A JUSTICE REPORT

GOING TO LAW

A Critique of English Civil Procedure

CHAIRMAN OF COMMITTEE
SIR JOHN FOSTER, K.B.E., Q.C.

With a Foreword by
THE RT. HON. LORD DEVLIN

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Foreword

I ONCE listened to a sermon at an Assize Service by the High Sheriff's chaplain in which he compared divine justice with human justice, greatly to the disadvantage of the latter. He drew some sharp distinctions between the two methods. But he overlooked one point. The Last Judgment, it seems safe to presume, will contain no order as to costs, while for every step in the human process someone will ultimately have to pay.

To raise human justice up to the standard of the divine would, even if it were possible, be very costly indeed. But it is not possible because there is a distinction in kind as well as in quality. The one is concerned with justice as a virtue transfiguring the acts of men and the other is, even at its best, not much more than a process of adjustment. The one would be a work of artists' hands; the other is a craft in which judge and advocates try to produce the best result from the best material they can get. No one thinks the worse of craftsmen if they work to a budget; only artists are supposed to think that money does not matter. The trouble at the root of our legal system is that we have allowed it to grow up in an atmosphere in which, where justice is concerned, money is hardly an object. But money must always be an object for those who believe in justice, for if the system is too expensive it will not be used and so injustices will go without redress.

The origin of this Report lies in the realisation that there is an area of small claims in relation to which the costs of even the cheapest litigation bears no sensible relation to the amount at stake. The system does not provide an acceptable method of resolving such disputes. The solution seemed to lie in setting a limit to the cost—some reasonable percentage of the amount at stake—and then devising some system, however primitive, which would keep the process within the limits. It was not to be expected that the new system would be even an imitation of divine justice. But at least it would be an " adjustment," perhaps not so very much more polished than the rough and ready agreement to which individuals who cannot afford litigation are so often driven, but at least

relieving an aggrieved party of the feeling that he had no alternative to submission to the *diktat* of a moneyed opponent.

JUSTICE had proceeded a little way in the search for a radically new system when it was overtaken by the publication of the Consumers' Council's *Justice Out of Reach*, which has led to the establishment of a special procedure for dealing with small claims. This is an experiment which manifestly deserves to be tried.

" Small " claims are by definition limited to £75. At the other end of the scale there are " large " claims by which I mean claims involving issues of such importance (whether because of the amount at stake or otherwise) that the cost of their determination is of only marginal significance, that is, it will not play a significant part in the decision whether or not to go to law. There is a middle class in between, extending to claims perhaps forty or fifty times the size of a small claim and comprising the bulk of ordinary litigation. Litigation within this class still remains quite uneconomic. The cost of a lawsuit is so formidable as to constitute a total deterrent to many individuals who would have to finance the suit unaided. The burden falls on the State which has to provide courts, judges and attendants and to foot the whole or a large part of the bill of costs. Naturally the state must limit the share of its resources which it devotes to the administration of justice, and if the money available is not used economically, the whole system suffers.

I should like to see JUSTICE sooner or later cast a radical eye on the processes current in this middle class of civil litigation. It will be no use looking at them in the traditional way or in the spirit that believes that in the search for justice no stone should be left unturned. Litigants do not care all that much about stones being turned, particularly legal stones. What they want is a fair settlement speedily arrived at, by agreement if possible, and if not, by an impartial judge. Some of them like the paraphernalia of the trial and the sound and smell of battle; others hate it. I believe that the majority would welcome, at least as better than nothing, a simple process producing quick results, even if it involved a departure from traditional methods.

This is a belief whose validity needs to be tested and I hope that some day JUSTICE will undertake the task. Meanwhile it has performed a great work in reviewing once again our traditional processes and in doing so particularly in the light of differing procedures in other countries. The Report is not primarily concerned

with cost-effectiveness. It seeks to identify and to remedy certain fundamental defects. It recommends considerable improvements in our methods of handling large claims. For middle-class claims it is not in my opinion the final solution, but it points the way.

