas in the continental tradition they are known and have for centuries been known simply as judges of the offices they occupy.

B. Remedies

The Nature of Remedies

In the English system of civil justice, remedies play, as they always have played, a part of crucial importance. Remedies are the life-blood of civil justice. They provide the judicial solutions to the problems of the parties. They are the means by which a legal right, claim or interest which has been established is rendered or made effective through the judicial process or by which legal wrongs are redressed, or as Professor Lawson pithily put it "remedies are cures for wrongs."³⁰ At the stage at which remedies are awarded by the court there arises the closest connection between civil

³⁰ *Remedies of English Law* (1980), p. 3. He extended the term "wrong" to include an interest protected by law, "So that it is the protection offered by law that is the remedy." *ibid.* p. 4.

procedural law and substantive law, since remedies reflect the substantive rights and interests of the parties and, conversely, they constitute an essential foundation upon which the rules of substantive law have been and are being fashioned, constructed and enforced. They take the form of a judgment or order of the court under which the legal rights and interests of the parties relating to the particular matters in controversy are thenceforth determined and regulated. The function of civil remedies is, in the English system, practical and pragmatic, namely, to grant the relief or redress appropriate to the legal right, claim or interest which has been established.

From the procedural point of view, the importance of civil remedies lies in the inseparable connection between the legal right, claim or interest and the judicial remedy, relief or redress provided by the court. This connection manifests itself in two ways: first, that there should be a remedy to give substance to the right, and secondly that the remedy should correspond with the right to give it reality. The age-old adage "*ubi jus, ibi remedium*" expresses a fundamental concept of the legal order, that where there is a legal right, there is, or there ought to be,³¹ a legal remedy. The converse of this maxim also affects the legal order, that where there is no remedy, there is no legal right. A right or claim without a remedy is empty of legal content; it may have some other social basis but is void of any legal basis.³²

³¹ This gives the Latin text an extended meaning, which is surely implicit in the principle.

³² A recent glaring instance is provided by *Trawnik v. Lennox* [1985] 1 W.L.R. 532. In this case, the plaintiffs, who were the occupiers of premises adjoining the airfield in the British Sector of Berlin, on which a shooting-range was being constructed, brought an action claiming a declaration that the Crown should not use or permit others to use the airfield so as to cause a nuisance, *e.g.* by the use of the shooting-range.

In the cases in which the remedy awarded may be followed by enforcement the importance of civil remedies is greatly increased, since in these cases there is a close inter-connection between the three important stages in the civil judicial process, with remedies coming in the middle, namely, the legal right or claim, leading to the appropriate relief or remedy into which the right or claim has been converted, which provides the basis for the appropriate process of enforcement of the relief or remedy granted by the court.

The effectiveness of the system of English civil justice may be attributed to the vast number, variety, diversity and flexibility of its judicial remedies. The remedies depend on the nature of the legal rights, claims and interests established, and as these may themselves vary considerably, so the corresponding remedies will vary also, which is why civil remedies are by their nature so multifarious and multi-varied. Moreover, there is no statutory or other binding list of civil remedies; on the contrary, the categories of civil remedies are not closed, and the judicial machinery, whether through the Rules Committee,³³ or by judicial

In spite of the cogent judgment of Sir Robert Megarry, the Vice-Chancellor, in which he said (at p. 544) "That the plaintiffs most certainly ought to be able to have their claim tested in some court somewhere," the Court of Appeal struck the action out on the ground that it was not maintainable. In the leading judgment, Lawton L.J. said (at p. 549) "The plaintiffs may be suffering a wrong for which there is no remedy in our courts. This is to be regretted." The result appears to be that the plaintiffs have no court either in Germany or in England which will hear their claim. This conclusion however should not be confused with the classes of cases in which the plaintiff may be held to have no legal claim on the basis of rules embodied in the maxims "*Damnum Sine Injuria*" or "*Injuria Sine Damnum*", since these rules are part of the substantive law, not of the procedural law.

³³ As, e.g. R.S.C. Ord. 53, which introduced the remedy of Applications for Judicial Review, see p. 180, below.

decision, may devise and operate new remedies,³⁴ or variations of old remedies.³⁵ A new remedy, however, which or to the extent to which it affects the substantive law can only be created by Act of Parliament.³⁶

The system of remedies cannot of course be fully treated here within the space and time available, but its essential features should perhaps be briefly sketched.

Legal and Equitable Remedies

At the start, it is right to begin with a peculiarly English distinction between legal and equitable remedies.

Until 1875, the fabric of English civil justice was in a state of some disarray with regard to the grant of judicial remedies. This was due to the co-existence of two systems of judicial remedies, the Common Law Courts granting legal remedies in respect of legal claims and the Court of Chancery granting equitable remedies in respect of equitable claims.

At common law, only a limited variety of judicial remedies was available to the Common Law Courts. They con-

³⁴ As, e.g. *Miliangos v. George Frank (Textiles) Ltd.* [1976] A.C. 443 (power of the English Court to give judgment expressed in foreign currency).

³⁵ As, e.g. the Mareva injunction, see p. 136 above; the Anton Piller Order, see p. 139 above; the power to stay a personal injury action unless and until the plaintiff submits to a reasonable medical examination, see p. 97 above. There are countless such instances.

³⁶ As, e.g. power of Industrial Tribunals to order the re-instatement or re-employment of an employee claiming unfair dismissal, see Employment Protection (Consolidation) Act 1978, s.69. Primary legislation will be required to provide the remedy of the attachment of property or debts before judgment on the lines of the continental system of *saisie conservatoire* or its equivalent. The introduction of new statutory remedies is a major way of effecting substantial improvements in English civil justice.

sisted mainly of money judgments for the payment of debt or damages and of certain kinds of specific recovery, originally only of freehold land. Whether legal remedies corresponded with the limited range of forms of actions at common law is not clear, but what is clear is that legal remedies were restricted in their range, that they were inadequate and inelastic, and moreover that they were inflexible and not responding to the needs of social and juridical change. In particular, except for technical procedures to attack pleadings and the constitution of parties to an action, the common law lacked any powers to grant pre-trial remedies, *i.e.* interlocutory or provisional remedies to protect or preserve the rights and interests of the parties pending the trial.³⁷

By contrast, equitable remedies were extensive, wide-ranging and adaptable to the changing needs of the judicial process. Compared with legal remedies it may be said that there are three distinguishing features of equitable remedies, namely, (a) they are mainly directed to the person, not to property or money; (b) they may be granted at the pre-trial stage, by way of provisional protection or preservation of the rights and interests of the parties pending the trial; and (c) they are discretionary and not granted as of right. Applying the pragmatic but effective principle that "equity acts *in personam*," the Court of Chancery developed a great variety, range and flexibility of equitable remedies before and after trial. Indeed, it may be said that equity itself is nothing more than a system of remedies. By providing the appropriate remedy, particularly in the imperative form "to do or not to do" a specified act, the Court of Chan-

³⁷ See p. 132, above.

cery virtually created substantive rights, of which the most celebrated is the concept of the trust which has played such a dominant part in the law of property. Equity thus transformed the age-old maxim into its converse, namely, "*ubi remedium ibi jus*," that the remedy itself is the source or basis of the substantive right.

The two systems of remedies, one at common law and the other in the Court of Chancery, continued side-by-side for centuries. Under the influence of Jeremy Bentham, it became evident in the nineteenth century that it was absurd as well as unnecessary for there to be two parallel ranges of civil remedies. During the course of that century, the Supreme Common Law Courts were granted powers to award equitable remedies as for example an injunction, and conversely the Court of Chancery was granted power to award legal remedies, as for example damages.

It was, however, left to the Judicature Acts 1873 and 1875 to make the bold leap forward and to provide for the co-extensive jurisdiction of the new Supreme Court to grant "all such remedies whatsoever as any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them."³⁸ Legal and equitable remedies have not changed their characters or operation; they remain separate and distinct, but the Supreme Court has the amplitude of power to grant any form of legal or equitable remedy as may be appropriate to meet the precise needs of any particular case. Since 1875, therefore, the English High Court has not been shackled by jurisdictional questions concerning its powers to grant the appropriate remedy.

³⁸ See Supreme Court of Judicature (Consolidation) Act 1925, s.43, replacing s.24(7) of the Judicature Act 1873 and now itself replaced by the Supreme Court Act 1981, s.49(2).

Remedies as of Right or Discretionary

An important distinction arises between remedies which are awarded as of right and those awarded at the discretion of the court.

Under the common law, once the legal right has been duly established, the court was bound to award the appropriate remedy; in such event, the remedy was a matter of right, not at the discretion of the court. So if the right to a debt is established to the satisfaction of the court according to the procedure involved, the court is bound to give judgment for the amount of the debt. Again, if the claim to recover possession of land is established and there are no statutory restrictions upon such recovery, the court is bound to order the recovery of the land. Further if the claim to recover possession of goods is established and there are no statutory limitations upon the recovery the court is bound to order that they be delivered up or that the defendant pay their value.³⁹ So again in the ordinary run of cases if the claim to recover damages for breach of contract or for tort is established the court will order the award of damages to be made, but if none is proved to have been sustained by reason of the breach of contract or by reason of the tort, only nominal damages will be awarded and the plaintiff will be at risk as to costs since his claim for damages will not have been substantiated. These remedies as of right form the basis of the procedures to obtain default judgments which is almost an administrative process in England, though the court may be empowered to stay execution on

³⁹ If the claim is for the recovery of specific goods without giving the defendant the option to pay their value, the remedy will only be granted at the discretion of the Court, see Torts (Interference with Goods) Act 1977, s.3(3), and *per Swinfen Eady in Whiteley Limited v. Hill* [1918] 2 K.B. 808, 819.

the judgment or to impose terms upon its enforcement, as may be appropriate.⁴⁰

Apart from the limited variety of remedies as of right, there is a wide range of civil remedies which the court may award as a matter of discretion and not as a matter of right. The power of the English court to grant remedies at its discretion is perhaps one of the most distinguishing features of the English system of civil justice. It appears to invest the judiciary, as in fact it does, with an enormous aggregate of judicial power, since the exercise of discretion, however burdensome, appears to give the courts a choice whether or not to grant a particular remedy and if so upon what terms. The essence of a discretionary remedy is that, although the legal right to the claim or interest is established, yet the court retains the power, having regard to all the circumstances of the case, to refuse the remedy or to award it and if so upon specified terms. A discretionary power must not, of course, be exercised arbitrarily, since arbitrariness is the very reverse of judicial conduct, but it must be exercised in accordance with judicial discretion. This is the key expression which governs the award of discretionary remedies. It has a wide meaning, both from the positive and negative standpoints, designed to ensure that the exercise of discretionary power is not arbitrary or contrary to law or accepted principles and will not result in injustice. Its foremost requirement is that the remedy should be within the discretion of the court to grant or refuse and that the court should in fact exercise its discretion and make a judicial choice of what order to make. It further requires, however, that the court should not act under a mistake of law or in

⁴⁰ See p. 119, above.

disregard of principles, that the court does not take into account matters which ought not to be taken into account or fails to take into account matters which ought to be taken into account, and that due weight is given to all the circumstances of the case.

The importance of discretionary remedies in the system of English civil justice may be gauged by their range, for by their nature they include all pre-trial or interlocutory remedies, all equitable remedies and all remedies granted by way of judicial review. Their importance is further underscored by the rule of practice, and the Court of Appeal will not entertain an appeal from the proper exercise of judicial discretion to grant or refuse a discretionary remedy, and will not, at any rate save in the most exceptional circumstances, substitute its own discretion for that of the judge.

Provisional or Final Remedies

In the English system, there is a clear distinction between provisional and final remedies, which may have important consequences.

Provisional remedies are those which by their terms and timing are interim or interlocutory in character and operation. As we have seen, they are made at the stage of pre-trial and operate pending the trial, and they are designed to preserve or protect the rights and interests of the parties during the interval between the commencement of the proceedings and trial.⁴¹ They have an enormous influence on the actual machinery of the civil judicial process, and in the majority of cases they operate to terminate the proceedings by settlement or compromise, or by submission or with-

⁴¹ See p. 132, above.

drawal or other disposal. They can of course be enforced during their currency, and yet during their currency they have the potential of being set aside or varied, which distinguishes them from final remedies.

Final remedies on the other hand are those which terminate the proceedings. As we have seen, they may be granted not only after a trial but also before or without a trial.⁴² A final remedy may be regarded as the end product of the judicial process. It produces three valuable consequences, namely, first it puts an end to the matter in controversy between the parties which in this sense becomes merged in the judgment or order of the court; second it operates as *res judicata* between the parties and those claiming under them and thereby precludes further litigation on the same issues; and thirdly, it provides the basis for appropriate enforcement procedures to be taken.

In the English system there are several remedies which must be final in their character and operation and cannot be granted merely by way of provisional process pending the trial. These include a declaration of right,⁴³ specific performance, rectification or rescission of written contracts, cancellation or destruction of documents or property and such like remedies which have a once and for all character about them. They also include remedies which are self-effectuating or regulatory, which are referred to as "constitutive remedies."⁴⁴

⁴² See p. 114, above.

⁴³ See R.S.C. Ord. 15, r. 16; *Clarke v. Chadburn* [1985] 1 W.L.R. 78; [1985] 1 All E.R. 211 (final declaration made in interlocutory proceedings).

⁴⁴ See Lawson, *op.cit.* p. 239. Instances of such remedies include a decree of divorce or nullity of marriage, an adoption order, a dissolution of partnership and such-like orders.

Remedies by way of Self-Help

It is right to mention, if only by way of passing, that the English system recognises remedies by way of self-help, whether by operation of law or under contract.⁴⁵ I wish however to refer only to two instances of such remedies, namely, distress for rent and forfeiture of a lease by re-entry by the landlord.

As for distress for rent, I would repeat the call of the Payne Report that this remedy should be abolished.⁴⁶ Distress for rent is an archaic, feudal survival, which has no place in a mature legal system. It is encrusted with technicalities, and the law relating to it "constitutes a veritable jungle of rules and exceptions."⁴⁷ It is discriminatory in giving the landlord rights which other creditors do not enjoy,⁴⁸ and in placing the tenant in greater peril than other debtors. It is an arbitrary, high-handed and summary process, unless as in the case of residential tenancies the leave of the court must first be obtained. Its very existence as a legal remedy besmirches the fabric of English civil justice.

The same may be said about the landlord's rights of re-entry to forfeit a lease for non-payment of rent. On the face of it this appears to be merely the exercise of a contractual right under the usual proviso for re-entry in a lease, but the

⁴⁵ See Lawson, *op. cit.* p. 23 *et seq.*

⁴⁶ Report of Committee on the Enforcement of Judgment Debts, (1969 Cmnd. 3909), para. 924. The recommendation was in the context of an integrated enforcement system and the introduction of an Enforcement Office, but the thrust of the argument was for the abolition of the right of distress.

⁴⁷ *Ibid.* para. 917.

⁴⁸ Except public authorities, by way of distress for rates and taxes, see (Keith) Committee on Enforcement Powers of the Revenue Departments, (1983) Cmnd. 8822.

exercise of this right should be limited to proceeding by action, as in the case of breaches of covenants other than for payment of rent.⁴⁹ Any element of arbitrariness, capriciousness or the appearance of “taking the law into your own hands” which is so contrary to the spirit of English civil justice, should be removed.

Judicial Review

The introduction in 1977 of the remedy of judicial review⁵⁰ was a milestone in the history of English civil justice. It constituted one of the most beneficent, significant and effective innovations and improvements in the fabric of English civil justice. It restored credence in the creativity of the system of English justice; it provided a virile and vigorous procedure for remedies in the public law area to replace those that were in a weary and withering state. It was a mighty leap forward towards a fresh, redesigned and renewed jurisprudence in the field of administrative law. It created a uniform, flexible, comprehensive code of procedure for the exercise of the supervisory jurisdiction of the High Court over proceedings, decisions and orders of inferior courts, tribunals and other bodies or persons charged with the performance of public acts and duties, and at the same time, it eliminated technicalities and complexities that marred the former practices relating to prerogative orders.⁵¹

⁴⁹ See Law of Property Act 1925, s.146.

⁵⁰ *i.e.* the new R.S.C. Ord. 53, which entirely replaced the former Ord. 53.

⁵¹ See *Supreme Court Practice*, Vol. 1, paras. 53/1–14/1, cited with approval by Ackner L.J. in *R. v. I.R.C. ex p. National Federation of Self-Employed and Small Business Limited* [1980] Q.B. 407.

The new remedy of judicial review was framed largely on the recommendations of the Law Commission,⁵² but, although they envisaged the need for an Act of Parliament, the new remedy was introduced by a change in the Rules of the Supreme Court, since it was determined that it effected changes in procedural law and not in substantive law.⁵³ Nevertheless, statutory authority has been given to the new remedy so that it is now, beyond question, part and parcel of English civil justice.⁵⁴

The success of the remedy of judicial review has exceeded all legitimate expectations, as the current phrase has it, both in the volume and in the variety of the cases which have been dealt with under this new procedure. The volume of applications for leave to apply and for applications for judicial review has been increasing ever since the introduction of the new remedy, and for as long as may be forecast, it will continue to increase and grow apace. The variety of matters that have been dealt with by way of judicial review has been quite remarkable and has covered almost every area of public affairs. Judicial review is clearly a burgeoning business of first importance.

The machinery of judicial review operates on a two-stage process, first, by application for leave to apply for judicial review,⁵⁵ and if such leave is granted, by the substantive

⁵² Report on Remedies in Administrative Law, Law Comm. No. 73, (1976) Cmnd. 6407.

⁵³ The crucial point was on the question of the "standing" of the applicant. The R.S.C. avoided this question, but at the same time provided a solution, that the applicant should have "a sufficient interest in the matter," see R.S.C. Ord. 53, r. 3(7), embodied in the Supreme Court Act 1981, s.31(3) and see *Supreme Court Practice* Vol. 1, paras. 53/1-14/27. Incidentally, Ord. 53 affords a notable example of the legislative power of the Rule Committee, see p. 54, above.

⁵⁴ See Supreme Court Act 1981, s.31.

⁵⁵ See R.S.C. Ord. 53, r. 3.

application for judicial review.⁵⁶ Both the grant of leave to apply and the application for judicial review are matters for the exercise of judicial discretion and not matters of right, so that even if the court determines that the claim for judicial review has been made out it still has a discretion whether or not to grant leave or judicial review, as the case may be.

The application for judicial review is heard, not by way of appeal on the merits, but by way of review of the procedure employed. The function of the court is not to substitute its own decision or opinion for that of the authority properly constituted to decide the matters in question,⁵⁷ but to ensure that that authority has acted with due fairness within the limits of its jurisdiction. For this reason, on judicial review the court will interfere only where it appears that the court, tribunal or other public authority acted without jurisdiction or exceeded its jurisdiction, or where there is an error on the face of the record, or where there has been a failure to comply with the rules of natural justice,⁵⁸ or where the decision arrived at is such that no comparable authority properly directing itself on the relevant law and acting reasonably could have reached.⁵⁹

⁵⁶ See R.S.C. Ord. 53, r. 5. In 1984, the total applications for leave to apply was 918 (852 in 1983), the number granted was 703 (623 in 1983), the number refused was 215 (229 in 1983), see Judicial Statistics Annual Reports 1984 Cmnd. 9599 and 1983, Cmnd. 9370, Table 1.15.

⁵⁷ See *per* Lord Hailsham L.C. in *Chief Constable of North Wales Police v. Evans* [1982] 1 W.L.R. 1155, 1160; [1982] 3 All E.R. 141, 143.

⁵⁸ See *Ridge v. Baldwin* [1964] A.C. 40, a landmark decision which paved the way towards judicial review.

⁵⁹ See *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* [1948] 1 K.B. 223, C.A., generally referred to as "the Wednesbury principle." This is very like the basis of the attack on the verdict of a jury, that no reasonable jury could have reached such a verdict.

The strength of the judicial review lies in the range of remedies which may be awarded on such an application. These include any one or more of the three prerogative orders, namely, an order of *mandamus*, *prohibition* or *certiorari*, or where appropriate a declaration or an injunction,⁶⁰ or in a proper case damages.⁶¹ These remedies may be claimed cumulatively or in the alternative; and where the relief sought is a declaration, an injunction or damages, the court may convert the application for judicial review as if begun by an ordinary writ.⁶² The procedure is further strengthened by the requirement that the application for judicial review must be made without undue delay.⁶³

In order further to strengthen and improve the machinery of judicial review, I would suggest three matters for consideration.

The first is that the requirement for leave to apply for judicial review should be abolished. The underlying reason advanced for such leave is that the court should act as a kind of sieve to eliminate groundless applications,⁶⁴ but this is contrary to the basic feature of English civil justice that the right to invoke the jurisdiction of the court is the act of the party, and not the court, so that the prior leave of the court should not be required.⁶⁵

The second is that the principle of exclusivity to proceed

⁶⁰ See Supreme Court Act 1981, s.31, and R.S.C. Ord. 53, r. 1.

⁶¹ See Supreme Court Act 1981, s.31 (4); R.S.C. Ord. 53, r. 7.

⁶² R.S.C. Ord. 53, r. 9(5).

⁶³ See Supreme Court Act 1981, s.31(6). Unless good reason is shown, the application must be made promptly and within three months from the date when the grounds for making it first arose, R.S.C. Ord. 53, r. 4.

⁶⁴ See, *per* Lord Diplock in *R. v. Inland Revenue Commissioners, ex p. National Federation of Self Employed and Small Businesses Ltd.* [1982] A.C. 617, 642.

⁶⁵ See p. 74, above.

by way of judicial review in matters that come within the area of public law should be discarded.⁶⁶ The introduction of the concept of public law into judicial review is an unnecessary complication in the field of English jurisprudence. It adds to the problems of litigants and the courts; it creates new areas of procedural technicalities; it raises new problems of distinguishing between what is and what is not comprised within the area of public law; it serves no useful purpose for any other procedure than that of applying for judicial review.

The third is that power should be provided to convert an action begun by writ or originating summons into an application for judicial review, just as there is power to do the reverse.

*Writ of Habeas Corpus*⁶⁷

This remedy is perhaps the most celebrated and the most effective in all the history of judicial process and certainly in the fabric of English civil justice. It lies in the very foundation on which the claim to freedom of the person is based. Its aim and effect is to secure the immediate release from restraint of anyone who is unlawfully restrained or imprisoned and to allow such person to enjoy immediate freedom without waiting for an ordinary action to be brought to test whether or not the restraint or imprisonment was lawful. Speed and summary process are the hallmarks of this remedy; anyone who is restraining the liberty of another may be called upon by this writ of habeas corpus to justify the restraint or let the

⁶⁶ See *O'Reilly v. Mackman* [1983] 2 A.C. 237; *Cocks v. Thanet District Council* [1983] 2 A.C. 286.

⁶⁷ See R.S.C. Ord. 54.

prisoner free. This ancient writ however is not much used nowadays in England.⁶⁸

Remedies in Miscellaneous Proceedings

The system of English civil justice provides a great variety and volume of remedies in the whole range of miscellaneous proceedings, ensuring that proper, effective and suitable remedies are available in each kind of proceeding.

This applies for example to matrimonial and family affairs, to admiralty, probate and administration actions, to insolvency proceedings, to employment law, to industrial relations, to discrimination on any ground, to the protection of the consumer as well as the protection of the environment, and to all other areas of the law.

C. Enforcement

Nature of Enforcement

In the system of English civil justice, as perhaps in other systems, the machinery of the enforcement of the judgments and orders of the court constitute the very foundation of the judicial process. It represents the coercive power of the court in the exercise of its judicial authority. It expresses the political will of the state to buttress the judiciary, which is

⁶⁸ In 1983 and in 1984, two orders for the writ of habeas corpus were made, though in 1983, 17 and in 1984, 16 applications for the writ were dismissed, see Judicial Statistics, Annual Reports 1983 Cmnd. 9370, and 1984 Cmnd. 9599, Table 1.15. The main use for the writs of habeas corpus in England nowadays is to test the validity of orders for the extradition of alleged criminal offenders at the request of foreign governments. In the United States, the writ of habeas corpus is used on a considerable scale to test the validity of criminal convictions in the state courts.

the third arm of government, and to make their judgments and orders authoritative and obligatory, binding and conclusive. It is the sanction provided by the law to compel or induce due compliance with and observance of the judgments and orders of the court. Without the supportive enforcement machinery, the judgments and orders of the court would lose their force and effect and become transformed into mere pious resolutions; with an effective enforcement machinery, they should command unquestioning and unconditional compliance. In the great majority of cases such compliance will ordinarily be forthcoming by the mere threat to employ the appropriate enforcement machinery or even by its mere existence without the need of resorting to the actual process of enforcement. In the instances in which such compliance is not forthcoming, either timeously or at all, the appropriate enforcement measures may be invoked to secure, so far as possible, due observance of the judgment or order of the court.

The overriding function of the judicial process of enforcement is of course to provide for the judgment creditor⁶⁹ the fruits of his judgment, to obtain for him due satisfaction, compensation, restitution, performance or compliance with what the court has granted in the way of remedy or relief or redress. Enforcement is, after all, the last stage of the judicial process after the legal right, claim or interest has been converted into a judgment or order which remains to be enforced. The legal machinery should therefore provide

⁶⁹ This term is used in the wider sense to include not only a judgment creditor who has obtained a money judgment, but also the party who has obtained a non-money judgment, sometimes called the judgment holder. Conversely, the term "judgment debtor" is used to include the party liable for payment of a judgment debt, as well as one who is liable under or affected by a non-money judgment.

all such enforcement measures which will be suitable and effective according to the remedy which has been awarded. This will conform with the general principle of enforcement, that the judgment of the order of the court must, so far as possible, be obeyed or complied with, for otherwise the authority of the court would be diminished and the legal order would suffer a breakdown.

On the other hand, the process of enforcement should not be regarded merely as a self-contained judicial process. It is necessary to emphasise that the enforcement of judgments and orders of the court is a highly complex and complicated problem, in which many social disciplines are entangled. It cannot be looked upon simply or merely as a legal problem and the concern only of lawyers. The operation of the enforcement process inevitably has extensive reverberations and repercussions extending beyond the property and person and position of the judgment debtor and his family, and should therefore be seen and understood in its comprehensive aspect, as involving not merely legal problems but also social, moral, economic and political problems. From this point of view the enforcement process should be designed to avoid producing greater social harm than the benefits accruing from it, or in other words, to strike a proper balance between producing for the judgment creditor the fruits of his judgment but avoiding unnecessary harmful effects for the judgment debtor and his family and at the same time maintaining the authority of the judicial process.

Features of Enforcement

A brief overview of the main features of the present machinery of enforcement may assist in comprehending its operation in its true perspective.

The distinguishing feature of the English system of enforcement of judgment and orders of the court is that it is an unplanned, unsystematic, haphazard, complex system.⁷⁰ It operates, especially in relation to money judgments, largely on a hit-or-miss basis. In relation to both money and non-money judgments, it is in part effective, but in part it is ineffective, inefficient, somewhat random and sometimes oppressive. It functions in the absence of a general body of principles, but rather on an *ad hoc* basis applicable to particular modes of enforcement. From the point of view of legal and social theory, the enforcement process is in a kind of backwater, seldom examined or studied.

Like the commencement of originating proceedings, the process of enforcement is at the initiative of the successful party. The adversarial system in England operates in relation to the enforcement of judgments as it does before judgment. It is for the successful party to activate the judicial process of enforcement, and it is for him to take the appropriate steps to enforce his judgment by the applicable mode and at the time and on the terms of his own choosing. Conversely, the court has no power and no machinery to act of its own motion to enforce, still less to police, its own judgments.⁷¹

In the English system there is no general enforcement

⁷⁰ See (Evershed) Report on Supreme Court Practice and Procedure, (1953) Cmnd. 8878, para. 3743.

⁷¹ In his Reservation to the (Payne) Report on the Enforcement of Judgment Debts, (1969) Cmnd. 3909, p. 388, Judge Baxter proposed that after the initial application for enforcement, the proposed Enforcement Office "should assume the responsibility for enforcement and should itself enforce" the judgment debt, exercising their powers on their own initiative. See also *per* Donaldson J. in *Con-Mech (Engineers) Ltd. v. A.U.E.W.* [1973] I.C.R. 620, 626, (proposal for employers to report to the Court breaches of injunction orders by trade unions, when the Court itself will assume the responsibility for issuing writs of sequestration.)

machinery, so that each mode of enforcement, selected by the judgment creditor, must be separately started. Every process of enforcement constitutes a fresh, separate, independent proceeding to give effect to the judgment or order of the court.

In the case of non-money judgments, the selection of the mode of enforcement is generally indicated by the character of the remedy granted, but in the case of money judgments, the selection of the mode of enforcement is generally made at random and somewhat in the dark without first ascertaining the means of the judgment debtor since the available machinery for the discovery of such means in aid of execution is comparatively rarely used.⁷²

The general rule is that each court enforces its own judgments and orders. This applies as much in the High Court, the Central Office in London and the District Registries in the country, as to each of the County Courts and the Magistrates' Courts. There are, of course, considerable powers for the transfer of the enforcement process, particularly in relation to judgment debts from the High Court to the County Courts⁷³ and between County Courts, and recently from County Courts to the High Court,⁷⁴ and in relation to maintenance orders from the High Court to the Magistrates' Courts. The result is that a "multiple debtor," who may have judgments and orders entered against him in several courts and who is a much more common figure than is generally realised, may be pursued by each court, quite independently of the other or others.

Moreover, each judgment creditor is entitled, by the enforcement process he selects, to recover the fruits of his

⁷² See R.S.C. Ord. 48; CCR 1981, Ord. 25, r. 3.

⁷³ See County Courts Act 1984, s.105.

⁷⁴ See County Courts Act 1984, s.106.

own judgment, regardless of the claims of other judgment creditors, and still less other creditors of the judgment debtor. The judgment creditor, however unmeritorious or ruthless, who gets in first may be able, as it were, to scoop the pool and to recover for himself whatever assets or property the judgment debtor may have without regard to the position or interests of other creditors. The general rule is "first come, first served."⁷⁵ The judgment debtor may thus be left helpless to face his other creditors.

In general, except for the enforcement in the High Court of a judgment for possession of land⁷⁶ or for breach of an injunction,⁷⁷ the judgment creditor is not required to give notice to the judgment debtor of initiation of enforcement proceedings against him, nor in general is the leave of the court required to activate any enforcement process.⁷⁸ The process of enforcement is operated as a self-contained judicial process, in the sense that, as there is a judgment or order of the court, its enforcement should follow as the necessary, inevitable routine without in general having regard to the social or financial consequences such enforcement may have on the judgment debtor or his family.⁷⁹

A peculiar feature of the English system of enforcement is that there are not one, not two, but three systems of enforcement, one in the High Court carried out by the Sheriff, Under-

⁷⁵ See (Payne) Report *op. cit.*, para. 304, where the nature of enforcement is described as "free-for-all" or "catch-as-catch-can."

⁷⁶ See R.S.C. Ord. 45, r. 3.

⁷⁷ See R.S.C. Ord. 45, r. 7(2). Service of a copy of the order may be dispensed with, *ibid.*, r. 7(2).

⁷⁸ For the exceptions, see R.S.C. Ord. 46, r. 2.

⁷⁹ In the High Court, a stay on the execution on goods may be granted where there are special circumstances which render it inexpedient to enforce the judgment or where the debtor is unable from any cause to pay the debt, see R.S.C. Ord. 47, r. 1. In practice, this provision is comparatively rarely invoked.

Sheriff and their bailiffs and officers, another in the County Court carried out through the Registrar and his bailiffs and officers and a third carried out in the Magistrates' Courts. The High Court system attracts considerable remuneration by way of fees, costs and charges calculated by reference to the amount involved or other scale of charges. It may be described as a form of private enterprise in the business of the enforcement of judicial processes, and it is highly productive and profitable. By contrast, the County Court and the Magistrates' Court systems are carried out by court officers, so that the enforcement process in the County Court and Magistrates' Court is a public service.

Perhaps the most outstanding feature of the English system of enforcement, and the most coercive and effective weapon that it wields is that the failure to comply with a judgment or order in civil proceedings to do a specified act within a specified time or not to do a specified act is treated as a contempt of court, for which the defaulting party may be committed to prison, fined or his property sequestered. In this respect, there is a fundamental difference between the English system of civil justice and the continental systems. In England, the concept of contempt of court is as old as the common law itself, stretching back to the 12th Century,⁸⁰ whereas by contrast, this concept is entirely unknown in the continental legal systems.⁸¹ Enforcement of non-money judgments, particularly judgments and orders "to do or not to do" a specified act is in the English system of civil justice buttressed by the overriding and overwhelming power of the court to compel compliance by invoking the doctrine of contempt of court, with the threat of imprisonment, fine or sequestration.

⁸⁰ See Sir John Fox, *The History of Contempt of Court*, p. 1.

⁸¹ See J. H. Merryman, *The Civil Law Tradition* (Stanford University Press, 1969), pp. 57, 130.

Enforcement of Money Judgments

At common law, the modes of enforcement of money judgments were somewhat limited in their range and effectiveness. They consisted principally of process against the property or the person of the judgment debtor, the seizure and the sale of his personal property or the seizure and imprisonment of the debtor himself. The Court of Chancery supplemented these methods by the device of appointing a receiver by way of equitable execution, to reach out to property and assets which the common law methods could not reach or to overcome the difficulties and limitations of execution at law.⁸² Since the last century, however, with the enormous expansion of trade and commerce and the ever-growing facilities of granting and obtaining credit and the captivating lure and temptations of incurring liabilities for debt both by traders and consumers, the number and value of judgment debts have increased and this has led to the introduction of new and extensive methods of enforcement. These have been designed, not only to make the enforcement process more speedy, certain and effective, but also to widen the areas of the property, assets and income of the judgment debtor which could be seized in execution and applied towards the satisfaction of judgment debts.

In the result, the English system of civil justice now provides several modes of enforcing judgment debts. Apart from execution upon goods and imprisonment for civil debt,

⁸² See Supreme Court Act 1981, s.37(4) and R.S.C. Ord. 51; County Courts Act 1984, s.107(1) and C.C.R. 1981, Ord. 32. This process is very much under-used. In 1984, there were only 44 appointments of such receivers in the Q.B.D.; see Judicial Statistics, 1984, (Cmd. 9599), Table 3.8, and none in County Courts.

which call for separate treatment, these methods include the following processes; (a) *Attachment of Debts* or garnishee proceedings as they are known, under which the court may order debts due or accruing due to the judgment debtor from a third party to be paid directly to the judgment creditor towards satisfaction of the judgment debt, thus by-passing the debtor altogether.⁸³ (b) *Attachment of Earnings*, under which the court, which for this purpose must be the County Court (except in respect of High Court maintenance orders) may order the employer of the judgment debtor to deduct a specified sum from his earnings and to transmit it to the court to be applied in payment of the judgment debt.⁸⁴ (c) *Charging Orders*, on any beneficial interest in land or securities owned by the judgment debtor, under which the court may order a charge to be imposed on the specified beneficial interest, thereby giving the judgment creditor effective security for the payment of the judgment debt to the value of such interest.⁸⁵ One outstanding feature of this process is that if the amount of the judgment debt is within the monetary jurisdictional limits of the County Court, the application for the charging order must be made in the appropriate County Court and cannot be made in the High Court.⁸⁶ This indeed is the model principle which should be applied to all the processes for the enforcement of money judgments, so that the County Court should have exclusive

⁸³ See R.S.C. Ord. 49; C.C.R. 1981, Ord. 30.

⁸⁴ See Attachment of Earnings Act 1971. This process was first introduced by the Maintenance Orders Act 1958 as an alternative to imprisonment of maintenance defaulters by Magistrates' Courts. It was extended to all judgments pursuant of the recommendation of the Report of the Committee on the Enforcement of Judgment Debts, Cmnd. 3909 (1969), para. 583.

⁸⁵ See Charging Orders Act 1979; R.S.C. Ord. 50; C.C.R. 1981, Ord. 31.

⁸⁶ See Charging Orders Act 1979, ss.1(2) and 7.

jurisdiction to enforce judgment debts within its own monetary limits.⁸⁷

Execution on Goods

The predominant mode of enforcement of judgment debts is by execution on the goods of the judgment debtor both in the High Court⁸⁸ and in the County Court.⁸⁹ The process itself is quite simple and is similar in both courts, though, as we shall see, there is a vast difference in relation to execution on goods between the two courts. In each court, the judgment creditor issues the appropriate process requiring or authorising the appropriate court officer to seize sufficient goods of the judgment debtor with a view to their sale to satisfy the amount of the judgment debt and the other amount specified in the process of that court. In the High Court, he issues a writ of execution (called “the writ of *fi. fa.*” or “*fi. fa.*” for short), and in the County Court, he issues a warrant of execution in the nature of a *fi. fa.* Though the process is simple, the law and practice relating to execution is encrusted with outdated technicalities and complexities and it is surprising that in practice it creates such few problems.⁹⁰

⁸⁷ This is the recommendation of the Report of the Committee on the Enforcement of Judgment Debts (referred to as “the Judgment Debts Report” *op. cit.*, para. 652, and see para. 120.

⁸⁸ In 1984, in the Q.B.D. there were 55,051 writs of *fi. fa.* issued (no figure for sales is given), compared with 3,777 Charging Orders and 1,058 Garnishees. Judicial Statistics, Cmnd. 9599 (1984), Table 3.8.

⁸⁹ In 1984, in the County Courts, there were 1,062,512 warrants of execution issued, and 4,204 sales compared with 12,325 orders of commitment and 3,723 Garnishees (no figure is give for charging orders).

⁹⁰ This area of the law, which may be called “Sheriff’s Law” is of considerable social importance, affecting as it does over a million people a year, and it is desirable and perhaps necessary that an early opportunity should be found to restate it in clear, plain, intelligible and modern terms.

The traditional English view of the function of execution on goods is that, it is not only a means of obtaining satisfaction, but it is also a form of punishment of the judgment debtor for his failure to pay the judgment debt. It is one form of execution, which the Evershed Committee said must be retained because "it is extremely unpleasant to the judgment debtor . . . and threatens him with some step of some severity."⁹¹ It is indeed an effective measure to coerce the judgment debtor to produce some money, sooner rather than later, from family, friends or other sources, to fend off the consequences of the execution. The deterrence of execution lies in the seizure of the goods, whatever their nature, quantity or value, with the possibility of their removal and ultimate sale. The consequences that face the judgment debtor are the loss of his home, in whole or in part and the destruction of his family life, which inevitably have far-reaching and widespread personal and social repercussions. These are compounded by the fact that the number of executions on goods exceeds a million a year,⁹² which thus creates an immensely serious and difficult legal and social problem in the field of civil justice.

In recent years, however, a significant shift has taken or at any rate is taking place about the function of execution on goods. It is that a fair balance should be provided between the rights of the creditor and the circumstances of the debtor.⁹³ On this basis, the function of execution, both from the legal and social point of view, is to deny the debtor the right to have and enjoy the use of any goods and prop-

⁹¹ See Report of Committee on the Supreme Court Practice, Cmnd. 8878 (1953), para. 399.

⁹² See notes 88 and 89, above.

⁹³ See Judgment Debts Report, Cmnd. 3909 (1969), para. 631.

erty which are not exempt from seizure whilst he remains under the obligation to discharge the judgment debt.⁹⁴ At bottom, this view assumes that, at any rate in the great majority of cases, the debtor is a casualty of the credit system, and that therefore execution on his goods should take account of what his circumstances are. When this view should prevail, the machinery of English civil justice will be greatly improved.

The goods of the debtor which are exempt from seizure in execution are woefully inadequate both in their description and their value. They consist at present of the wearing apparel and bedding of the debtor or his family to the value of £100, and the tools and implements of his trade to the value of £150.⁹⁵ The Payne Committee recommended that the exempted goods should consist of the household goods and personal clothing which are necessary "to provide a clean and decent home for the whole family" and the tools of trade and goods of a tradesman which are necessary to enable him to maintain his earnings.⁹⁶ In 1969, they stated that the implementation of this recommendation was regarded "as a matter of urgency."⁹⁷ It is still so regarded.

⁹⁴ *Ibid.*

⁹⁵ The value of the exempted goods was first fixed at £5 by the Small Debts Act 1845, s.8 and the County Courts Act 1846, s.96. The Austin Jones Committee on County Court Procedure, Cmnd. 7668 (1949), recommended that the amount should be increased and the Evershed Committee on Supreme Court Practice, Cmnd. 8878 (1953) raised the recommended figure to £20 or such other sum as may be prescribed. The power to prescribe such amount was given by the Administration of Justice Act 1956, s.37(2), and see County Courts Act 1984, s.89. In 1963, the prescribed amount was increased to £50 and in 1980 the amounts were increased to those stated in the text (see S.I. 1980 No. 26).

⁹⁶ See Judgment Debts Report, para. 675.

⁹⁷ *Ibid.*

As stated earlier,⁹⁸ the High Court and the County Courts exercise concurrent jurisdiction for the enforcement of their own judgment debts within the monetary jurisdiction limits of the County Court by way of execution on goods. If, therefore, a warrant of execution is issued in the County Court, the creditor will be entitled, as the warrant provides, to recover the amount of the judgment and "the costs of execution," whereas, if a writ of *fi.fa.* is issued in the High Court, the creditor will be entitled, as the writ provides, to recover not only the amount of the judgment debt and any interest accruing thereon and the costs of execution but also "Sheriff's poundage, Officer's fees, costs of levying and all other legal incidental expenses." The effect of this difference between the writ of *fi.fa.* in the High Court and the warrant of execution in the County Court is greatly to increase the ultimate amount which the debtor will have to pay to satisfy the execution process taken in the High Court as compared with that taken for the same amount of judgment debt in the County Court. Moreover, any proceeds recovered by way of execution must first be applied to satisfy the Sheriff's costs, charges and expenses. While, therefore, it may be as claimed, that execution on goods in the High Court is more beneficial to the judgment creditor, it is more harmful to the judgment debtor by increasing his burden of debt.

The exercise of this concurrent jurisdiction is carried out on a vast scale, since 9 out of 10 writs of *fi.fa.* for execution on goods in the High Court are for amounts within the County Court jurisdictional limits.⁹⁹ Indeed, if all executions for sums within the County Court jurisdiction were to be carried out in the County Court, the remaining

⁹⁸ See p. 189, above.

⁹⁹ See Judicial Statistics, 1984, Cmnd. 9599, Table 3.8.

executions by writ or *fi.fa.* in the High Court would not produce sufficient revenue to enable the Under-Sheriffs' Association to continue their function and maintain their organisation.¹ The real vice, however, in the operation of this concurrent jurisdiction is that it creates inequality in civil procedural law, since for the same amount of judgment debt, we now have two different systems of enforcement, carried out by different court officers, who are differently motivated and remunerated, and producing a different quality of justice for litigants in the same situation, whether as judgment creditors or debtors. This disfigures and distorts the fabric of English civil justice, which is quite indefensible, and ought to be abolished.²

Imprisonment for Debt

The system of English civil justice had for centuries endured the common law rule that for default in the payment of a judgment debt, the debtor was liable to be arrested under a writ of attachment and imprisoned for an indefinite period until the debt was satisfied or the creditor relented. It is not surprising that under this rule, the debtors' prisons were overcrowded, their conditions were loathsome and horrible and the state of the debtors was wretched, revolting and hopeless. These conditions were vividly and realistically portrayed by many novelists, notably by Charles Dickens; and in the middle of the nineteenth century, they aroused the national will to call for the abolition of imprisonment for debt, though there was strong

¹ See Judgment Debts Report, Cmnd. 3909 (1969), para. 654.

² This was specifically recommended by the Judgment Debts Report para. 652. The provisions of the County Courts Act 1984, s.106 for the transfer of judgments and orders of County Courts for enforcement in the High Court is a retrograde step and against the current of history, and should be repealed.

resistance to this call from powerful quarters, such as the body of County Court judges.

The result was an unhappy compromise, which retained the process of imprisonment but limited its duration for each debt or instalment unpaid. The preamble to the Debtors' Act 1869 does indeed carry the clarion claim that it is an Act for the "abolition of imprisonment for debt," and the Act does provide that no person should be arrested or imprisoned for making default in payment of a sum of money; but the Act also created exceptions which have eaten away the primary rule.³ The most important exception was that where the debtor defaults in the payment of a sum of money under an order or an instalment order, whether by way of refusal or neglect and it is proved that he has or since the date of the order had the means to pay the sum in respect of which he has made default, the court may order him to be imprisoned for a term not exceeding six weeks, or earlier release if that sum be paid.⁴

Under this formula, the English system preserved imprisonment as a process for the enforcement of judgment debts. In this respect, it differed sharply from the continental civil law systems, all of which had abolished imprisonment for debt (except in relation to maintenance orders) by the end of the last century. Under the machinery of the judgment summons, mainly in the County Court, literally tens, even hundreds of thousands of committal orders were made by the County Courts and thousands of debtors were imprisoned year by year. This state of affairs continued until August 1971, when the provisions of the Administration of Justice Act 1970, implementing in large measure the

³ Debtors Act 1869, s.4.

⁴ *Ibid.*, s.5.

unanimous recommendations of the Payne Committee on the Enforcement of Judgment Debts, that imprisonment for debt and the judgment summons procedure (except in relation to maintenance orders about which they were divided) should be abolished, were brought into force. The change was immediate and dramatic, for whereas in 1971 there were 88,594 orders for commitment issued, in 1972 there were only 993 such orders issued, and whereas in 1971 1200 debtors were conveyed to prison, in 1972 there were only 82.⁵ This change should be reckoned as one of the most notable and beneficent reforms in English civil justice during the last 25 years.

The story, however, does not end here, and it will not end until imprisonment for all debts is abolished.

The Administration of Justice Act 1970 retained imprisonment for two classes of debts, namely, maintenance orders and debts for the payment of taxes, including rates, and specified statutory contributions and liabilities.⁶

As for the imprisonment of maintenance defaulters, it is true that the Payne Committee were divided on this issue. Three members were against its abolition at any time, three others were in favour of its abolition at a later date, but the remaining six recommended its immediate abolition. In other words, the majority of the Payne Committee were in favour of its abolition either immediately or at some future date. Those who were for its immediate abolition castigated imprisonment of maintenance defaulters, as well as of civil debtors, as being "morally capricious, economically wasteful, socially harmful, administratively burdensome, and jur-

⁵ Civil Judicial Statistics, 1972, Cmnd. 5333, Table 22 (xxxiii).

⁶ Administration of Justice Act 1970, s.11.

idically wrong.”⁷ In 1974, after a fresh and indeed a deeper examination of this question, the *Finer Report* adopted this criticism and unanimously recommended that imprisonment of maintenance defaulters should be abolished.⁸ Here was advice which should have been immediately heeded, but in fact it still has not been. It is therefore lamentable to find that in 1984 there were still over 1050 maintenance defaulters sent to prison.⁹ Such imprisonment was of course imposed by Magistrates’ Courts which are basically Criminal Courts functioning in a criminal environment, and whether they realised it or not, they were taking the anomalous course of inflicting criminal punishment for a civil liability, and crossing the line between criminal and civil justice. The truth is that imprisonment for maintenance defaulters is a disturbing factor in the field of family law, and the first thing that needs to be done to reform family law is to abolish such imprisonment.

As for imprisonment for non-payment of taxes, rates and other statutory contributions and liabilities, this provision was introduced into the Administration of Justice Act 1970 by the government of the day on its own initiative, to foster its own interests, without the support of any social welfare or other interested organisation and against the unanimous recommendations of the Payne Committee for the abolition of imprisonment for debt without distinguishing between classes of debts, except in relation to maintenance orders.¹⁰

⁷ Report of the Committee on the Enforcement of Judgment Debts, Cmnd. 3309 1969, para. 1099.

⁸ Report of the Committee on One-Parent Families, Cmnd. 5629, 1974, para. 4.163.

⁹ Prison Statistics England and Wales, Cmnd. 9622, 1984. Table 6.1.

¹⁰ It was also against the recommendation of the Walpole Report of 1873 on Imprisonment for Debt, see Report of the Committee on the Enforcement of Judgment Debts, para. 1005.

It was a serious error of judgment in an important area of social policy. It creates an arbitrary distinction between debts arising between subjects and those between subjects and central and local government. This distinction operates in England, but not anywhere else in the European countries. It is hardly credible that at this day and age the English legal system should still be embroiled with the problem of imprisonment for debt. It is therefore utterly deplorable that in 1984, there were nearly 490 debtors committed to prison for non-payment of such debts.¹¹ One ground advanced for retaining imprisonment as a process of enforcement is that the threat of imprisonment itself operates as the real deterrent,¹² but if imprisonment is wrong, so is the threat of imprisonment. The truth is that imprisonment as a process of enforcement besmirches and distorts the fabric of English civil justice and it should be abolished for all classes of debt as soon as may be.¹³

Enforcement of Non-Money Judgments

The system of English civil justice naturally deploys a great number and variety of modes of enforcement of non-money judgments. Unlike the simple objective of the enforcement of money judgments, which is to obtain the money equivalent of the award, the objective of the enforcement of non-

¹¹ Prison Statistics England and Wales, *op. cit.* This figure is made up as to 94 (1 female) committed by County Courts and 395 committed by Magistrates' Courts, 2 for tax, and 393 (26 females) for rates. An additional 41 (2 females) were committed for unspecified "other debts."

¹² See p. 195, above, deterrence of execution.

¹³ In 1984, the County Courts issued 12,324 orders of commitment. See Judicial Statistics 1984, Cmnd. 9599, Table 7.18.

money judgments is a great deal more complex. It is aimed at achieving compliance with the multifarious judgments and orders awarded by the court or tribunal to correspond with the remedies claimed in a vast variety of different proceedings, whether at the stage of pre-trial or trial. These, of course, include not only what may be called ordinary proceedings in the courts relating to private law matters but also specialised proceedings in such legal areas as matrimonial and family affairs, administrative law matters, labour and industrial relations, civil rights, consumer protection, control of the environment and other such like proceedings. A particular non-money judgment which calls for special treatment is the imperative injunctive order of the court to do a specified act within a specified time or to abstain from doing a specified act.

A striking feature of non-money judgments is that many such classes of judgments are self-effectuating, since they take effect as and when made, without the requirement to employ any process of enforcement. Some such judgments operate *in rem*, as well as *in personam*, as for example a decree of divorce or nullity, an adoption order, or an order pronouncing a will to be null and void. Other such judgments operate *in personam* such as, for example, a summary order terminating proceedings as against one or other of the parties, an order for the preservation of a building or tree and so forth. Other non-money judgments may be enforced indirectly, for example, an order for specific performance of a contract, which may be enforced by the court nominating an official to execute the contract or the instrument,¹⁴ or the power of the local authority to execute works which a per-

¹⁴ See Supreme Court Act 1981, s.39.

son is required by an appropriate notice or order to execute but fails or refuses to do so.¹⁵ Most other non-money judgments, at any rate in ordinary proceedings, may be enforced by the mode appropriate to the terms of the judgment or order, as for example a writ or warrant of possession of land, or a writ or warrant of delivery of goods, or the taking of an account or the cancellation or destruction of infringing or invalid documents or materials.

An important form of non-money judgment is the declaration of right.¹⁶ An action for a declaratory judgment was not known to the common law, but the Court of Chancery could grant a declaration of right if some right to other relief was shown and established. Such an action was introduced into the Supreme Court by the Rules of 1883, whether or not any consequential relief is or could be claimed, and it has been described as "an innovation of a very important kind."¹⁷ A declaration is basically self-enforcing,¹⁸ and operates *in rem* as well as *in personam*, which is why it will not be granted by consent or on admissions or on a procedural default¹⁹ but only after proper argument. It is a procedural device for ascertaining and determining the rights of parties or for the determination of a point of law. It is today one of the most prolific forms of non-money judgments which are granted by the courts.

¹⁵ Control of Pollution Act 1974, s.69(2). The local authority is entitled to recover the expenditure incurred. See also Public Health Act 1936, s.290(6).

¹⁶ See R.S.C. Ord. 15, r. 16.

¹⁷ *Per* Lindley M.R. in *Ellis v. Duke of Bedford* [1899] 1 Ch. 494, 515.

¹⁸ If a party flagrantly disregards a declaratory judgment, he may be guilty of contempt of court.

¹⁹ See, *per* Megarry V.-C. in *Metzger v. D.H.S.S.* [1977] 3 All E.R. 444, 451.

Contempt of Court

In the English system of the administration of justice, civil and criminal, the doctrine of contempt of court plays a central, fundamental part. It is as ancient as the common law itself.²⁰ It is deeply embedded in the English legal system and operates to this day wherever the common law has taken root. It is entirely foreign to civil law systems of Europe or other legal systems. It is essentially an English common law doctrine, which arose out of the conditions prevailing at the time of the first foundation and institution of the courts. Its historical, juridical and constitutional basis is that the courts were the King's Courts, originally carved out of one Supreme Court, and were divisions of the *aula regis*, where the King in person dispensed justice, and the power of the courts to commit for contempt was an emanation of the royal authority, for any contempt would be a contempt of the Sovereign.²¹

The doctrine applies to the whole machinery of justice, and is not limited to the civil enforcement process. Its underlying objective is to empower the court to prevent or punish conduct which may tend to obstruct, prejudice or abuse the administration of justice either generally or in relation to a particular case. The law on the subject has developed on a case-to-case basis, and it thus lacks both system and symmetry and is complex, complicated and

²⁰ "Rules for preserving discipline, essential to the administration of justice, came into existence with the law itself, and contempt of court (*contemptus curiae*) is a recognised phrase from the twelfth century to the present time." Sir John Fox, *History of Contempt of Court* (1927), p. 1. See also *per* Wilmot C.J. in *R. v. Almon* (1765) Wilmot's Notes, 254. See p. 191, above.

²¹ See *per* Cockburn C.J. in *R. v. Lefroy* (1873) 7 L.R.Q.B. 134, 137.

technical.²² There is even no statutory authoritative definition of what constitutes a contempt, nor is there any clear-cut classification of the kinds of contempt. There is, however, a generally accepted distinction between criminal and civil contempt.²³ Criminal contempt is said to consist of words or conduct obstructing or tending to obstruct or interfere with the administration of justice; it is an offence of a public nature, with which the courts nevertheless have power to deal by summary process, and to punish by imprisonment²⁴ or a fine or by an order to give security for good behaviour. Civil contempt is contempt in procedure and consists of disobedience to or failure to comply with the judgments or orders or other processes of the court and involves a private injury.

A civil contempt is therefore essentially concerned with the enforcement of judgments and orders of the court, but it is also concerned to uphold the authority of the law and to maintain the rule of law. In English civil justice, the most powerful weapons in the armoury of the process of enforcement are the penalties which may be imposed for contempt of court. This applies especially to the injunctive, imperative orders of the court "to do or not to do" a specified act. Thus, if a party is required by a judgment or order to do an act within a specified time but refuses or neglects to do it within that time or if a person disobeys a judgment or order to abstain from doing a specified act, he will be guilty of

²² The Contempt of Court Act 1981 has been described as a "disappointment" and is said to have introduced "enormous complexity and added uncertainty," see Borrie and Lowe, *Law of Contempt*. Preface to the Second Edition (1983).

²³ *Halsbury's Laws of England*, 4th Ed. (1974) Vol. 9. para. 2.

²⁴ Until 1981, the term could be for an indefinite period but under the Contempt of Court Act 1981, s.14(1), the maximum period is two years in the case of superior courts, which include County Courts, and one month in the case of inferior courts.

civil contempt and will be liable to process of execution for the purpose of compelling him to obey it.²⁵ Such process of enforcement has two purposes, namely, to compel or coerce the defaulting party to comply with terms of the judgment or order, and secondly, to protect the public interest by punishing the offender so that the court appears to have the means of enforcing its own orders. The penalties that may be imposed for a civil contempt thus take on a coercive as well as a penal character.

Indeed, the civil contempt itself has the character of a criminal offence. Although a civil contempt is dealt with by summary process on affidavit evidence which is rarely cross-examined and without the process of discovery or a trial, the procedure for invoking the sanctions for civil contempt must be followed with great strictness. It is dealt with in public and must be proved according to the criminal standard of proof, *i.e.* beyond reasonable doubt. Moreover, any person not a party to the instant proceedings, who knows of the judgment or order of the court must not aid or abet or even facilitate its breach, for otherwise he will be guilty of contempt himself. Nevertheless, on the basis of the English adversarial system, it is for the party in whose favour the judgment or order was given or made to apply to the court to impose the appropriate penalty for contempt of court, since the court has no power or machinery on its own motion to police its own orders.

The penalties for a civil contempt of court, which may be imposed cumulatively, include²⁶ the following:

²⁵ R.S.C. Ord. 45, r. 5(1). The same consequences will follow where a voluntary "undertaking" is given to the court in lieu of an injunctive order.

²⁶ The court may also take security for good behaviour or grant a further injunction. A party in contempt cannot be heard in later proceedings in the same cause until he has purged his contempt.

- (a) *Imprisonment* for a fixed term of an individual or a director or other officer of a corporate body.²⁷
- (b) *A fine*, as to which there is no limit on the amount, though of course the court will have regard to the seriousness of the contempt and the damage done to the public interest.²⁸
- (c) *Sequestration* of property, by the issue of a writ of sequestration under which the entire property and assets of the offender are placed under the control or power of four Commissioners, thus depriving him of any power or authority to deal with any of his property or assets.²⁹

A party on whom a penalty for contempt of court has been imposed may apply to discharge the order if and when he "clears his contempt."³⁰

As already indicated, there was a clear divide between the English common law doctrine of contempt of court and its total absence from continental legal systems. This creates an unbridgeable gulf in the process of enforcement of non-money judgments between English and civil law systems. The basic view of the continental legal systems is that the failure to comply with the judgment or order of the

²⁷ In 1984, there were 1,058 (38 females) prisoners for contempt of court. See Prison Statistics, England and Wales 1984, Cmnd. 9622, Table 6.1.

²⁸ This power is not contained in any statutory provision, but laid down by judicial decisions. The fine is estreated to the Crown, and its payment may be enforced by order of the High Court as if it were a judgment for the payment of money: Supreme Court Act 1981, s.40(1).

²⁹ R.S.C. Ord. 46, r. 5.

³⁰ For this purpose, which is commonly called "purging" the contempt, the offender must apologise or express regret for his contempt and must do what he had been required to do or promise to abstain from doing what he had been forbidden to do and pay the costs.

court gives rise to a mere conflict between the parties and should not be considered as directed towards the court or judicial authority, still less the state or the Sovereign; it does not take on the character of a contempt of court and should not have criminal or quasi-criminal repercussions. The enforcement of a non-money judgment should be aimed ultimately at obtaining an appropriate money judgment against the defaulting party. On this basis, French law has developed the *astriente* as the means of coercing the defendant to comply with a non-money judgment to do or not to do an act. An *astriente* is an order for the payment of a certain sum of money for each unit of time, usually a day, during which the defaulting party delays in complying with the judgment or order of the court, typically for the specific performance of a specified act. The order is imposed not by way of a fine, payable to the state, but by way of damages payable to the plaintiff, and it is assessed by reference to the damage likely to be occasioned to the plaintiff by the default. With appropriate modifications the French model of the *astriente* is applied in almost all European countries.³¹ All continental procedural scholars speak highly of the *astriente* as an effective coercive measure to secure due compliance with non-money judgments and orders and they compare it favourably with the penalties that may be imposed for contempt of court in England, which they maintain are too severe and stringent. It would, of course, be invidious here to enter into an evaluation of the two systems. It is enough to say that there is a great deal to commend the procedural device of *astriente* for adoption or adaptation into the English system

³¹ In Germany and Austria, they employ the procedural instrument of *Geldstrafen*, under which a money penalty may be imposed, and in default of payment, a term of imprisonment not exceeding six months.

by way of addition to the present penalties for contempt of court. The amount of the penalty imposed by an order of *astriant* would increase day by day or week by week, as the case may be, and this would have the psychological and social effect of concentrating the mind of the defaulting party that he must, sooner or later, comply with the judgment or order of the court or otherwise face total liquidation. Such an order may well by itself have the compelling or coercive power to secure the observance of non-money judgments and orders.

D. Appeals

Nature of Appeal

In the system of English civil justice, there are two basic principles which appear to be in conflict and to tug in opposite directions, namely, the principle of the finality of judicial decisions and the principle that judicial decisions should be correct and just according to law. These principles are reconciled by the judicial process of an appeal, under which the opportunity and means are afforded to the "dissatisfied" or aggrieved party to apply to a superior court to reverse, correct or vary the decision of the inferior court. Curiously enough, there is no statutory definition of an "appeal," but it has been described as an application to set aside or vary the decision of another tribunal on the ground that it was wrongly made.³² The underlying basis of an appeal, which is a plea from one judicial authority to a

³² See *Supreme Court Practice*, Vol. 1, Para. 59/1/2.

higher authority,³³ is that the decision of the inferior tribunal may be erroneous or wrong and ought to be put right. The system of appeals assumes the fallibility of courts, judges and juries who may make mistakes about law or fact or both and provides for a hierarchy of courts to correct such mistakes.

Every appeal that is lodged may be regarded as the affirmation of faith in, or as an attack on, the judicial process. On one view, it bears the mark of confidence that the mistaken judicial decision at first instance can be duly remedied or corrected by a higher judicial authority, and on the other view, it carries the cry of a defeated litigant who disparages the court at first instance for its mistaken judicial decision, which he is compelled to seek to overturn. The appeal system provides the means of expression for both these extreme views; it constitutes a crucial feature of the machinery of justice.

There is indeed a wide admixture of judicial and social reasons which make the appeal system necessary as part of the fabric of English civil justice.³⁴ These include the following objectives: (a) to provide a powerful corrective to any sense of grievance which the losing party may experience by making available to him the means of correcting the judicial decision; (b) to advance the public and social interest to

³³ At common law and in equity, there were formerly procedures for challenging judicial decisions at first instance by what is commonly called "collateral attack," *i.e.* applying to the same court or its equivalent to review and reverse or vary its own decisions, as for example, at common law, by a motion to arrest judgment or to enter judgment *non obstante veredicto*, or in equity, by applying to the Lord Chancellor to set aside or vary his own original decision.

³⁴ See Jacob, "The Administration of Civil Justice" in *The Reform of Civil Procedure Law* (1982) p. 85; and for fuller discussion, see Herzog and Karlen, *Attacks on Judicial Decisions*, Chap. 8 Vol. XVI, Civil Procedure, International Encyclopedia of Comparative Law.

correct erroneous judicial decisions which should not be allowed to stand, since otherwise they might create a sense of injustice and unfairness and a loss of confidence in the administration of justice; (c) to produce a correct and just result according to law in the particular case; (d) to compel judges and other judicial officers to be more careful when making decisions at first instance and to be judicial and reasonable and to apply the law and not to be arbitrary; (e) in the English and common law systems in which the binding character of judicial precedent plays such a crucial part, to enable the appellate tribunal to expound and clarify the law, to build up a uniform system of law responding to social changes, and to develop the law in a harmonious and consistent manner; (f) to obtain a second judicial decision by the appellate tribunal consisting of a greater number of judges, who are considered to be more experienced and mature and who can, within the narrower compass of appeal, devote greater deliberation to the relevant facts and the law. These reasons or objectives, of course, do not all apply to every appeal, but this should be taken into account when, as it appears, there are many lawyers and others, including some judges, who would disfavour and discourage appeals.

The right of appeal is a part of the substantive law, and it is not a mere matter of procedure. It requires legislative authority and neither the inferior nor superior tribunal nor both combined can create such a right³⁵ nor can the inherent jurisdiction of the court be invoked to review a judicial decision by way of appeal. It cannot be abrogated or abridged except by statutory provision. It constitutes part of the fundamental right to a fair trial or hearing, for the

³⁵ See *Supreme Court Practice*, Vol. 1, paras. 59/1/2.

appeal is but the sequel of the trial or hearing at a higher level of the judicial hierarchy.

Historical Background

Before 1875, in the machinery of English civil justice, there was no common system of appeals from courts of first instance either in the hierarchy of the courts or in their procedures. On the contrary, the operation of the appeal process, to the extent that it did prevail, was archaic, disordered and bordering on the chaotic. It is hardly credible to conceive how complex, complicated and contrary to the interests of justice the appeal process then was and the extent to which it disfigured and distorted the fabric of English civil justice. A brief sketch of the pre-1875 systems of appeal in equity and at common law should demonstrate that there are times in the history of civil procedure when it becomes necessary to be creative and courageous and to throw out the old and bring in the new order.³⁶

In equity, an appeal from the Court of Chancery lay either to the Court of Appeal in Chancery or to the House of Lords, at the option of the appellant, and further appeal lay from the Court of Appeal in Chancery to the House of Lords. The Court of Appeal in Chancery consisted of the Lord Chancellor and the Lords Justices, but in practice it generally divided into two courts, in one of which the Lords Justices sat and in the other the Lord Chancellor presided alone, though his court was closed when Parliament was in session. If the Lords Justices differed, the appeal failed and a further appeal to the House of Lords would result. The

³⁶ See First Report of the Judicature Commissioners [4130] (1869), p. 20 *et seq.* The Report also deals with appeals from the Probate, Divorce and Admiralty Courts.

jurisdiction of the Court of Appeal in Chancery extended to all orders and decisions of the court below, whether interlocutory or final and whether on questions of fact or law. An appeal to the Master of the Rolls or a Vice Chancellor to rehear his own decree could be excluded by a formal procedure called Enrolment at the instance of any party at any time within five years from the date of the decree or order, though in such event an appeal would lie to the House of Lords. Both the Court of Appeal in Chancery and the House of Lords proceeded on the same record and evidence which were before the court from which the appeal was brought, and the Court of Appeal in Chancery had all the powers possessed by the court of first instance, for example, to allow amendments and in some cases to receive new or further evidence. The time for appeal in Chancery was a period of five years from the date of the original decree or order, unless extended by the court, and the time for appeal from the Court of Appeal in Chancery to the House of Lords was two years from the date of the enrolment of the order until after the beginning of the next session of Parliament. When an appeal was brought against a final decree, all prior interlocutory orders could be included in the appeal. In the Court of Chancery, no security for costs of the appeal was required beyond a deposit of £20 with the Registrar, and an appeal did not operate as a stay of execution unless the court so directed.

At common law, appeals and error from the courts of Queen's Bench, Common Pleas and Exchequer lay in all cases to the Court of Exchequer Chamber, from whose judgments a further appeal or error, as the case may be, lay to the House of Lords. In certain cases, the appeal was brought by way of error and in other cases by way of appeal strictly so called. Error was brought, as of right, on matters

of law apparent on the record, on judgments on demurrer, on bills of exceptions for the improper reception or rejection of evidence or for misdirection by the judge at the trial, on special cases, on judgments *obstante veredicto* and for arrest of judgment. Appeal lay, as of right, from decisions upon points of law reserved at the trial, and with the leave of the court on motions for a new trial on the ground of improper reception or rejection of evidence or a misdirection of the judge. Error, however, could not be brought from any interlocutory judgment, *e.g.* a judgment allowing a demurrer, until the final determination of all the issues of law and fact joined on the record. The Court of Exchequer Chamber was formed by a combination of all the judges of the courts of Queen's Bench, Common Pleas and Exchequer under such arrangements that errors and appeals from each of those courts were determined by judges taken from the other two. The court did not proceed simply on the materials which were before the court below, but a case was required to be made between the parties which must be settled by the judge if the parties differed. The time allowed for bringing error to the Exchequer chamber was six years from the date of judgment, and a further six years for bringing error from the Exchequer Chamber to the House of Lords. In cases of appeal, strictly so called, as distinguished from error in the common law courts, the notice of appeal was required to be given within four days after the decision was given, unless the time was enlarged, but on the other hand, no time was limited within which the party was obliged to prosecute his appeal. Every appellant, in an appeal technically so called, and every party who brought error was required to give substantial bail to pay the costs. In the courts of common law, appeal or error always operated as a stay of execution as soon as security was given.

System of Appeals

Against this background, it is not surprising that the Judicature Acts 1873–85, implementing the basic recommendations of the Judicature Commission,³⁷ swept away the existing hierarchy of courts and the procedures of appeal from courts of first instance and replaced them by an entirely new process. Instead of the various and discordant systems of appeal, a single Court of Appeal was established as part of the Supreme Court of Judicature to which appeals would lie from all the Divisions of the High Court; and instead of the then divergent appeal procedures between the different courts, a common procedure for appeals was created for appeals from all courts of first instance, though some of the more valuable features of the equity procedures were retained. This was one of the most notable and remarkable achievements of the Judicature Acts, and it may fairly be claimed that the system of appeals and procedures they introduced forms one of the finest features of the fabric of English civil justice.

The English system of appeals, taking the Court of Appeal Civil Division as the model, follows the typical hierarchy of courts. There are three tiers of courts, forming a kind of pyramid, the base consisting of numerous courts of first instance, narrowing to the higher level of the Court of Appeal at which most cases terminate but in relation to the others it functions as an intermediate court, and culminating in a comparatively few cases at the apex of the appellate judicial structure, the House of Lords. There are, of course, many variations of this model, since there are several

³⁷ *Ibid.*

classes of cases in which there may be four or more layers or tribunals with lower intermediate review bodies. The outstanding feature of the English system is that (save for the exceptional case of a direct appeal from the High Court to the House of Lords) appeals from all courts and tribunals to review judicial decisions, whether given at first instance or by other intermediate review bodies, must ultimately be taken first to the Court of Appeal, and thence, if at all, to the House of Lords. The Court of Appeal thus stands at the point of crucial convergence in the structure of the judicial system.

The system of appeals is extremely well safeguarded by restrictions and limitations on the right of appeal. These greatly curtail or inhibit the exercise of this right and are designed, of course, to prevent the right of appeal from being misused, as for example, by seeking to obtain a fresh trial or hearing at second instance or other collateral procedural advantages. They are also designed to exclude from the civil appeal process, either absolutely or conditionally, appeals against judicial decisions which are inappropriate for civil appeals or which are not reasonably well-founded or serious or genuine or important from the point of view of the individual or the public interest. These restrictions and limitations are partly imposed by statute and are partly derived from the principles applied by the appellate court or by its practice and procedure. Those imposed by statute are either absolute in the sense that the statutory provision prohibits an appeal in a specified class of case, or conditional in the sense that an appeal may lie only with the leave of the court giving the instant decision or the leave of the court addressed. In practical terms, the cumulative effect of these restrictions and limitations is to trim down the number of appeals that are brought to a manageable

total with which the appellate court can adequately cope and which they can dispose of after due deliberation.³⁸

Court of Appeal

The Court of Appeal forms part of the Supreme Court and consists of two divisions, namely, the Criminal Division and the Civil Division.³⁹ We are here, of course, concerned with the Civil Division only, and unless otherwise indicated, the term "Court of Appeal" will be used to refer to that division.

As already indicated, the Court of Appeal is the centre-piece in the hierarchy of the civil judicial structure and is the model for the civil appeal process. It is therefore fitting to dwell briefly on some of its more important features, such as its constitution, jurisdiction, procedure and powers and the principles which govern its proceedings.

Constitution

The Court of Appeal consists of the Master of the Rolls as its president, and a specified number of ordinary judges of that court who are called "Lords Justices of Appeals."⁴⁰ It

³⁸ Thus, in 1984, in the Court of Appeal (Civil Division) there were 902 appeals (final and interlocutory) outstanding at the beginning of the year and 873 outstanding at the end of the year, and there were 1,491 appeals set down and 1520 appeals disposed of during the year. See Judicial Statistics 1984, Cmnd. 9599, Tables 1.11 and 1.12.

³⁹ See Supreme Court Act 1981, ss.1 and 3. The president of the criminal division is the Lord Chief Justice, and he or one Lord Justice sits with the puisne judges, mainly from the Queen's Bench Division to hear and deal with criminal matters. For the business of the Criminal Division, see Supreme Court Act 1981, s.53.

⁴⁰ See Supreme Court Act 1981, s.2. Under the power to do so, the number specified in the 1981 Act has been increased to 21. There are also ex-officio judges, *ibid.*; and former Lords Justices are often co-opted to sit as members of the Court.

sits in London and imparts a highly centralised pull over the whole civil judicial process. Until 1934, on the principle of specialisation, it sat in two specialised courts, one in Chancery and one in common law matters, each comprising the same specialist judges during the term of office as Lords Justices.⁴¹ Since 1934, when County Court appeals were transferred from the Queen's Bench Divisional Court to the Court of Appeal, the courts of the Court of Appeal have ceased to be specialist courts, and indeed, next to the House of Lords, they are the least specialist of all courts. The Lords Justices are appointed from all the divisions of the High Court, so that there is a considerable intermix of experience and expertise between them. In place of specialisation we have what is commonly called "cross-fertilisation," under which each member of the court contributes his own distinctive knowledge and understanding of the law to the subject in hand. In this way, the judgment of the court becomes more rounded and authoritative.

For final appeals, except from County Courts, the general rule is for the Court of Appeal to sit in a collegiate body of three judges, but although the court is a single body, the judges retain their separate identity and individuality. They can and often do deliver their own separate judgments and, of course, any one of them may give a dissenting judgment or all may arrive at the same conclusion for different reasons. In recent years, however, there has been a growing practice for a selected member of the Court of Appeal to deliver the leading judgment, with which the other members of the court express their agreement. Of course, if a judge in the Court of Appeal really has no contribution of

⁴¹ Many believe that the 1920s and early 1930s enjoyed the golden era of the Common Law Court of Appeal.

his own to make, it would be unhelpful for him to give a contrived judgment, but the practice of simply expressing agreement with the leading judgment may have the effect of greatly impoverishing the development of English jurisprudence in all areas of the law, since it is not unreasonable to expect that judges of the calibre of members of the Court of Appeal would have useful reasons of their own, even for agreeing with the leading judgment. This practice should be carefully watched and should be followed only in exceptional cases, otherwise the judges of the Court of Appeal will appear to be striving for anonymity which is the characteristic feature and failing of all continental courts and chambers.

The Court of Appeal has or may have conferred on it extensive powers to sit as a two-judge court.⁴² Such a court has all the powers, jurisdiction and authority of the full Court of Appeal.⁴³ Yet there may be an impression that a two-judge court, save where the parties have consented, is a somewhat diluted version of a three-judge court and that its decisions do not carry the same force, authority and influence as the decisions of a three-judge court. This applies especially to interlocutory judgments and orders and County Court judgments, for in these classes of cases the appeal to the Court of Appeal is for all practical pur-

⁴² See Supreme Court Act 1981, s.54(4). These powers extend to interlocutory appeals *ibid.* s.54(4)(a) and County Court appeals under an order made under *ibid.*, s.54(4)(e). If the members of such a court are divided, a party may apply to have the case re-argued before and determined by an uneven number of judges not less than three *ibid.* s.54(5).

⁴³ There is, however, a question whether the full Court of Appeal is bound by the decision of a two-judge Court on an interlocutory matter, see *Boys v. Chaplin* [1968] 2 Q.B. 614, C.A., though it may be doubted whether this case has survived the statutory provisions of Supreme Court Act 1981, s.55(4).

poses the final appeal. These constitute more than three-fifths of all the appeals actually heard and disposed of by the Court of Appeal; and it seems strange, to say the least, that such a large proportion of appeals is left to be dealt with by a two-judge court.⁴⁴ As a matter of principle and certainly when resources are or can be made available, it should be urgently considered whether these classes of appeals should be heard and determined by a three-judge Court of Appeal.

Jurisdiction

As might be expected, the jurisdiction of the Court of Appeal is as wide and extensive as may be. It encompasses the whole body of the law, except the criminal law. For the purposes of appeal, what is not a criminal cause or matter is a civil matter.⁴⁵ In such matters, subject to statutory exclusions and conditions, appeal lies to the Court of Appeal against the judicial decisions, whether final or interlocutory, of all the courts of the High Court, the County Courts and other specialist courts and tribunals.⁴⁶ It is not surprising, therefore, that with such a vast catchment area of appeals, the Court of Appeal should be one of the busiest

⁴⁴ In 1984, there were 280 County Court (final) and 692 interlocutory appeals, making a total of 972 compared with 558 other appeals disposed of after a hearing by the Court of Appeal, see 1984 Judicial Statistics, Cmnd. 9599, Tables 1.11 and 1.12.

⁴⁵ "The civil division of the Court of Appeal shall exercise the whole of the jurisdiction of that Court not exercisable by the Criminal Division." Supreme Court Act 1981, s.53(2), and see *ibid.*, s.17(1)(a). The jurisdiction of the Criminal Division of the Court of Appeal is explicitly spelt out in *ibid.* s.53(2) and (4).

⁴⁶ Examples include the Employment Appeal Tribunal and Social Security Commissioners.

courts in the land.⁴⁷ Its judges bear an enormous burden of difficult and demanding work, day in day out, to which they have to apply themselves with immense concentration and application. They carry a heavy and great responsibility in reviewing the decisions against which appeals are brought, with due and mature deliberation, in order to arrive at a correct and just result according to law. Apart from its primary function to do justice in the particular case, both from the point of view of the parties and the public interest, the Court of Appeal exercises an outstanding and crucial influence over the whole body of the law. It acts as a unifying and authoritative body to sustain and develop the basic concepts of English jurisprudence, and it helps to build up a coherent, uniform, harmonious and systematised framework of principles in all branches of the law, including the administration of justice. In some cases, it may perhaps be too timid and cautious, even hidebound; in other cases it may perhaps be over-bold, imaginative, creative and even reformist. For all practical purposes, its decisions are the final appeal,⁴⁸ and they are binding, not only on all inferior courts, but as a general rule on the Court of Appeal itself.⁴⁹

In several classes of cases, an appeal to the Court of Appeal is entirely prohibited, as for example, from any judgment of the High Court in any criminal cause or

⁴⁷ The other equally busy court is of course the Court of Appeal Criminal Division.

⁴⁸ In 1984, the House of Lords determined 39 civil appeals from the Court of Appeal, affirming the order in 23 cases, reversing it in 15 cases and varying it in one. See 1984 Judicial Statistics Cmnd. 9599, Table 1.6.

⁴⁹ *Young v. Bristol Aeroplane Company* [1944] K.B. 718, C.A.; *Gallie v. Lee* [1969] 2 Q.B. 17, C.A. where there are two conflicting decisions of the Court of Appeal, the court is not bound by either, nor is it bound where the previous decision or decisions of the court cannot stand with a decision of the House of Lords nor where the previous decision was given *per incuriam*.

matter.⁵⁰ Moreover, save in specified cases, of which the more important instances are where the liberty of the subject or the custody, education or welfare of a minor is concerned or where an injunction is granted or refused,⁵¹ an appeal from any interlocutory order or judgment made or given by the High Court or any court or tribunal will lie to the Court of Appeal only with the leave of the court or tribunal giving the decision or the Court of Appeal itself.⁵²

The requirement of leave to appeal against an interlocutory order or judgment has the effect that the Court of Appeal has no jurisdiction to hear such an appeal unless leave to appeal has first been granted. This is clearly a serious restriction on the right of appeal. Its justification is said to lie in the nature of an interlocutory order or judgment, which is made or given at the stage of pre-trial to direct the future course of the proceedings, and it is therefore not fitting that the Court of Appeal should entertain such an appeal without a judicial warrant in the particular case that it should do so. Two questions, however, arise over the requirement of leave to appeal as a pre-condition to the hearing of the appeal. The first is that there is no developed jurisprudence as to the reasons why such leave should be granted or refused,⁵³ and in practice no reasons are given, so that this is one judicial decision which gives or may give the impression of being arbitrary, which discolours the fabric of civil justice. The second is that a sharp distinction is drawn between a final and an interlocutory order or judgment, and despite specific powers to make

⁵⁰ Supreme Court Act 1981, s.18(1)(a). The other classes of cases are specified in *ibid.*, sub-sections (b) to (g).

⁵¹ Supreme Court Act 1981, s.18(1)(h)(i) to (vi).

⁵² *Ibid.*

⁵³ See Jacob, "Leave to appeal to give or not to give?" in (1986) 5 C.J.Q.3.

rules of court to distinguish between final and interlocutory orders and judgments⁵⁴ no such rule has been made, and the question has been left in a state of uncertainty to be determined on a case-by-case basis, which is surely very unsatisfactory.

Procedure

From its creation in 1875 until 1955, the remarkable feature of the procedure of the Court of Appeal was that the judges came to hear the appeal entirely fresh, knowing nothing about the case or the questions arising for their decision. Indeed, even the respondent did not know what were the precise points being raised by the appellant, and although he might have an inkling from what was argued in the court below, he could well be taken by surprise. The notice of appeal was laconic and uninformative, and except where a new trial was sought, the grounds of appeal were not required to be stated.⁵⁵ This lack of precision of the ambit of the appeal was compounded by the lack of preparation of the material to be used on the appeal, which led to all the documents and the transcripts of all the evidence being produced on the appeal, although much of this material would turn out to be wholly irrelevant and unnecessary and would thus greatly add to the costs of the appeal.

The whole appeal was expounded and unfolded before the judges through the oral presentation of their respective cases by counsel on both sides, with no limit on the length of time each took to do so. The point or points of law and fact arising for decision were defined and thoroughly probed

⁵⁴ 1981, s.60.

⁵⁵ An informal notice of intention to appeal was sufficient, see *Little's Case* (1878) 8 Ch. D. 806.

and sifted in the course of the arguments of counsel and the process of dialectic examination of the issues between counsel and the members of the court, sometimes between the members of the court themselves. After the addresses of counsel and perhaps a short-huddled consultation between them, the judges would ordinarily each deliver an oral *ex tempore* judgment, unless of course they decided to reserve judgment.

In 1955, considerable improvements were introduced into the practice of the Court of Appeal.⁵⁶ The notice of appeal was required to specify the grounds of the appeal and the precise form of order sought,⁵⁷ and equally the respondent was required to serve a respondent's notice if he wished to contend that the decision of the court below should be affirmed on grounds other than those relied on by that court or that that decision should be varied or was wrong, and in such case to specify the precise order sought⁵⁸; and these notices were binding on the parties and would not be allowed to be departed from without the leave of the court. The element of surprise was thus eliminated from the appeal process. Time and costs were also saved by the requirement that only the relevant parts of the transcript of evidence should be lodged.⁵⁹ Counsel were encouraged to exchange lists of authorities, and the judges were encouraged, before the hearing, to read the notice or notices of appeal and the transcript of the judgment under appeal;

⁵⁶ See R.S.C. (Appeals) 1965, implementing the main recommendations of the (Evershed) Report of the Committee on Supreme Court Practice and Procedure (Cmnd. 8878 (1953)), para. 582.

⁵⁷ See R.S.C. Ord. 59, r. 3.

⁵⁸ See R.S.C. Ord. 59, r. 6.

⁵⁹ R.S.C. Ord. 59, r. 9(1)(g), introduced in 1965, though embodying the previous practice.

but the appeal remained basically an oral process and no time limit was placed on the presentation of the respective cases by counsel for the parties.

Since 1981, the procedure of the Court of Appeal has been changed in profound and thoroughgoing ways, and except for the oral hearing of the appeal, it bears little resemblance to what it had hitherto been. The judges and the parties come to the appeal, not in ignorance or in the dark of what are the questions or issues to be decided, but fairly fully primed as to the points to be raised by both parties. The arguments to be advanced by the parties are sketched out in outline form. The relevant documents, evidence and authorities relied on by each of the parties are identified and spelt out. All pre-trial applications will have been disposed of. The changes are intended, on the one hand to preserve the orality of the presentation of the appeal, and on the other hand to speed the appeal process, to make it more effective, to concentrate on the real controversies between the parties without being distracted by procedural side-issues, and to save time, costs and labour and to enhance the quality of justice at the stage of appeal.

The basic changes have been made almost simultaneously in three areas, namely, (a) the introduction of written procedures; (b) the requirement for relevant documents to be lodged in due time and in proper order and condition, and (c) the conduct and control of the pre-appeal applications.

First, the importance of the notice of appeal has been enhanced, so that, properly drawn, it would define and confine the areas of controversy and enable counsel without the prolonged opening to come at once to the central issues.⁶⁰

⁶⁰ See *Practice Note (Court of Appeal : New Procedure)* [1982] 1 W.L.R. 1312; [1982] 3 All E.R. 376.

This was followed by the introduction of a valuable procedural tool, called the "Skeleton Argument" which each party is required to produce, setting out in skeleton or outline form the arguments or submissions of each party, supported by reference to such parts of the documents, evidence and authorities relied on,⁶¹ together with a separate document setting out the chronology of events.⁶² It should contain everything which it is thought the judges would be expected to write down, and it should be supplied in advance of the hearing to enable the judges and the opposite party to read it before the hearing. It is not intended that the Skeleton Argument should be a formal binding document, nor that it should replace the basic mode of oral presentation of the arguments of counsel without curtailing their time or their technique of advocacy, but it should act as a working note for the judges and the counsel on both sides. In this way, the procedure of the Court of Appeal has become a judicious mix of written and oral procedures.

Secondly, within seven days of the service of the notice of appeal, the appellant must leave certain specified documents with the Registrar of Civil Appeals, who will set the appeal down in the appropriate list, and within 14 days thereafter, the appellant must lodge certain specified documents and the Registrar may give directions in relation to the documents to be produced at the appeal and in the manner in which they are to be presented.⁶³ The documents

⁶¹ See *Practice Note* [1983] 1 W.L.R. 1055; [1983] 2 All E.R. 34. See Jacob, "The Administration of Civil Justice" (1980) in *The Reform of Civil Procedural Law*, p. 86.

⁶² See *Practice Note* [1985] 1 W.L.R. 1156; [1985] 3 All E.R. 384.

⁶³ See R.S.C. Ord. 59, r. 9.

to be lodged must be in proper form and content and in good order and condition, and the prescribed time for their lodgment must be strictly adhered to. The Registrar will monitor whether these obligations are being observed and if they are not, the appeal may be delayed for hearing or even listed for dismissal for default of due compliance.⁶⁴

Thirdly, the crucial change in the conduct and control of the pre-appeal application has been the creation of the office of the Registrar of Civil Appeals.⁶⁵ This is one of the more important and imaginative of the recent reforms in English civil justice. The Registrar performs administrative as well as judicial duties. On the administrative side, subject to the directions of the Master of the Rolls, he may be described as the executive manager of the business of the Court of Appeal. On the judicial side, he has power to give directions not only as to the documents but also "to other matters incidental to the conduct of the appeal."⁶⁶ Applications to the Court of Appeal, unless otherwise directed, may be made *ex parte* or on summons to a single Lord Justice or to the Registrar.⁶⁷ The Registrar normally deals with what may be called routine pre-appeal applications, such as extensions of time, leave to amend the notices of appeal, security for costs, leave to adduce further evidence, expediting or vacating a hearing date and directions generally.

⁶⁴ See *Practice Direction (Errors in Documents)* [1983] 2 All E.R. 416; *Practice Statement (Preparation of Appeal Documents)* [1985] 1 All E.R. 841.

⁶⁵ See Supreme Court Act 1981, s.89(1), and Sched. 2, Pt. 2, para. 9. I had the great privilege of first proposing the creation of an office of this character to the Scarman Working Party on the Work of the Court of Appeal (Civil Division) (1978) who recommended the establishment of this office.

⁶⁶ See R.S.C. Ord. 59, r. 9(3).

⁶⁷ See R.S.C. Ord. 59, r. 14(1).

Indeed, he may give directions without a hearing and he may summons the parties for a hearing for directions or a pre-appeal review of his own motion. An appeal from his decision lies to a single Lord Justice. The office of the Registrar has become of exceptional importance in the procedure of the Court of Appeal, and it may well become necessary to appoint a second or deputy Registrar.

Powers

In exercising its jurisdiction as an appellate tribunal, the Court of Appeal possesses the plenitude of powers which are necessary to enable it to fulfil its functions as a superior court in the hierarchy of courts. Its powers are wide, extensive and comprehensive for all practical purposes. They are not limited, as they are in the case of the French *Cour de Cassation* or its equivalent in the civil law countries of Europe to uphold or quash the decision on a point of law and to remit the case to a lower court for a new decision, but they extend to upholding, reversing or varying the judicial decision under appeal and itself making such order as the justice of the case may require, including an order for a new trial.

In general terms, the Court of the Appeal has all the authority and jurisdiction of the court or tribunal from which the appeal is brought.⁶⁸ Its overriding powers include the power "to give any judgment and make any order which ought to have been given or made and to make such further or other order as the case may require"⁶⁹ and "to make any order, on such terms as the Court thinks just,

⁶⁸ Supreme Court Act 1981, s.15(3).

⁶⁹ R.S.C. Ord. 59, r. 10(3).

to ensure the determination on the merits of the real question in controversy between the parties."⁷⁰

In more specific terms, the Court of Appeal has power to order a new trial,⁷¹ to amend the pleadings and other documents and to exercise other ancillary powers of the High Court,⁷² to draw inferences of fact⁷³ and to order the appellant to give security for the costs of the appeal.⁷⁴

Further evidence on questions of fact may be received by the Court of Appeal, but where judgment has been given after the trial or hearing of the action on the merits such further evidence would be admitted only on special grounds, except as to matters that have occurred since the trial.⁷⁵ The requirement for such special grounds flows from the obligation of the parties to produce all their evidence, oral and documentary, at the trial itself. Accordingly, stringent restrictive conditions which must first be satisfied before fresh evidence of facts would be admitted on appeal have been authoritatively laid down and are strictly applied.⁷⁶ Such fresh evidence must be such that: (a) it could not have been obtained with reasonable diligence for

⁷⁰ R.S.C. Ord. 59 r. 10(4). The power may be exercised notwithstanding that the point has not been raised in the notice of appeal or respondent's notice, *ibid.*

⁷¹ See Supreme Court Act 1981, s.17, and R.S.C. Ord. 59, r. 11. The grounds on which a new trial may be ordered are manifold, see *Supreme Court Practice*, Vol. 1, notes to Ord. 59, r. 11, but in practice, with the virtual elimination of trial by jury, this power is rarely exercised after a trial by a judge alone.

⁷² See R.S.C. Ord. 59, r. 10(1).

⁷³ *Ibid.* r. 10(3).

⁷⁴ *Ibid.* r. 10(5). This rule is derived from the pre-1875 practice of the Court of Chancery.

⁷⁵ R.S.C. Ord. 59, r. 2.

⁷⁶ *per* Denning L.J. in *Ladd v. Marshall* [1954] I.W.L.R. 1489; [1954] 3 All E.R. 745, approved by the House of Lords in *Skone v. Skone* [1971] 1 W.L.R. 812; [1971] 2 All E.R. 582.

production at the trial; (b) it must have an important influence on the result of the case though not necessarily decisive; and (c) it must be credible, though not necessarily incontrovertible. In practice, these conditions have the effect that fresh evidence on matters of fact is comparatively rarely admitted on appeals after trial.

This feature of the English process of appeal is in sharp contrast with the practice prevailing in the appeal systems of the civil law countries of Europe. In France, for example, there is what is called the principle of the double degree of jurisdiction, at first and also at second instance. On this basis, the intermediate Court of Appeal acts as a court of trial, and the appeal takes the form of a trial *de novo*, at which the parties are entitled to introduce fresh evidence, oral and documentary, in order to enable the court to arrive at what is regarded as a "more correct" decision, and to give what may be called a judgment at second instance.⁷⁷

Principles

The Court of Appeal has fashioned for itself several general principles to govern the ways in which to exercise its appellate jurisdiction and powers. These principles are derived largely from their own decisions, supported in many instances by the authority of the House of Lords. They have not been gathered together in a body of rules of court, and perhaps this is just as well, since in the form of judicial decisions they retain a greater measure of flexibility in their application. The policy underlying the principles applied by the Court of Appeal is on the whole more restrictive than expansive; they have the effect and are perhaps intended to

⁷⁷ See J. H. Merryman, *The Civil Law Tradition*, p. 127.

have the effect of creating barriers to appeals and of limiting the number and range of appeals. They are basically founded on the fundamental feature of the finality of judicial decisions, coupled with the aim of upholding the judicial process. The governing concept is that a party who has had his case duly heard and determined by a court or tribunal should be content with its decision, and there is no social or political need to provide an open avenue to reverse or vary that decision except within somewhat strict limits. The applicable principles of the Court of Appeal should therefore discourage rather than encourage appeals. Whether this policy and concept are right is of course a large question which can only be addressed by examining what are the principles on which the Court of Appeal carries out its functions. It will not, however, be possible here to do more than to sketch briefly some of the more important of these principles.

The primary principle governing an appeal to the Court of Appeal is that it is "by way of rehearing."⁷⁸ These words have been interpreted to have the limited meaning that the Court of Appeal will review the trial at first instance but will not itself conduct a re-trial, as is the practice in the appeal system of the civil law countries of Europe. The Court of Appeal does not actually re-hear the case afresh, with a new hearing of witnesses or parties in the same order as at first instance, but reviews, so far as necessary, the whole of the evidence and the course of the trial in the court below; it carries out a rehearing on the documents.⁷⁹ This principle is reinforced by the rule that fresh evidence may be

⁷⁸ R.S.C. Ord. 59, r. 3(1).

⁷⁹ See, *per* Lord Wright in *Powell v. Streatham Manor Nursing Home* [1935] A.C. 243, 263. This principle is derived from the pre-1875 practice of the Court of Appeal in Chancery.

received by the Court of Appeal on an appeal from a judgment after a trial on the merits only if special grounds are shown.⁸⁰

On the basis of the finality of judicial decisions, the burden is on the appellant in the Court of Appeal to show that the decision of the court was wrong, and if the Court of Appeal is not so satisfied, the appeal will be dismissed.⁸¹ Accordingly, if the two judges in a two-judge court disagree the appeal will fail,⁸² but a party may apply to have such an appeal re-argued before a three-judge court.⁸³

The Court of Appeal may consider facts, matters and changes that have occurred after the date of the trial which substantially affect a basic assumption made at the trial.⁸⁴ It may also consider changes in the law made by legislation after the date of trial provided the legislation has retrospective effect,⁸⁵ but not legislation which is not retrospective.⁸⁶ In short, the Court of Appeal may determine the appeal according to the state of the facts and the applicable law at the time of the appeal.

On an appeal on a question of law, the task of the Court of Appeal is straightforward enough, either to uphold the

⁸⁰ See R.S.C. Ord. 59, r. 10(2) and see p. 230, above.

⁸¹ See *per* Lord Esher M.R. in *Colonial Securities Trust Co. v. Massey* [1896] 1 Q.B. 38, 39. In *Brown v. Dear* [1910] A.C. 373, 374. Lord Loreburn L.C. said "When a litigant has obtained a judgment in a Court of Justice . . . he is entitled not to be deprived of that judgment without very solid grounds."

⁸² The old practice was that the junior judge withdrew his judgment.

⁸³ Supreme Court Act 1981, s.54(5).

⁸⁴ See R.S.C. Ord. 59, r. 10(2); *Jenkins v. Richard Thomas & Baldwin Limited* [1966] 1 W.L.R. 476; [1966] 2 All E.R. 15, C.A.; *Mullholland v. Mitchell* [1971] A.C. 666.

⁸⁵ See *Att.-Gen. v. Vernazza* [1960] A.C. 965.

⁸⁶ *Re A Debtor, ex p. Debtor* [1936] Ch. 237, C.A.

decision of the lower court or to reverse or vary it and substitute its own opinion on the point.

On the other hand, on an appeal on questions of fact, the principle of the finality of judicial decisions plays a prominent part. On this basis the Court of Appeal will rarely disturb the findings of the primary facts by the trial judge, where such findings were based, even in part, on the testimony of witnesses whom he has seen and heard, whose bearing, manner, conduct and demeanour he has observed and whose intelligence, position and character he has been able to estimate.⁸⁷ However, where the trial judge has failed to use or has misused his advantage of seeing and hearing the witnesses, the Court of Appeal will not shrink from its responsibility of reversing decisions so arrived at.⁸⁸ Nevertheless, under its powers to draw inferences of fact, the Court of Appeal is more ready to form an independent opinion of the proper inferences to be drawn from the specific or primary facts found by the trial judge.⁸⁹

On an appeal against the exercise of judicial discretion, the Court of Appeal will assume that the judge properly exercised his discretion unless the contrary is shown.⁹⁰ It will not entertain an appeal against an order which it was within the discretion of the judge to make, unless it is shown that he exercised his discretion under a mistake of law, or a

⁸⁷ See *Powell v. Streatham Manor Nursing Home* [1935] A.C. 243; *S.S. Hontestroon v. S.S. Sagaporack* [1927] A.C. 37, 47 (*per* Lord Sumner). It is extremely rare indeed for the Court of Appeal to set aside the findings of the trial judge and to order a new trial by a judge alone, see *Meek v. Fleming* [1961] 2 Q.B. 366. (concealment of material evidence); *Jones v. National Coal Board* [1957] 2 Q.B. 55 (substantial interference by trial judge).

⁸⁸ p. 229, above.

⁸⁹ See *Bemax v. Austin Motor Company Limited* [1955] A.C. 370.

⁹⁰ *Bew v. Bew* [1899] 2 Ch. 467.

misapprehension of the facts or applied incorrect principles or took into account irrelevant matters or failed to take into account relevant matters or failed to exercise his discretion at all or the order would result in injustice or was wrong.⁹¹ In particular, the order will not be disturbed merely because the judges on appeal would have exercised the discretion differently.⁹²

On an appeal against the verdict of a jury, the Court of Appeal will rarely interfere with the verdict if there was evidence to support it. The verdict will only be set aside and a new trial ordered if no jury properly directed could reasonably have returned it,⁹³ so that if the court is satisfied that if the jury were rightly directed, it would still have returned the verdict, the verdict will stand.⁹⁴

On an appeal against an award of damages, the Court of Appeal rarely interferes with the amount awarded even though they may have themselves awarded a different figure. They will only do so, where the award is made by a judge, where they are satisfied that he acted on a wrong principle of law or has misapprehended the facts or has made a wholly erroneous estimate of the damage suffered and where the award is made by a jury, that it was so

⁹¹ See *Donald Campbell & Co. Ltd. v. Pollock* [1972] A.C. 732; *Evans v. Bartlam* [1937] A.C. 473; *Ward v. James* [1966] 1 Q.B. 273, C.A.

⁹² See *Charles Ossenton & Co. v. Johnston* [1942] A.C. 130, 138.

⁹³ The grounds for an application for a new trial include misdirection, or the improper admission or rejection of evidence, or the verdict of the jury was not taken on a question which the trial judge was not asked to leave to them, but in such cases, a new trial will not be ordered unless some substantial wrong or miscarriage was occasioned (see R.S.C. Ord. 59, r. 11(2)). Other grounds for a new trial are that there was no evidence to go to the jury or that the verdict was against the weight of the evidence.

⁹⁴ *Mechanical Inventions Co. Ltd. v. Austin* [1935] A.C. 346.

excessive or inadequate that no jury could reasonably have awarded it.⁹⁵

The general rule is that an appeal to the Court of Appeal lies only on points, whether of law or fact, that have been taken in the court below, although the respondent can support the decision of the court at first instance on any other grounds than those relied on by that court.⁹⁶ The Court of Appeal will therefore not entertain an appeal on a point not taken at the trial, unless all the relevant facts are before the court as completely as would have been the case if it had arisen at the trial.⁹⁷

An appeal to the Court of Appeal will not operate as a stay of execution of the judgment of the court below unless that court or the Court of Appeal itself or a single judge of the Court of Appeal otherwise directs.⁹⁸ The principle is that the successful litigant should not be deprived of the fruits of his litigation, or have funds locked up to which he is *prima facie* entitled.⁹⁹

The Court of Appeal will apply to appeals the rule that costs follow the event, so that ordinarily the court will order the losing appellant to pay the costs of the appeal and the unsuccessful respondent to pay these costs as well as the

⁹⁵ See *Scott v. Musial* [1959] 2 Q.B. 429. The Court of Appeal can substitute its own award of damages for that of a judge but in the case of an award of damages by a jury, the Court of Appeal has no power to reduce it or increase it, unless all the parties consent or the receiving or paying party consents to the amount being reduced or increased as the case may be (see Ord. 59, r. 11(4)).

⁹⁶ See Ord. 59 r. 6(1)(b). For this purpose a respondent's notice of appeal must be served.

⁹⁷ See *The Tasmania* (1890) 15 A.C. 223.

⁹⁸ See R.S.C. Ord. 61, r. 13(1)(a). This reverses the pre-1875 practice of the superior common law courts. If a stay of execution is granted, terms may be imposed.

⁹⁹ See *The Annot Lyle* (1886) 11. P.D. 114.

costs incurred in the court below. This conclusion no doubt appears to be proper and satisfactory to the winning appellant, but to the respondent who loses the appeal it may appear, as though, so far as the costs of the appeal are concerned, he is being called upon to pay for the mistake of the judge or court below. In the great majority of appeals he will have been doing no more than endeavouring to support the decision of the judge or the lower court which was found by the Court of Appeal to be erroneous. It was that error which led to the appeal. In these circumstances, the question arises for consideration whether the State should recognise its responsibility to recompense a party who has suffered as a result of such error. There may, therefore, be a strong case for the view that a discretionary power should be conferred on the Court of Appeal to order that the unsuccessful respondent should have his costs of the appeal refunded by the State, on the principles, for example, of the Suitors' Funds Act in New South Wales. Such a power would be exercisable having regard to all the circumstances surrounding the appeal, so that, for example, such an order would be withheld where the respondent failed to recognise that the judicial decision appealed against was mistaken or where he sought to uphold it on grounds other than those relied on by the court below.

Miscellaneous Appeals

In the English system of civil justice, for the reasons already indicated that make an appeal against judicial decisions necessary,¹ especially the production of a correct and just result and the provision of a corrective to any sense of

¹ See p. 211, above.

grievance, a right of appeal is provided, subject in particular instances to specified restrictions and limitations, against all judicial decisions made at first instance by all courts and tribunals and other judicial decision making persons or bodies. There are a vast number and great variety of such courts, tribunals, persons and bodies,² each of which has its own hierarchy of appeals, its own constitution, jurisdiction, powers and procedures and applies its own principles. These differences greatly increase the complexities and technicalities of the structure and operation of civil appeals, and indeed it may be said that the present scene of the English system of civil appeals is that of a veritable wilderness, with a confused mass and jumble of individual practices and procedures. It is no doubt necessary to retain the manifold and multifarious courts, tribunals, persons and bodies who are charged with making judicial decisions. On the other hand, the time has surely come to consider producing order out of chaos in the process of appeal and to introduce greater simplicity and a coherent, common and uniform system in the practice and procedure of appeals against all judicial decisions at first instance, though of course, so far as may be necessary, variations may be included to meet the specific requirements of any particular category of appeals.

Two further matters in the appeal system may be briefly mentioned.

The machinery of appeals and reference to the High Court by way of case stated is extremely valuable.³ It is

² See David Price, *Appeals* (London Format Publishing, 1982). The author lists 182 courts, tribunals, persons and bodies whose appeal systems he sketches. There may be others, such as the disciplinary bodies in sports organisations.

³ See Chitty and Jacob (21st ed., 1986), Chap. 122, Section 2, p. 1485.

derived from the ancient common law practice of the Court of King's Bench in the exercise of its supervisory jurisdiction over inferior courts and tribunals and it applies in a great variety of cases. The essential feature of a case stated is that it is a statement of the facts found by or admitted before the lower court or tribunal or other person or body and it states the question or questions of law or jurisdiction raised for the opinion of the High Court. It describes the proceedings, states the findings or admissions of fact, the contentions of the parties, the decision if any arrived at and the question or questions of law raised for the opinion of the court on what that decision should be or whether or not it was correct. The case stated removes all controversy on questions of fact and distills the questions of law which arise thereout. It is an extremely useful tool in the appeal system.

The system of appeals from tribunals other than the ordinary courts of law is extremely complex and in some instances bordering on the chaotic. In different classes of cases, the appeal lies to a single judge of the Queen's Bench Division, or of the Chancery Division; in some instances, it lies to a nominated judge; in other instances it lies to the Divisional Court of the Queen's Bench Division. In some cases, the tribunal may be requested by a party or may of its own motion state in the form of a special case for the opinion of the High Court any question of law arising in the proceedings. It would seem plain that such complexity and technicality in the system of appeals from tribunals is undesirable and that this system, at any rate, should be replaced by a simple, uniform and common process of appeals.

Appeals to the House of Lords

At common law, an appeal lay to the House of Lords, as part of the High Court of Parliament, in common law cases

from the Superior Common Law Courts and later from the Court of Exchequer Chamber by way of writ of error, and in equity cases from the Lord Chancellor and later from the Court of Appeal in Chancery by way of appeal.⁴ In 1876, a right of appeal by way of petition to the House of Lords from the new Court of Appeal was provided by statute.⁵ In 1934, this right of appeal was made subject to first obtaining leave to appeal from the Court of Appeal or of the House itself.⁶ In 1966, the House of Lords freed itself from

⁴ Probate appeals lay direct from the Probate Court and Divorce appeals lay from the Full Court of Divorce Judges.

⁵ See Appellate Jurisdiction Act 1876, s.3. This followed the recommendation of the Judicature Commissioners in their First Report (4130), p. 21. At that time, however, there was a strong tide running to abolish the appellate jurisdiction of the House of Lords for English appeals, but not for Scottish or Irish appeals. Indeed, this jurisdiction was in fact abolished by s.20 of the Supreme Court of Judicature Act 1873, which, however was not due to come into force until November 1874. In the interval, in February 1874, there was a change of government, from the Liberals under Gladstone to the Conservatives under Disraeli, and the tide began to run in the opposite direction towards retaining the House of Lords as the final Court of Appeal for English appeals. By the Supreme Court of Judicature (Commencement) Act 1874, the coming into force of the Judicature Act (1873) was deferred to November 1875. In August 1875, the Judicature Act of that year was passed and with the Judicature Act 1873 it came into force in October 1875 but it expressly provided that the provisions of the 1873 Act for the abolition of English appeals to the House of Lords should be further postponed to November 1876. In August 1876, the Appellate Jurisdiction Act was passed providing for the right of appeal from the Court of Appeal in England to the House of Lords by way of petition. See R. B. Stevens, "The Final Appeal," (1964) 80 L.Q.R. 343, where this dramatic story is unfolded in graphic detail, and R. B. Stevens, *Law and Politics* (1978). See also Appellate Jurisdiction Act 1887.

⁶ Administration of Justice (Appeals) Act 1934, s.1. In their First Report in 1869, (see n. 5), with uncanny prescience, the Judicature Commissioners had envisaged the need to make the decisions of the Court of Appeal final unless leave was first given either by that court or by the House of Lords.

the fetters of being bound by its own decisions.⁷ In 1969, a special procedure was provided to enable a "leap-frog" application for leave to appeal to be made direct from the High Court to the House of Lords, thereby by-passing the Court of Appeal.⁸

The House of Lords is the final Court of Appeal in England, Scotland and Northern Ireland.⁹ Its decisions are binding on that part of the United Kingdom from which the appeal is brought, unless the House expressly holds that it

⁷ *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234; [1966] 3 All E.R. 77, negating *London Street Tramways v. L.C.C.* [1898] A.C. 375. Very soon thereafter, the House of Lords first exercised their newly found freedom in *Conway v. Rimmer* [1968] A.C. 910, in which they held, departing from *Duncan v. Cammell Laird & Co. Ltd.* [1942] A.C. 624, that the certificate or affidavit of the appropriate Minister or other political head claiming to withhold production of a document on the ground of Crown privilege was not conclusive, but the court had an overriding discretionary power to look at the document to exercise the claim made and determine whether or not its production should be withheld on the ground that disclosure would be injurious to the public interest, which in fact the House in that case did, and ordered the disclosure of some of the documents that had been withheld.

⁸ Administration of Justice Act 1969, Pt. II. This in part implements a recommendation of the Evershed Committee on Supreme Court Practice and Procedure Final Report 1953 (Cmd. 8878), paras. 483–503. It was also envisaged by the Judicature Commissioners in 1869 in their First Report [4130] 1869, p. 24, who recommended a direct appeal to the House of Lords from the High Court "if the respondent consents to that course being taken." To enable an appeal to be brought directly to the House of Lords, the trial judge must certify that he is satisfied that a sufficient case for an appeal to the House of Lords has been made out to justify an application for leave to bring such an appeal, and that all parties consent to the grant of this certificate. The judgment to be appealed must involve a point of law of general public importance and relate to the construction of a statute or statutory provision or is one in which the High Court is bound by judicial precedent to follow. If these conditions are satisfied, the House of Lords may grant leave for the appeal to be brought direct to the House.

⁹ See L. Blom-Cooper and G. Drewry, *Final Appeal* (1972).

is stating the law of another part.¹⁰ In its appellate jurisdiction, the House of Lords consists of the Lord Chancellor, the eight Lords of Appeal in Ordinary, commonly called Law Lords, and such peers as hold or have held high judicial office.¹¹ For the purposes of its appellate jurisdiction, the House sits in Committee. There are two Appeal Committees, each ordinarily consisting of three Law Lords, to consider petitions and applications for leave to appeal or interlocutory or post-appeal causes, and two Appellate Committees, each ordinarily consisting of five Law Lords,¹² to consider the substantive appeals. Each Committee reports its conclusion to the House.¹³

The House of Lords is, of course, Master of its own procedure, and for this purpose, the House has given directions and made standing orders regulating the conduct of appeals.¹⁴ Under its powers to grant or refuse leave to appeal, save for the appeals in relation to which the Court of Appeal has granted such leave, the House is able to

¹⁰ See, e.g. *Donoghue v. Stevenson* [1932] A.C. 562, which was a Scottish appeal, but Lord Atkin said that he was stating the law of England as well as of Scotland.

¹¹ See Appellate Jurisdiction Acts 1876, and 1887; see also A. Paterson, *The Law Lords* 1982. The Law Lords are appointed from England and Scotland in a finely balanced proportion, and the peers who sit with them may be drawn from any part of the United Kingdom. Before 1844, lay peers were entitled to hear appeals and vote on judicial decisions of the House, see *O'Connell v. R.* (1844) 11 Cl. and F. 155, pp. 421–426.

¹² If present, the Lord Chancellor will preside, otherwise it will be the senior Law Lord.

¹³ Standing Order No. 81 of the House of Lords, see *Supreme Court Procedure*, para. 4980.

¹⁴ See "Directions as to Procedure and Standing Orders Applicable to Civil Appeals," *Supreme Court Practice*, paras. 4901–5013. Separate directions have been given as to the procedure applicable to criminal cases, see *Supreme Court Practice*, paras. 5014–5016. Unlike the Rules of the Supreme Court, these directions and standing orders are not made under statutory authority, but by virtue of the inherent jurisdiction of the House of Lords to control its own process, both in its legislative and judicial capacities. They have the force of law and no question can arise of their being *ultra vires*.

determine which appeals it will or will not entertain,¹⁵ but these powers are exercised on a case-by-case basis, rather than by categories of cases.¹⁶

The first requirement for an appeal to the House of Lords is leave to appeal. Application for such leave must first be made to the Court of Appeal, and if leave is refused by that court an application can be made to the House of Lords. It is made by way of petition for leave to appeal, which must be lodged within one month from the date of the order complained of. The petition will be referred to an Appeal Committee, who will consider its competency and fitness for an oral hearing. Leave may be refused without an oral hearing. If the petition is referred to an oral hearing, the respondent will be notified and all the parties will be directed to attend. At the oral hearing, only brief, succinct, and concentrated argument will be allowed, at the end of which the Appeal Committee will give its decision whether to grant or refuse leave to appeal, but without giving any reasons or judgments therefor.¹⁷

An appeal to the House of Lords is by way of petition of appeal, which must be lodged within three months from the last order appealed against.¹⁸ Each of the parties must

¹⁵ In 1984, there were 125 petitions for leave to appeal in civil cases, of which 108 were disposed of, 80 being refused, 25 allowed, and 3 withdrawn, see Judicial Statistics 1984, Cmnd. 9599, Table 1.7. There were 4 "leap-frog" petitions for leave to appeal from the High Court, and all were allowed. No figures are given for the number of appeals for which the Court of Appeal granted or refused leave to appeal.

¹⁶ Exceptions exist in the categories of cases for which petitions for leave to appeal have been directed to be "incompetent," see Direction 6 of Directions as to Procedure, *Supreme Court Practice*, para. 4910.

¹⁷ There are a multitude of reasons why the Appeal Committee grants or refuses leave to appeal, see *per* Lord Roskill in *Wilson v. Colchester Justices* [1985] A.C. 750, and see Jacob, "Leave to appeal—to give or not to give?" [1986] 5 C.J.Q. 3. See also L. Blom-Cooper and G. Drewry, *Final Appeal*, pp. 146–149.

¹⁸ The procedure will follow the Directions given and Standing Orders made by the House of Lords, see n. 14. Unless legal aid has been

lodge a printed case, which must be a succinct statement of their argument in the appeal, settled by counsel and stating what are the issues arising in the appeal.¹⁹ Unless leave to appeal has been granted by the Court of Appeal, the petition of appeal must be signed by two counsel certifying that the appeal is reasonable.²⁰

The appeal will be heard by an Appellate Committee, ordinarily consisting of five Law Lords. At the hearing, although the Law Lords may be expected to have read the cases lodged by the parties, nevertheless arguments are addressed orally by counsel for both sides, without any time-limit being set for the presentation of their respective cases. Such oral arguments call for the exercise of great skill and expertise in forensic advocacy, especially as the Law Lords will be likely to intervene by posing penetrating questions, during the course of a dialectical debate. At the end of the hearing, the Law Lords will ordinarily reserve their decision, which will be contained in their written "speeches" and handed down on a later occasion.²¹ The decision of the House is arrived at by a majority of the Law Lords who heard the appeal.²² If it should become necess-

granted or the respondent waives the requirement, the appellant must give security for costs in the sum of £4,000, see dir. 20 *Supreme Court Practice*, paras. 4927-4932.

¹⁹ Dir. 22 of Directions as to Procedure, see n. 76. *Supreme Court Practice*, para. 4934. The Case should not contain detailed arguments or references or citations as in the case of the American "briefs" on appeal, see *per* Lord Diplock in *M.V. Yorke Motors v. Edwards* [1982] 1 W.L.R. 444; [1982] 1 All E.R. 1204.

²⁰ Standing Order IV, see *Supreme Court Practice*, para. 4985.

²¹ Formerly, each Law Lord would rise in his place and deliver his speech as if the House of Lords were in session.

²² The historic seminal decision in *Donoghue v. Stevenson* [1932] A.C. 562 creating a greatly extended dimension of the tort of negligence was arrived at in this way.

ary to enforce the order of the House of Lords, it must first be made an order of the High Court.²³

The powers of the House of Lords in the appeal are in no way confined or defined, except that the House "may determine what of right, and according to the law and custom of the realm, ought to be done." The House applies the principle which it has itself laid down for the Court of Appeal to follow in matters relating to questions of law, to questions of fact, to the exercise of discretionary powers, to the awards of damages and to applications for a new trial.²⁴ An appeal to the House of Lords does not operate as a stay of execution, unless such stay is granted by the Court of Appeal.²⁵

The large question whether the appellate jurisdiction of the House of Lords in English appeals should be retained or abolished was decisively answered in favour of its retention in 1876.²⁶ Its abolition has however been recently advocated in a somewhat desultory fashion and without much support.²⁷ At present, the appellate jurisdiction of the House of Lords has been overwhelmingly accepted as part of the fabric of English civil justice, not only for the considerable importance of some of their decisions,²⁸ but also on the ground that the system of civil justice is better served by having a three-tier rather than a two-tier system of appeals.

²³ See R.S.C. Ord. 32, r. 10.

²⁴ See pp. 231 *et seq.*, above.

²⁵ A stay will not be granted save in very exceptional circumstances: see *Supreme Court Practice*, Vol. 1, para. 59/13/5.

²⁶ See n. 5, p. 240, above.

²⁷ See Gardiner and Martin, *Law Reform Now* (Victor Gollancz Ltd., London, 1963), p. 16.

²⁸ In 1984, there were 80 English civil appeals of which 42 were determined, 24 being affirmed, 17 reversed and one varied. See Judicial Statistics 1984, Cmnd. 9599, Table 1.6.

4. Prospects for the Future

Looking Ahead

It would be idle to pretend that the present state of the fabric of English civil justice is in good working order and condition—it is not. This is so notwithstanding the virtual transformation of the system, as I have indicated earlier, during the last century and the considerable improvements introduced since the end of the Second World War.

For more than a century before the time of Jeremy Bentham, there was hardly a ripple of reform or even of change to ruffle the wretched waters of civil justice, either at common law or in equity. Since the age of Bentham,¹ great strides have been taken to change, improve and develop the

¹ More precisely, the date may be identified as February 7, 1828, when Henry Brougham, later Lord Brougham, Lord Chancellor, delivered his celebrated speech on Law Reform in the House of Commons. See *Speeches of Henry Lord Brougham, with Historical Introduction* (Edinburgh,

machinery of civil justice.² These were pointed mainly in two directions. The first direction was towards the sweeping renovations of civil procedure itself, which are generally known under the rubric of the "fusion of law and equity" and which were designed to simplify the means of the commencement of proceedings, to make more flexible the joinder of parties and claims in actions, to substitute a new system of pleadings for both common law and equity proceedings, to introduce the equity system of discovery into the common law courts, to enhance the system of pre-trial procedures, and to empower both the Courts of Common Law and of Chancery to recognise the same defences and award the same remedies. The second direction was towards the thorough reconstruction of the courts, including the creation of the County Courts with their own rules of procedure, the establishment of the Courts of Probate and of Divorce, and finally with a great leap forward by the Judicature Acts 1873–1875 the consolidation of all the Superior Courts into a single Supreme Court of Judicature, having a common Court of Appeal and operating under a common procedure contained in the Rules of Court.³ The foundations of the structure of civil judicature and procedure were thus firmly laid in 1875 and, subject to modifications which have been made since the War, they have continued to prevail in England ever since.

Thus it is that the English legal system in 1875, like

1938) Vol. II pp. 319–486. See Jacob, "Justice between Man and Man," *Current Legal Problems* (1985) Vol. 38, p. 211. Bentham himself did not approve of this speech. See also Brougham's *Speeches on Local Courts*, *ibid.* p. 521.

² See Jacob, "Civil Procedure since 1800" in *The Reform of Civil Procedural Law*, (Sweet and Maxwell, 1982) p. 130.

³ See Jacob, "The Judicature Acts 1873–1875—Vision and Reality" in *The Reform of Civil Procedural Law* (Sweet and Maxwell, 1982), p. 301.

grandfather's clock, was sometimes thought to have stopped, never to go again. Indeed, during the next 70 years or so, there was barely any significant or lasting reform or change in the machinery of civil justice.⁴ As though the achievements of the nineteenth century were like a gargantuan feast and needed a long time to ingest, the appetite for reform had virtually vanished.⁵ To change the metaphor, civil justice had drifted into the doldrums and moved but slightly with a slight change of breeze.

Since the War, however, there has been a veritable explosion of changes and reforms in civil justice, some of which may well be described as fundamental and of crucial importance. These have not been directed at any particular area but have been as multifarious as they have been manifold. It is of course not feasible to set out all these changes and reforms here, but it may be enough to mention a few outstanding instances by way of illustration of their variety and compass. These include the introduction of legal aid, advice and assistance; the radical changes in family law and procedure, including matrimonial property and the care, control and welfare of children; the creation of the whole range of tribunals other than ordinary courts of law; the refashioning and development of judicial review in the areas of public and administrative law; the conduct of small

⁴ Some of the exceptions were the creation of the Central Office, the District Registries and the Commercial Court and the provision for appeals from the county courts to lie not to a Divisional Court but direct to the Court of Appeal.

⁵ Some of the exceptions were the Gorrell Committee on County Court Procedure (1909) H.C. 71; the St. Aldwyn Committee on Complaints of Delays in the King's Bench Division (1913) Cd.6761 and Cd.7177; the Hanworth Reports on Business of the Courts (1933) Cmnd. 4265, (1934) Cmnd. 4471, (1936) Cmnd. 5066; and the Peel Report on Despatch of Business at Common Law (1936) Cmnd. 5065.

claims procedures in the county courts; the virtual but not complete abolition of imprisonment for civil debt; the rise of community law centres and other procedural devices to promote access to justice; the abolition of the ancient system of Assizes; the re-organisation of the High Court on a more specialist basis; the strengthening of the finality of arbitral awards; the more open system of pre-trial procedures by the disclosure of hearsay and expert evidence; the more effective system of pre-trial remedies and the establishment of the office of Registrar of Civil Appeals. The cumulative effect of these and many other changes and reforms has been to transform the character of civil litigation from what it was at the end of the War and to do so almost beyond recognition from what it was in 1875, though the system of courts and procedures established under the Judicature Acts 1873 to 1875 has been substantially retained.

I suggest that the history of the reform of civil justice reveals three lessons, which need to be thoroughly understood.

The first is that the changes and reforms in civil justice, particularly those achieved during the nineteenth century, did not come easily or readily, but they had to be fought for with popular support, almost step by step in piece-meal measures, and against the doubts, objections and resistance of the legal profession and the judiciary.⁶ They were introduced or made largely in response to the changing needs of society. The public perception of the system of civil justice was and still is that it is afflicted with grave defects which inhibit the ordinary citizen from going to law to assert or

⁶ See Jacob, "Civil Procedure since 1800" in *The Reform of Civil Procedural Law*, *op. cit.* pp. 206-208.

defend his rights, by its costs, delays, technicality, complexity, uncertainty, perplexity and mystery all of which combine to place justice out of his reach. The changes and reforms in civil justice have been designed, so far as they can, to rectify these defects and to renovate the system, so as to increase public confidence in the administration of justice and to attract the ordinary citizen to go to law to effectuate his legal rights. Nevertheless, it is plain that any further proposed changes to reform and improve the system of civil justice will almost certainly face opposition, objection and most of all outright rejection and it will therefore be necessary that anyone facing the prospects for the future of civil justice will have to be courageous and constructive and be prepared to overcome resistance.

The second lesson is that the changes in reforms of civil justice introduced or made during the last century and since the War have all been fully absorbed and incorporated into the legal system, so much so indeed that everyone who has formerly resisted the change or reform would not wish to undo what has been accomplished.⁷ This indeed is the general outcome of most changes; the pattern takes the following sequence: present state of affairs—proposals for change—support or objection—change made—new state of affairs—general acceptance.

The third lesson is that notwithstanding the enormous changes made in the system of civil justice, some even of fundamental importance and of far-reaching consequence, the momentum for further change still remains and it must be followed up. Changes already accomplished have not achieved their objectives of producing a satisfactory system

⁷ One exception I have come across is the view of some circuit judges that they would welcome the restoration of imprisonment for civil debt.

of civil justice which fulfils its aspiration to be an instrument of social justice or to meet the needs of modern society. There is no need for civil justice, either socially, politically or juridically, to go into a period of quiescence and to remain dormant before being roused again to sudden and undiminished activity. Public confidence in the law is manifested precisely at the stage of its administration, when the great maxims of the law are practised, as for example the rule of law, the precepts of natural justice, the independence of the judiciary, equality before the law and equality in procedure. The price of public confidence in the administration of the law is its continual renewal to match the needs of society.

It is therefore fitting, if not essential, as part of this survey of the fabric of English civil justice, to look ahead and to peer into what may be its prospects for the future. Such a scan is not intended in any way to belittle the achievements so far attained in the field of civil justice but rather to repair and renovate where necessary and to uphold, maintain and strengthen the system. The challenge to change is imperative in its call, immediate in its need, extensive in its reach, and inescapable in its purpose. The response to that challenge must be bold, imaginative and creative; it must seek to capture a vision of the future; and it must extend to all the areas of civil justice, institutional, professional and procedural and at the same time stretch out not merely to the near-distance but to the far-distance.

In the time and space available, however, it will not be practicable to prepare a programme for the reform of civil justice. It will suffice for present purposes to spotlight a series of problems and issues which will have to be seriously addressed, sooner rather than later. It will not be possible to develop them at length, but only to allude to them

briefly. They are not meant to be in any order of priority, nor to be exhaustive, since there will surely be a host of other ideas, projects and proposals which will call for early attention.

Studies in Civil Justice

In 1923, Sir Maurice Amos lamented the fact that "very little has been written upon Civil Procedure of a critical or analytical character since the days of Bentham."⁸ In 1940, Professor R. M. Jackson observed that "procedural law (was) becoming a sadly neglected subject."⁹ Although more recently there have been some indications of a growing academic interest in the subject¹⁰ it remains a deplorable fact that England is perhaps the only country in the world where civil procedure is not generally taught as a required subject for the first degree in Laws, and where there is hardly any research taking place in the subject at Universities and Polytechnics. Save for commendable exceptions, there is in England a great divide between the legal practitioners and the judiciary on the one side and the academic lawyers on

⁸ Sir Maurice Amos "A Day in Court at Home and Abroad," (1926) 2 *Cam. L.J.* 340.

⁹ R. M. Jackson *The Machinery of Justice in England* (Cambridge University Press, 1940), p. 303. This failing was largely remedied by his own work.

¹⁰ Since 1960, under the title "Principles of Civil Litigation," civil procedure has been taught as a post-graduate subject for the degree of the LL.M. of London University. It is, moreover, being taught in Birmingham and Cambridge Universities. It was the subject of the Ford Foundation Workshop of the Institute of Advanced Legal Studies in July 1970, and of the Oxford Colloquium of the U.K. National Committee of Comparative Law in September 1970.

the other, almost as though they each as a group inhabit a different planet. The generally perceived wisdom is that civil procedural law is not an academic subject but should or will be picked up, perhaps even learnt, in the course of the practice of the law. The apparent dilemma is evoked that academic lawyers, who have not generally been engaged in practice, do not know enough about and cannot teach procedural law, at any rate in the absence of authoritative text-books on the subject and that legal practitioners who know all about procedural law and its practice do not have the time and are not able to teach it at any rate without knowing and mastering the skill of teaching. The inevitable result is that civil procedural law remains the Cinderella of the legal academic world.

This is a situation which is plainly not satisfactory, either for students of law or for practitioners, and it should not be allowed to continue. It should be realised in the academic world that it is simply not good enough to teach what may be called the macro features of the English legal system, the structure of the courts, the hierarchy of appeals, the organisation of the legal profession and such like broad questions, but that it is also necessary to teach what may be called the micro features of civil justice, the principles governing the actual procedures and practices of the litigation and the judicial processes, the law in action. The teaching of civil procedure for the examinations of the legal professions is largely directed to the vocational requirements of the students emerging into their chosen profession. The teaching of the civil justice process as an academic subject in the Universities and Polytechnics should of course be aimed far beyond this limited objective. For those students who will be going into practice, such a study will make them better fitted as practitioners, for they will understand the prin-

ciples of their professional tools, the whys and wherefores of what they are doing. For those students who undertake post-graduate research or become teachers of law or go into government, trade or commerce, they will develop an expertise in a new practical branch of legal learning.

There is therefore an important role for the academic world to play in the actual machinery of civil justice. What we need in England today is a core of academic scholars in the field of the theory and practice of civil justice. At present, proposals for change in detailed matters of civil procedure go almost unchallenged, except perhaps by practitioners and the judiciary, and they are hardly commented on by academics. In the future, academic scholars in civil justice will be able, in an authoritative way, to examine and criticise proposals for change and will themselves be in a position to make recommendations for change on the basis of principles. They will be able to assess and analyse the reasonableness of procedure, to undertake and to promote and foster the study and research into civil justice, its past, its cultural and moral values and its social impacts, its defects and deficiencies and their remedies, its present operation and its prospects for the future in a critical, comparative and reformist spirit. They will create an improved climate of academic excellence in civil justice. They will very likely not confine themselves to academic analysis but will undertake or promote field studies in different areas of the machinery of justice. Above all, they will closely co-operate with scholars in other social sciences and would seek to attract their interest and collaboration in the operation of civil justice. In every way, they would greatly enlarge, enrich and enhance the machinery of civil justice.

I would therefore raise the cry that the law faculties and departments of all the Universities and Polytechnics in

England and Wales should consider, as a matter of urgency, introducing into their curriculum for the first degree in Laws the subject of civil justice or at least civil procedure. There is no need to wait for a young law teacher who has been engaged in practice to come forward and volunteer for this course. There are plenty of materials at present and to come to put such a course forward,¹¹ and there will certainly be many, if not a great number of, law students who will flock to such a course. Above all, there is a great and pressing need for studies in civil justice to be introduced into the teaching of law.

A Ministry of Justice

The time is fast approaching when consideration will have to be given to the establishment of a Ministry of Justice in place of the Lord Chancellor's Department. This proposal may be thought to be more concerned with the machinery

¹¹ There are now several works on Civil Procedure, some for professional bodies, as well as publications of a number of organisations concerned with the machinery of justice such as The Legal Action Group, Justice (the British Section of the International Commission of Jurists), the Socio-Legal Centre at Wolfson College, Oxford, and the Institute of Judicial Administration at Birmingham University which is also associated with the publication of the *Civil Justice Quarterly*. There are also the proceedings of the Congresses and Conferences of the International Association of Procedural Law, to which at present only a very few English academic lawyers belong. The contributions of Jeremy Bentham to civil justice are being unfolded by the *Bentham Project* at the University College, London, where the initiative to establish a *Centre for Civil Justice* has had for the present to be left in abeyance for lack of financial support. There is also shortly to be published a volume on Civil Procedure as part of the International Encyclopedia of Comparative Law under the auspices of the Max-Planck Institute at Hamburg.

of government than with the machinery of civil justice,¹² but it is in truth central to the larger question of the administration of justice as a whole in this country. The great divide between criminal justice on the one hand, largely administered by the Home Office, and civil justice on the other, largely administered by the Lord Chancellor's Department, is an unnecessary separation of functions in the field of judicial administration, and it is highly desirable that they should be dealt with together under one Minister of Justice. This of course is a far-reaching project which has considerable constitutional implications, affecting the office, duties and responsibilities of the Lord Chancellor and also of the Law Officers, but such implications have not stood in the way of earlier reforms of the judicial system. The testing issue is whether a new Ministry of Justice would improve the administration of justice, civil and criminal, its organisation, its management, and its governance. There may naturally be loud cries against this proposal, warning of the dangers to the independence of the judiciary and the legal profession and pointing to the desirability of a bridge in the form of the Lord Chancellor between the executive and the judiciary; but equally there are forceful and persuasive arguments in favour of creating a Ministry of Justice which would improve the machinery of justice and enhance the public confidence in its administration and performance.

This is not the place to enter fully into this debate nor to deal in detail with the ways in which a new Ministry of Justice should be fashioned out of the present departments of

¹² In 1915, Lord Haldane advocated a Minister of Justice in his evidence to the Royal Commission on the Civil Service, (see (1915) Cd. 8130), and again in 1918, as the Chairman of the Committee on the Machinery of Government (see (1918) Cd. 9230). In 1940, Professor Jackson supported

the Lord Chancellor and the Law Officers and the criminal justice functions of the Home Office. For myself, I am strongly of the opinion that it is desirable and indeed necessary to establish a Ministry of Justice responsible for the actual working of the legal process and the machinery of justice.

Council on Civil Justice

The continual changes necessary to be made in the machinery of civil justice to match the needs of a complex, changing society require to be kept under constant review. The traditional pattern so far of considering needful changes in civil justice has been the appointment of an *ad hoc* Departmental Committee or Working Party or other like body or occasionally a Royal Commission to enquire and report on a specified topic or topics, who will then take "evidence" from interested persons and bodies and in due course publish a Report of their findings and recommendations for changes, if any, after which they will disperse losing all trace of their identity and unity.¹³ Experience over many decades has shown that this pattern of pursuing the reform of civil justice has been unsatisfactory and ineffective, since it has been fitful, spasmodic and has failed to deal with fundamental questions to improve the machinery and quality

this proposal saying that "the important thing is that there should be a Minister responsible for administration in connection with justice," see (1940) *op. cit.*, p. 313, but by 1964, *op. cit.*, p. 419, his support was much muted.

¹³ An important exception is the Law Reform Committee appointed by the Lord Chancellor in 1952, in succession to the Law Revision Committee set up in 1934, see Michael C. Blair, "The Law Reform Committee: The First Thirty Years" (1982) 1 C.J.Q. 64.

of civil justice.¹⁴ The time has surely but sorely come to renounce this pattern and to strike out on a new path.

It is therefore proposed that a new, permanent advisory body be created, to be called the Council on Civil Justice, whose duties and functions would be to keep all matters relating to the system of civil justice under constant review and to advise and report to the Lord Chancellor as may be necessary. The Council would, it is suggested, consist of nine to fifteen members, lay people as well as lawyers, serving terms from three to five years which of course would be renewable. It would act in parallel with the Lord Chancellor's other advisory bodies, such as The Advisory Committee on Legal Aid, but as the Council on Civil Justice would be charged with the overview of the whole field of civil justice, courts as well as tribunals, the functions of the Council on Tribunals could well be merged with those of the Council on Civil Justice. This Council would act as a watchdog over the actual working of the machinery of justice and ensure that it is matching the changing needs of society. It would study the development of the subject at home and abroad both in common law and in civil law countries. It would thus come to play the part both of the guardian of civil justice as well as the champion of its reform.

Re-organisation of Civil Courts

Although in recent years, the High Court of Justice has been somewhat reconstituted, its business redistributed and

¹⁴ An exception may be created by the present Civil Justice Review, set up by the Lord Chancellor in February 1985. Five topics have been specified for its enquiry, personal injuries, small claims, debt, housing and the commercial court, but it is also likely to deal with some important questions of principles, and thus it may well leave behind a legacy of valuable contributions and conclusions on the machinery of civil justice.

Courts of Assize abolished,¹⁵ and although the jurisdiction of County Courts has been increased to £5,000, there has been no significant restructuring of the system of civil courts since the Judicature Acts 1873 to 1875. Yet it is precisely in the area of the organisation of civil courts that crucial and dramatic changes need to be made in the field of English civil justice. Some of these changes may be grouped under the following headings,

- (1) creation of a single court of civil judicature;
- (2) replacement of county courts by district courts of the High Court of Justice;
- (3) abolition of the civil jurisdiction of magistrates' courts.

1. Single Court of Civil Judicature¹⁶

The crucial major change that is required in the reorganisation of the civil courts is to consolidate all the civil jurisdictions now exercised by the High Court of Justice, the County Courts and the Magistrates' Courts into a single unitary composite Court of Civil Judicature which of course would still be called the High Court of Justice and would form part of the Supreme Court of Judicature. It would thus amalgamate the superior and inferior courts into one single court. In this way it will eliminate all questions concerning concurrent, parallel, overlapping or disparate jurisdiction between the High Court and the County Courts, and produce uniformity of practice and procedure. For the proper

¹⁵ See Administration of Justice Act 1970; Courts Act 1971.

¹⁶ See Jacob, *The Reform of Civil Procedural Law* (Sweet & Maxwell, 1982), pp. 7 *et seq.*; "The Administration of Civil Justice" (1980) in *ibid.* pp. 67 *et seq.*

functioning of the single Court of Judicature it will of course be necessary also to produce a single Code of Procedure, a single body of Rules of Court, which would make different provisions as necessary for different classes of cases.

2. District Courts of the High Court

Under a single High Court of Justice, the County Courts would become District Courts of the High Court, and they would basically be serviced by the present District Registries. Outside London, this should create no problems, though even within the London area, the County Courts could function as if they were District Registries. All civil proceedings would have to be begun in the local District Court, and if contested, the cases would be channelled to another court according to the amount involved or to the nature or complexity of the case or other criteria.

3. Abolition of Civil Jurisdiction of Magistrates' Courts¹⁷

However one may try to disguise the fact, the public perception remains that the Magistrates' Courts are courts exercising criminal jurisdiction and it is a glaring and palpable anomaly that they should continue to exercise civil jurisdiction. This is particularly so in the case of matters relating to matrimonial and children affairs and the recovery of local rates. The whole of their civil jurisdiction should be abolished and should be transferred to the appropriate court of the integrated civil judicature, except for such matters as licensing and other similar matters which may have a local connotation.

¹⁷ See Jacob *The Reform of Civil Procedural Law*, *op. cit.*, p. 14.

Family Courts or Tribunals

It is literally incredible that a Family Court has still not been created after all that has been said about the need for it and particularly after the unequivocal recommendation for its establishment by the Finer Report in 1974.¹⁸ Such a Court would consolidate the jurisdiction in all family matters in one court and would thus eliminate all the differences between the Family Division of the High Court and the Magistrates' Courts in their respective jurisdictions, procedures and practices and the remedies they may award.¹⁹ These differences, which exist side by side, are not merely glaring and indefensible anomalies but they operate in an injurious and unjust way, since they are contrary to the fundamental principle of equality in procedural law.

The establishment of the system of Family Courts should, therefore, be regarded and treated as a pressing priority and should be accomplished as soon as is practicable. The Family Court should have investigatory powers to inquire into and ascertain the facts for themselves and also adequate and effective machinery to promote conciliation between the parties wherever appropriate. They should be able to conduct the proceedings in a relaxed informal atmosphere rather than in the adversarial, confrontational

¹⁸ See (Finer) Report of the Committee on One-Parent Families, Cmnd. 5629. (1974), Vol. I, ss.13-14 and see Jacob and Wheatcroft on "Courts and Methods of Adminstrating Justice" (1965) in *The Reform of Civil Procedural Law*, *op. cit.* p. 43.

¹⁹ See Jacob, *The Reform of Civil Procedural Law* (1980), *op. cit.*, p. 16: "In the area of family affairs, there are at present two systems of jurisdiction, two sets of procedures, two ranges of remedies and two kinds of justice which are being administered by two different kinds of courts, the Family Division of the High Court and the Summary Jurisdiction of the Magistrates' Court."

manner. It may perhaps help if in this respect they were called "Family Tribunals."

Small Claims Courts

It is perhaps no exaggeration to say that the system of "small claims courts" as part of the County Courts has come to stay and is very likely to burgeon out.²⁰ It fulfils an essential social and judicial service for the resolution of small or moderate claims, now limited to £500,²¹ for which the resort even to the ordinary procedures of the County Court would be too expensive, elaborate and dilatory and hence out of the reach of the individual claimant.²² It reflects the world-wide search for access to justice for small or modest claims.

Strictly speaking, the small claims court is not a new court or institution but rather a new procedure within the County Court system. Its basic features are that the claim is treated as being referred to "arbitration," though it is not truly consensual; the hearing takes place in private, but it must be informal, without the strict rules of evidence applying; the arbitrator, generally the Registrar of the County Court, may adopt any convenient method of procedure but he must afford a fair and equal opportunity to each party to present his case; the adversarial system continues to regulate the proceedings, but legal representation is discouraged, since, for example, solicitor's costs will not be allowed except in specified circumstances.

²⁰ See County Courts Act 1984, s.64 and County Court Rules 1981, Ord. 19, rr. 1-6. It was introduced in 1973. See Jacob, "Access to Justice in England" in *The Reform of Civil Procedural Law* (1978) *op. cit.*, pp. 150-151.

²¹ Originally, the amount was limited to £100, and later increased to £200.

²² See the seminal paper, *Justice out of Reach: A Case for Small Claims Courts* (H.M.S.O., 1970) published in its dying days by the former Consumer Council.

This important procedural device needs to be further nurtured and developed. A first step would be to set aside the fiction that it is an "arbitration" and to require the hearing to take place in public in compliance with the fundamental principle of publicity governing judicial proceedings. This would at the same time increase public knowledge of the system and public confidence in its operation. A second step would be to augment the active role of the court both in the preparation of the cases of the parties and at its hearing, and in particular to empower the court to promote conciliation between the parties by the settlement or compromise of the dispute. A third step would be to allow an unrepresented party to be assisted by non-legal representatives. A fourth step would be to introduce a new scheme for the hearings of small claims to take place before local lawyers, practitioners as well as academics, volunteering to act as judicial officers who will attend to carry out their duties in rotation, and such hearings to take place in the evenings. This, of course, would be quite a far reaching scheme and it could only operate with the written consent of the parties. One word of caution is, however, necessary; there is a great temptation to increase the monetary limit for the small claims procedure, but this should be resisted, at any rate beyond £1,000, to prevent the system of small claims' courts taking the same road of expansion as the County Courts have taken since their creation.

Procedural Changes

It would be tedious to rehearse here the many changes in the procedural process which have been earlier indicated. They cover all the stages of civil proceedings, from their commencement through to parties, causes of action, pleadings, discovery and pre-trial review. Each of the changes

proposed would be valuable in itself and, taken together, they would constitute a radical remodelling of the system of civil procedure in the High Court, which would be reproduced in the machinery of other courts and tribunals.

Even these changes, moreover, have to be seen in the context of future prospects of some of the fundamental features of English civil justice, as for example (1) the adversary systems; (2) the trial process; and (3) the stage of pre-trial.

1. Adversary System

The system of English civil justice has no choice but to retain its adversarial basis. It cannot replace this basis by adopting the inquisitorial system as it operates in the civil law countries of Europe, since this would require the creation of a new *corps* of lawyers, who would be career judges. As things stand, there are at least two obstacles in the way of creating career judges in England. The first is that England does not have a Code of Procedure, a *corpus* of principles of procedural law which can be readily taught and learnt and made the subject of scholarly commentaries. It would require enormous upheavals in refashioning English legal education to teach and train career judges, and it would add to the complexity of the present debate between the two branches of the legal profession if a third branch were to be created. The second obstacle is that England has a large, valuable lay magistracy which fulfils judicial functions in the field of criminal justice, though also in significant areas in the field of civil justice, and it would be difficult, if not impossible, to replace them by career judges.

On the other hand, the dominant role played by legal practitioners under the adversarial system in the conduct of their cases at the pre-trial stage can be and perhaps ought to be very largely constrained by the court, acting not in a

judicial but in an administrative capacity. At the pre-trial stage, the court should play a more active role in overseeing, monitoring and controlling the conduct and progress of cases, and for these purposes using computers and other modern technological equipment. While of course it remains true that a party should have the primary responsibility for the conduct of his own case, it is also true that once a party invokes the process of the court, he should be required to comply with its requirements, and in the way of superintendence, there is no reason why the court should not satisfy itself that its process is not being abused. To this extent, at any rate, the adversary system should yield to the inquisitorial system.

2. The Trial Process

In the system of English civil justice, the trial process is the jewel in its crown. The trial is an oral, public, continuous and concentrated process, for the whole world to judge the fairness of its conduct. It was devised for the jury but has survived many changes²³ including the virtual elimination of the jury, and it remains the most striking and expressive image of the law in action. It was a great invention of the common law, which has endured to this day.

The essential features of the trial process, its orality, publicity and episodic character, should be maintained, at any rate for the foreseeable future.²⁴ Prompted no doubt by

²³ It survived the periods when parties and interested persons were not allowed to give evidence, when the jury consisted of male persons only, when only those having specified property qualifications could serve on the jury, when there were special and common juries, when the juries were directed to return special verdicts and not merely a general verdict, when the verdict of the jury was required to be unanimous and not merely by a majority.

²⁴ Witnesses should be invited to sit, unless they prefer to stand.

court administrators and a perception of heavy waiting lists, there are great temptations to shorten or speed up trials by pre-reading documentary materials, such as the correspondence, exhibits, experts' reports, case precedents and so forth and by other "short cuts," but these devices should be resorted to only within the framework of an oral, public concentrated trial process.

One important change, however, which should be made in the trial process concerns the law of evidence, which curiously enough in England is part of the substantive law, not of procedural law. What is proposed is that, unless the trial is with a jury, the strict rules of evidence should not apply to civil trials. In civil trials accordingly, there should be the free admission of evidence and there should be what is called the free evaluation of the evidence by the court. This would carry to its logical conclusion what has been happening in practice, that the rules of evidence play an almost insignificant part in the civil trial process. The machinery devised for the admission of hearsay evidence²⁵ is elaborate, complex and difficult to operate and by all accounts is comparatively seldom used and should therefore be abolished. This would liberate the admissibility of evidence from the fetters within which they are confined by the strict rules of evidence.

3. The Stage of Pre-Trial

If the present trial process is to be maintained, so almost must the stage of pre-trial continue into the foreseeable future. On the other hand, its character and functions may well require to be completely changed and restructured. First, what can be done by order of the court should be

²⁵ Under the Civil Evidence Act 1968, and R.S.C. Ord. 38, rr. 20-34.

required to be done by rule of court.²⁶ Secondly, there should be introduced on as wide a range as possible the open system of pre-trial procedure, so that the parties become fully informed of each other's cases at as early a stage as possible to enable them to make a realistic appraisal of the respective strengths and weaknesses of their cases which should lead to earlier and fairer settlements. Thirdly, there should be introduced a power, even a duty, on the court to promote a settlement or compromise between the parties either of its own motion or an application made by way of a settlement summons. Fourthly, except for *ex parte*, *i.e.* one-sided applications, the proceedings at the pre-trial stage should be held in public and not as at present in private, or in Chambers as it is called. The public has as much right to know how justice is being administered at the pre-trial stage as at the trial stage. At both stages, the proceedings are judicial in nature and outcome, and both stages come within the general fundamental principle that whatever is done in the course of the administration of justice should be done in public.²⁷ There may well be much opposition to the proposal, but on reflection, it may come to appear that it is desirable as well as necessary and that its introduction will enhance the fabric of English civil justice.

Conciliation

It should be recognised that the process of conciliation as a method of resolving civil disputes is an alternative method to the process of adjudication. Adjudication operates by imposing on the parties a solution of their disputes; conciliation operates by producing an agreed solution of the dis-

²⁶ Thus, for example, the need for a summons for directions would be eliminated, as has happened in the case of actions for personal injuries.

²⁷ See above, p. 22.

pute between the parties. Both methods have the effect of bringing the dispute to an end, which is what most parties in most cases desire most. It is generally accepted that in a vast number, perhaps the majority of disputes, the parties seek to arrive at a solution by negotiation, often even before resorting to the courts and continuing their efforts thereafter up to the door of the court and beyond. Conciliation would provide an additional method or process to encourage the parties to settle their dispute when negotiations between them have failed to do so. Moreover, conciliation is socially valuable, since by bringing the parties together it promotes harmony, whereas adjudication may have the effect of exacerbating the emotional antipathies the parties have for each other. The time has surely come to introduce conciliation as a procedural device for promoting the compromise or settlement of civil disputes.²⁸

Overriding Statutory Time-Limits

Since its introduction into England in 1623,²⁹ the Limitation Act has operated in a sort of blind, mathematical way. A claim becomes barred³⁰ if legal proceedings to recover or enforce it are not brought before the date of the expiry of the relevant statutory time-limit. This is so without regard to the merits of the claim or the circumstances of the parties or any other consideration³¹ and the court has

²⁸ See "Reservations by Master Jacob" to the Report of the Committee on Personal Injuries Litigation (1968) Cmnd. 3691, p. 153.

²⁹ See 21 Jac.c. 16.

³⁰ The defence of limitation must, however, be expressly pleaded, otherwise it will not avail the defendant. R.S.C. Ord. 18, r. 8(1). The English Court cannot raise this defence of its own motion.

³¹ The Limitation Act itself provides "gates" which validate claims brought out of time, *e.g.* by acknowledgment, or by part payment or by fraudulent concealment.

no power or discretion to extend or override the specified time-limit.³² The Statute of Limitation has been described as an "Act of Peace,"³³ meaning no doubt that the intended defendant may enjoy the legitimate expectation that after the current period of limitation has expired he would no longer be vexed by litigation or the threat of it. On a wider basis, the Statute of Limitation may be regarded as being a socially desirable objective of preventing litigation after a specified period of time and thus introducing an element of certainty as to the time within which claims must be brought. On the other hand, it is also widely recognised that the defence of limitation is a technical defence and may be raised to defeat well-founded claims which in justice the defendant should satisfy, perhaps later rather than sooner.

For this reason, there has always been a strong body of opinion in favour of giving the court a general discretion to override the statutory time-limit.³⁴ When Parliament first granted this discretionary power to the court in actions for personal injuries or death,³⁵ the Court of Appeal hailed this as a revolutionary and valuable change which would enable justice to be done, even at the expense of some uncertainty,³⁶ but the House of Lords soon thereafter rejected

³² The exception is the limited discretionary power in actions for personal injuries or death under the Limitation Act 1980, s.33.

³³ See *per Best C.J.* in *A'Court v. Cross* (1825) 3 Bing. 329, 332. The Act itself was expressed to be "for quieting of mens' estates and avoiding suits in law."

³⁴ This proposal was rejected by three successive Committees, see the Report of the Law Revision Committee ((1936) Cmnd. 5334, para. 7); the Report of the Committee on Limitation of Actions in Cases of Personal Injury ((1962) Cmnd. 1829, paras. 10 to 33); Interim Report on Limitation of Actions in Personal Injury Claims ((1974) Cmnd. 5630, para. 35).

³⁵ s. 2D of the Limitation Act 1939, as inserted by the Limitation Act 1975.

³⁶ *Firman v. Ellis* [1978] Q.B. 886, C.A.

this interpretation of the statutory provision.³⁷ I was held that, far from conferring a wide, unfettered discretion on the court to disapply the statutory time-limit, the new discretionary power was limited and restricted in its operation, so that it could not be invoked in the case of an action begun within the primary statutory period, though the House later held that it could apply to actions begun after the statutory period.³⁸

This is a somewhat unseemly situation in which the operation of the Limitation Act has been left and it should be put right as early as possible. All that is necessary is a slight redrafting of section 33 of the Limitation Act 1980 to give effect to the decision of the Court of Appeal in *Firman v. Ellis*, to make it plain that the discretionary power to override the statutory time-limits is wide and unfettered and applies to actions begun within or after the primary statutory limitation periods. At the same time, and perhaps this is even more important, it should be made clear that this discretionary power to disapply the limitation periods extends not merely to actions for personal injuries and death, but to all classes of actions. In this way, the Limitation Act would no longer operate in a mindless way but will empower the court to allow meritorious claims to be duly effectuated.

³⁷ *Walkley v. Precision Forgings Ltd.*, [1979] 1 W.L.R. 606; [1979] 2 All E.R. 548, H.L. This is a classic instance of the serious divergence between the House of Lords and the Court of Appeal in the construction of a statute, which, of course, would be all the more grave if it related to a question of human rights.

³⁸ *Thompson v. Brown* [1981] 1 W.L.R. 747; [1981] 2 All E.R. 296, H.L. Lord Diplock recognised the anomaly that a defendant would be better off where, unknown to him, a writ had been issued within the primary statutory period but not served, than he would be if the writ had not been issued at all.

Central Enforcement Authority

A cardinal change of crucial importance in the fabric of English civil justice, which is required to be made in the near future and indeed is a matter of urgency, is the creation of a Central Enforcement Authority (C.E.A.),³⁹ for the enforcement of judgments and orders of all civil courts and tribunals, and particularly of judgment debts. At one stroke, the C.E.A. would introduce into the machinery of enforcement of judgments simplicity and speed, efficiency and effectiveness as well as fairness in place of complexity, confusion and unfairness. It would operate as an integrated system for the enforcement of judgments and would enjoy exclusive jurisdiction for this purpose, and thus it would produce uniformity and equality of treatment for all judgments and eliminate procedural anomalies and differences between the different courts that enforce judgments at present. It would provide the mechanism for enforcing through one office, attached to each of the County Courts throughout the country, all the judgments of all the civil courts and tribunals.

The judgment creditor would no longer be required to go to the court in which the judgment was obtained in order to enforce it nor would he have to pursue each mode of enforcement separately. All he would be required to do is simply to apply to the district office of the C.E.A. in the area in which the debtor resides or has his business for the enforcement of the judgment, and the C.E.A. will then

³⁹ This is the preferred name to "Enforcement Office" which was used in the (Payne) Report of the Committee on the Enforcement of Judgment Debts (1969: Cmnd. 3909) (see s. 2) but otherwise, in this respect, the recommendations of that Report are fully adopted and endorsed. Compare the Swedish model of the Enforcement Authority established in 1982.

employ the appropriate mode or modes of enforcement, concurrently or consecutively in one continuous process. The C.E.A. would have a computerised record of all judgments entered against every defendant and on the application for enforcement, it will immediately discover whether the debtor is a new or a "multiple" debtor and if so what are his other debts. The C.E.A. will also ascertain, if it does not already have this information, all the relevant particulars relating to the family and financial circumstances of the debtor, his property, assets, income and outgoings, and will thus be able to determine what is the most appropriate mode, if any, of enforcing the judgment. No mode of enforcement would be employed unless it is likely to be productive of some resources. In place of the present system operating between creditors on the basis of "first come first served," any proceeds recovered in the course of enforcement of a judgment debt would be fairly distributed, *pari passu*, amongst the judgment creditors subject to specified priorities between them. So far as possible the C.E.A. will ensure that the judgment creditor does recover the fruits of his judgment and that the judgment will be complied with, while at the same time it will also ensure that in the process no greater harm is occasioned to the judgment debtor and his family than the benefits which will accrue to the judgment creditor. There will of course be an obligation on the judgment debtor to disclose all his financial circumstances and to keep this information up to date so far as necessary.

The process of enforcement has the character of an administrative or executive function, *i.e.* simply enforcing the judgment of the court. But the C.E.A. will have to make decisions, as for example which mode of enforcement to employ or to vary orders for enforcement and so forth, which may or will have a judicial nature about them. It

would seem inevitable therefore that the C.E.A. should itself be a new court exercising limited judicial functions, but having powers to act of its own motion. Nevertheless, the C.E.A. should also have power to refer legal problems or questions arising in the course of the enforcement to the court for judicial determination.

Two matters could well be attended to even before the creation of the C.E.A.

The first is the greater use of Administration Orders on the lines recommended by the Payne Committee,⁴⁰ and the second is the establishment of a social work agency such as the Social Service Office for Debtors with trained staff to assist the debtor and the court.⁴¹

Reducing Costs

In 1947, at the very forefront of their terms of reference, the (Evershed) Committee on Supreme Court Practice and Procedure were instructed to consider "what reforms of practice and procedure should now be introduced . . . for the purpose of reducing the cost of litigation".⁴² They made a prolonged, valiant and somewhat detailed attempt to comply with this direction, but their recommendations did not succeed in reducing the burden of the costs of litigation in the Supreme Court. Indeed, experience over many decades before and since the Evershed Report has shown that reforms of the practice and procedure of the courts have only a marginal, and not a significant, effect in reducing the burden of costs. To be realistic, therefore, it must be confessed that mere changes in practice and procedure are

⁴⁰ Judgment Debts Report, Pt. IV, s.5.

⁴¹ Judgment Debts Report, Pt. VI, s.6.

⁴² See Report of this Committee (1953) Cmnd. 8878, p. 4.

unlikely to produce any substantial reduction of the costs of litigation, but this can only be achieved by drastic and radical changes in the structure and management of the courts and their procedures.

The root of the problem militating against the reduction of costs in the system of English civil justice is its adversarial system, compounded to some extent by its divided legal profession. Under the adversarial system, the parties are entitled to conduct their cases in their own way, subject to complying with the relevant rules of court. They are free to take or resist any step they think advisable in the course of the litigation. They each know that the ultimate end of the law-suit is "win-all or lose-all," and they are easily tempted to attack or to resist the attack of the opposite party. Moreover, the prudent solicitor will wish to have counsel to advise on what step to take or resist or at least to support what he himself has embarked on. Since it is impossible to forecast what the ultimate costs are going to be, there is an inherent risk that the costs of the litigation will mount up, and this is aggravated by the fact that there is no limit on the amount of court-time that may be taken up or the volume of documents that may be produced for the purpose in hand. Then, finally, if there should be a trial, the costs escalate to huge amounts, increasing by the day, which has the effect in most cases of making the costs factor overwhelm the issues in the case.

If, therefore, substantial reductions in the burden of costs cannot be achieved by changes in practice and procedure, it may be necessary to make a direct frontal attack on the costs of litigation themselves. This is what the Evershed Committee attempted. They examined several proposals for limiting the amount of costs, such as the limitation of solicitor and own client costs, the limitation of party and party

costs, the abolition of costs *inter partes*, the matching of costs proportionate to the amount at stake or the amount recovered, the quantification of costs in advance, the limitation of costs to what are strictly necessary.⁴³ They rejected all these proposals, though at any rate some of them may be worth re-examining afresh in the light of modern practice.

One such proposal which the Evershed Committee rejected, but which is certainly worth re-examining, is the provision of scales of recoverable costs. The regulation of costs by scales already exists in the County Courts.⁴⁴ It should not be difficult to provide for three or four scales of costs to, say, claims for up to £50,000 which would account for the greater proportion of actions brought in the High Court. The parties would thereby have some idea of what the amount of the costs may be as between themselves.

The general rule that "costs follow the event"⁴⁵ is a satisfying, easy and ready rule to apply. Tradition has it that if one party wins, surely he ought to get the costs. The rule is applied in practice in an almost mechanical way. It has the element of certainty about it, though it exaggerates the importance of winning as the objective of the law-suit. It does not specify what is the "event" which the award of costs is required to follow, except that it is the party in whose favour the litigation or proceeding has ended.

Yet the rule that "costs follow the event" may not always operate to secure the ends of justice. There are thus specified circumstances where costs do not follow the event,⁴⁶ and other specified matters which must be taken into

⁴³ *Ibid.* Section X, pp. 232 *et seq.*

⁴⁴ See C.C.R., 1981, Ord. 38.

⁴⁵ See R.S.C. Ord. 62, r. 3(3).

⁴⁶ See R.S.C. Ord. 62, r. 6.

account when awarding costs.⁴⁷ Indeed, nowadays the factor of costs is of much greater importance than it used to be, and therefore the court should not readily slip into the groove of "costs follow the event," but should be vigilant and "cost-conscious" when awarding costs. At this stage, the court should exercise a real, actual discretion, and should, as it is required to do, examine all the circumstances of the case to see whether some other order than "costs follow the event" should be made as to the whole or part of the costs.⁴⁸ Thus, for example, if the winning party has lost one or more of the issues or has recovered a sum proportionately much less than he has claimed or has taken more time than was reasonably necessary in presenting his case, whether in addressing the court or examining or cross-examining the witnesses, or has produced and referred to a considerably larger volume of documents than was reasonably required, or has made applications for unreasonable orders and such like matters, the court should take those circumstances into account when making its order for costs. What is really required, for the sake of uniformity of practice, is that the Rule Committee should formulate a series of criteria for the matters and circumstances which the court will be required to take into account when exercising its discretion as to costs.

Access to Justice

A powerful, propulsive force towards the future enhancement of the fabric of English civil justice, as that of other legal systems, is to give real, practical effect to the demands

⁴⁷ R.S.C. Ord. 62, r. 9. These include a payment into Court in satisfaction under R.S.C. Ord. 22 or its equivalent.

⁴⁸ R.S.C. Ord. 62, r. 3(3).

for access to justice.⁴⁹ The concept of access to justice has the character of a clarion call to make the administration of justice available to all on the basis of equality, equity and fairness.⁵⁰ Among its fundamental principles are that there should be, not only equality before the law, but equality of access to the law and legal services, including advice and assistance, alike for rich and poor and those of moderate means, and that such access should extend to all civil claims and defences at all levels of the judicial process, without regard to the nature of the dispute or complaint or the relief or remedy claimed. In practical terms, access to justice should be real, effective, comprehensive and unimpeded. This is not a "mission impossible," but though it may take time, it is within the grasp of society determined to improve its system of civil justice.

The methods of advancing the ends of access to justice will include the dismantling of the barriers obstructing the road to justice, and at the same time building or restructuring new ways towards the attainment of justice. Among these barriers are the problems of legal costs and delays, the uncertainties, formalities, complexities and technicalities of the legal process. Here it is not possible to do more than to deal with the problem of costs in respect of the provision of legal services, and this aspect has been chosen since it is the cutting-edge of the legal system with which the public first comes into contact with the law. Looking to the future, two questions arise respecting legal services in England, first, should the contingency fee system be introduced as a

⁴⁹ See *Access to Justice, A World Survey*, Vols. 1-4, (ed. Cappelletti and Garth, 1978) Guiffre and Sijthoff.

⁵⁰ See Jacob, *Access to Justice in England*, *ibid.* Vol. 1, Bk. 1 and in *The Reform of Civil Procedural Law* (Sweet & Maxwell, 1982), p. 125.

method of remunerating legal practitioners or secondly, should the provision of legal services for the needy be more effectively organised?

Contingency Fees

In the American legal system, access to justice is afforded to large sections of the community by the combination of two criteria governing the incidence of costs. The first is, that by and large and save in respect of modest court fees, each party is responsible for its own legal costs, win or lose, and the second is that litigation in crucial areas of the law is conducted on the basis of the "contingency fee." Under this basis, the lawyer can stipulate before the action has begun that he will undertake the litigation on behalf of the plaintiff on the terms that if the action is successful he will share in the proceeds, generally by a percentage of the amount recovered, but if the action fails he will charge the client nothing. In other words, the plaintiff's lawyer gets paid on the "contingency" of winning. His terms are "pay if you win, and no pay if you lose." Juries are said to be familiar with this arrangement, and their awards of damages are reflected by the factor which is thought to be referable to the lawyer's percentage of the recovery.

The contingency fee system in America is applied on an extensive scale in actions for personal injuries and in class actions (or as we would say, representative actions) and in derivative actions (or as we would say, minority shareholders' actions). In such classes of actions, it is said that legitimate claims are enforced which would otherwise be abandoned by reason of the poverty of the claimant or by reason of the smallness of the individual claim of a claimant. Notwithstanding the stirrings in the American legal

system towards a costs-sanction to abate the so-called explosion in civil litigation by the introduction of a rule on the lines of "costs follow the event," there does not appear to be any real prospects in the foreseeable future of their abandonment of the system of contingency fees.

On the other hand, in England it has been a rule of law of long standing that a solicitor may not make an agreement or arrangement by which he is to be remunerated on the contingency fee basis, *i.e.* that he gets paid his fees if he wins but not if he loses. In such event, he would be guilty of the offence of champerty and maintenance, besides committing serious professional misconduct. Contingency fee arrangements were regarded as the maintenance of actions by lawyers, which was particular obnoxious.⁵¹ However, both maintenance and champerty have ceased to be either criminal or tortious but without prejudice to questions of public policy or the legality of contracts.⁵²

⁵¹ It is worth remembering that English law did in fact recognise what is called "a speculative" action, *i.e.* where the solicitor has no prospect of being paid either fees or outgoings except by virtue of an order for costs against the unsuccessful defendant. Two conditions were, however, necessary to be observed, first, that the solicitor honestly considered that the client had a bona fide cause of action and secondly, that he made no bargain for any interest in the proceeds of the action. See *Ladd v. London Road Car Company* (1900) 110 L.T. Jo. 80, *per* Lord Russell of Killowen L.C.J. approved by the Court of Appeal in *Rich v. Cook* (1900) 110 L.T. Jo. 94. Lord Russell observed that if it were not so, the wrongs of the "humble classes" might go unvindicated. Speculative actions were rife in England, or at any rate in London, in the decade before the War, but they were looked on with much disdain by the higher echelons of the legal profession. The speculative action has, of course, virtually disappeared with the impact of legal aid, though it is not possible to say that it has entirely gone out of existence.

⁵² See Criminal Law Act 1967, ss.13 and 14, and see also Solicitors Act 1974, s. 59(2)(b) under which it is implied that an agreement by a solicitor for payment only in the event of success remains invalid.

This has led to murmurings that, precisely on grounds of public policy, contingency fee arrangements should be allowed in England, as providing access to justice to litigants who might otherwise have to abandon their claims. In 1967, the Law Commission considered that the problem of contingency fees required further study,⁵³ and in 1970, the Law Society thought that existing rules of law and professional conduct should not be altered to permit contingency fees save in the case of debt-collecting actions.⁵⁴ From the practical point of view, however, under the English legal system, a contingency fee arrangement would expose the plaintiff himself to an order for costs if he should lose on the basis that "costs follow the event"; it would leave the solicitor liable for the fees of the barrister and any experts even if the action is lost; it may result in the solicitor being held personally liable to pay the costs of the winning party; and it may create the risk of both the solicitor and barrister being guilty of a serious breach of professional conduct if they or either of them should be held to have agreed not to be paid unless the action succeeded. Nevertheless, Lord Denning proposed that the contingency fee should be introduced to enable a solicitor to conduct a derivative or a minority shareholders action.⁵⁵ This proposal should be regarded as the last gasp of survival of the contingency fee in the English legal system. The other members of the court⁵⁶ firmly rejected it and thus the contingency fee in England may be said to have been finally laid to rest.

⁵³ See *Proposals for Reform of the Law Relating to Champerty and Maintenance* Law Comm. No. 7 (1966), para. 2.

⁵⁴ See *Law Commission 6th Annual Report 1970-1971* Law Comm. No. 47.

⁵⁵ *Wallersteiner v. Moir* (No. 2) [1975] Q.B. 373. He gave the Benthamite ground that otherwise "wrongdoers will get away with their spoils."

⁵⁶ *Ibid.* Buckley and Scarman L.JJ.

Legal Services Commission

The time has come when we should recognise, as the Rushcliffe Committee did in 1945, that there is "the need for a new approach to the whole question of legal assistance."⁵⁷ It has to be confessed that in England today access to justice and in particular the provision of legal services to the poorer and disadvantaged sections of the community is in a somewhat confused and disorderly state. In the present climate of financial constraints, it is perhaps not possible to raise our sights and hopefully look towards the creation of a National Legal Service.⁵⁸ Nevertheless, it is desirable, if not necessary, to improve the delivery of legal services, both for contentious and non-contentious matters, to the underprivileged, disadvantaged and low income groups, and to those who may be in need of legal advice. These sections of the community have substantially similar problems which may require legal aid, advice or assistance, such

⁵⁷ Rushcliffe Report Cmnd. 6641, p. 23.

⁵⁸ See C. P. Harvey, "Law Reform after the War" [1942] M.L.R. 39, a powerful paper in which he said (at p. 43): "It is difficult to think of any commodity which lends itself more properly to nationalisation than Civil Justice, a point which is surely recognised in the promise of Magna Carta to deny it to no one." This would be the logical consummation that legal aid is a public service. Incidentally, this would remove the serious blemish of the present legal aid scheme under which people with financial resources exceeding the specified limits of capital or income are not eligible for legal aid and so because they are not rich enough to face the risks of litigation nor yet poor enough to qualify for legal aid they may be denied access to justice. It may also be found that the "merits test" to qualify for legal aid that the applicant must show "that he has reasonable grounds for taking, defending or being a party" to proceedings (Legal Aid Act 1974). s. 7(5)) is perhaps too strict, and that all that the applicant need show is that the application is genuine and that he has a good arguable case.

as matrimonial and domestic matters, social security, welfare benefits, consumer problems, housing, employment, discrimination and the like. They become involved in such problems largely for the same or similar reasons, because they are ignorant of their rights, inadequate in looking after their affairs and inarticulate in expressing themselves. They go to one or other body or agency to obtain advice or information about their rights or their problems and such bodies or agencies are located in substantially the same districts of high social deprivation, especially in inner cities, and cater for people in substantially the same catchment areas. There may therefore be a considerable overlap between the several bodies and agencies who proffer legal advice or render legal services to the needy, with a consequent loss of effectiveness and efficiency of one or other of them.

In this situation, one of the ways, perhaps the most productive way, of improving the delivery of legal services to the needy would be to integrate all the bodies and agencies which now carry out this function into a single, unified organisation. Under the aegis of such an association, say a Legal Services Commission, the bodies and agencies concerned who, of course, would retain their separate identities, would be able to pool their resources, efforts and even their staff; they could join forces in promoting common policies and practices as, for example, in advertising; they could develop specialist expertise in different branches of their work, as, for example, in representation before tribunals or in preparation of small claims cases in County Courts; they could support and strengthen each other in many other ways, and improve and enhance the quality of the legal services they render. Anyone going to any one of those bodies or agencies could be confident

that he would get the same or equal treatment as if he had gone to another.

The bodies and agencies who, of course, would be most affected by this proposed development would be the Citizens Advice Bureaux⁵⁹ and the Community Law Centres,⁶⁰ but they would include other law advice centres⁶¹ and other bodies giving legal advice and assistance.⁶²

Pursuit of Justice

In the forefront of every study concerning the future prospects of English civil justice, the factor which must be given

⁵⁹ The CABx came into operation when the War began in 1939 and they have expanded enormously since then. There are now about 900 CABx spread all over the country handling nearly three and a half million enquiries a year. They are non-legal agencies giving general advice to citizens on a wide range of matters free of charge, but if any problem has a legal element, it will generally be referred to a law centre or to a local solicitor in private practice. The CABx perform an enormously valuable social service in assisting vast numbers of people to learn about their rights and to obtain access to justice to enforce them.

⁶⁰ The Community Law Centres owe a great deal for their creation to a Fabian Society pamphlet, *Justice for All* (London, 1968) a Report of the Society of Labour Lawyers, which itself drew heavily on the American experience of law centres set up under the Economic Opportunity Act 1964 to finance the anti-poverty programme, in which lawyers took on cases at no fee or a reduced fee on the basis of *pro bono publico*, later referred to as "public interest." They employ their own lawyers on a salaried basis. There are now about 60 Law Centres, spread all over the country, and funded by a variety of sources; most of them are affiliated to the Law Centres Federation. Their character and work vary considerably. They render legal services usually free and no rigid means test is prescribed. They also act as a referral agency for cases which solicitors in private practice are prepared to do on a legal aid basis.

⁶¹ These include those that were formerly of greater importance, e.g. Toynbee Hall, the Mary Ward Settlement, Cambridge House and a great number of Poor Man's Lawyer Centres, many of which are set up by local political parties.

⁶² These include, e.g. National Council for Civil Liberties, the Child Action Poverty Group, the National Association for Mental Health.

the most important weight is justice itself. This is all the more necessary because the traditional tendency in England is to avoid thinking of reasoning in terms of principles but rather to look instead to down-to-earth, workable, flexible measures for resolving new problems. The field of civil justice and particularly civil procedure is strewn with solutions which are not logical or coherent or based on principles, but which, nevertheless, work in practice, according to methods and usages which have become part and parcel of the habits and customs of both lawyers and laymen. The technicalities and complexities of the law have arisen and still hold sway, not because they respond to the needs of justice, but precisely because they have been for ages and still are acceptable practices irrespective of whether they serve the cause of justice. That is why, when looking ahead to the future, we must give pride of place to justice in our thinking towards achieving the ends of justice.

It is also important to remember that in searching for solutions to new problems in civil justice and in civil procedure especially, the constituency for consultation is generally very limited. It will ordinarily consist mainly of lawyers, judges and practitioners, and probably the same judges and practitioners on one problem as on the next. Experts in other social sciences generally are not familiar enough with this technology of civil procedure to be really helpful and lawyers on the whole would regard their taking part in such enquiries with some questioning and doubt. It is true that by and large every measure for change has to be laid before Parliament, but experience has shown that it is mainly the lawyers there who debate such matters.

There is the further temptation, perhaps greater today than ever before, to seek for solutions to new problems on grounds of cost-effectiveness. Measures may be proposed to

reduce costs, delays and technicalities, but it will also be found that such measures may have as their ultimate objectives those of reducing the need for more judges, providing more space for judges and courts, reducing judge-time and reducing the cost of judicial administration generally. In this context, it is worth recalling the following passage from a characteristically forthright speech,

“It is not only important to realise that litigation is an evil; it is also important to realise that neither speed, nor cheapness nor universality are the ultimate ends of litigation. The ultimate end is justice . . . ”⁶³

The pursuit of justice must therefore remain paramount in fashioning the fabric of English civil justice in the future, for “justice is the great interest of man on earth.”⁶⁴

⁶³ *Per* Mr. Quintin Hogg M.P. (later Lord Hailsham of St. Marylebone, Lord Chancellor) on May 25, 1949, on the Third Reading of the Legal Aid and Advice Bill, see Hansard, H.C. Debates, 5th Series, Vol. 465, Col. 1378.

⁶⁴ *Per* Daniel Webster in his eulogy of Mr. Justice Story, cited by Chief Justice Arthur T. Vanderbilt in *The Challenge of Law Reform* (Princeton University Press, 1955), p. 1.

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