DEVLIN

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[NOTE: In the interests of economy all footnotes, whether textual extensions or references, have been grouped together at the end of Chapters.]

INTRODUCTION

1. Throughout this century—and very likely before—civil litigation in England and Wales has become more complicated, more expensive, and more long-winded. It is common ground among most lawyers that these trends are undesirable, that they put people off going to law to resolve their disputes or enforce their rights, and that they lead to an increase in the gap between the citizen and the law, and so to disrespect and ultimately disregard for law.

2. One of the major factors which has been identified for many years as contributing towards these trends—if not indeed as their principal cause—is our system of civil procedure. JUSTICE therefore decided in 1969 to set up a committee to conduct an enquiry into the subject. This decision was encouraged by Lord Devlin, who kindly agreed to guide the work of the committee. The object of the exercise was to identify the features of English civil procedure which produced the mischief of which people complain, and if possible to devise an alternative system which lacked these features.

3. We agreed from the start that we must try to get to the root of the problems, and that any proposals designed to solve them might well need to be radical, and might thus evoke opposition from the inherent conservatism of lawyers. (They are not unique in this: most other professions too cling with some tenacity to their established organisation and methods.) As will be seen, this is the shape which our report has in fact taken, and some of the things we have to say will not find ready favour with many in the legal profession. But we are confident that our analysis is sound, and that our proposals are workable.

4. It will be seen that, in criticising the present system, we draw attention more than once to ways in which it is open to lawyers to make tactical use of the rules for their clients' benefit, but contrary to a wider view of the true principles of justice. We are concerned to make it as plain as we can that these are strictures which we make of the *system*, and not of the lawyers who use it. Although we are all lawyers ourselves, we would not hesitate to criticise our profession in public if we thought there was occasion for it, but we are in fact satisfied that the great majority of our colleagues at the present time conduct the lawsuits which are entrusted to them with skill, industry and integrity, despite the fact that they are far from over-paid for what they have to do. Nonetheless, we are convinced that any system of civil procedure which is potentially open to undesirable manipulation is to that extent defective, and we therefore feel bound to point to those defects in our system which make such abuses possible, even though they may not be in fact practised with any substantial frequency by any substantial proportion of the profession.

5. In any case, the first duty of any lawyer is to advance his client's interests as best he can within the latitude which the law allows him, and provided he behaves honestly and within the rules it is not for him to judge whether the tactics which he employs on his client's behalf are more or less likely to result in injustice, for that is a judgment which only the court can make. If, therefore, injustice *can* result from a proper use of the rules by lawyers who are doing no more than their duty to their clients, that again

is a valid ground for criticism of the rules, without importing any condemnation of the lawyers who use them.

6. We should perhaps also make it clear that the problems to which this Report is directed, and the solutions which we propose for them, are confined to contentious disputes which do go to court. There is a far larger number—no one can tell how many, and we know of no way of finding out—which never get near a court at all. Either the parties eventually agree amongst themselves, or they go to their solicitors who settle the dispute with the other side after enquiry into the facts, and perhaps a few rounds of correspondence or a meeting or two. There are also many disputes which are disposed of without too much trouble or expense but which do have to go to court, such as most divorces in modern times, and many default judgments. All these, taken together, probably constitute the bulk of the contentious work of most solicitors today. But to an important extent, the minority of contested cases will determine how the majority of disputes is settled, and it is with that important minority that we are here concerned.

7. The object of publishing this Report is not, of course, to try to convince everyone that we have found the complete, or the only, answer to all the problems which currently beset civil litigation in England and Wales. What we have tried to do is to strike at the root of the current waste of time and money by devising a new procedure. It is by no means the only new procedure which might be suggested or which might work better than the one we have. Many others are possible, and all that we hope to achieve in putting this one forward is to stimulate a wide-ranging discussion among those, professionals and laymen, who now use the courts, or who would wish to use them but—for reasons of complexity, delay or expense—do not. If, out of such a discussion, there eventually grows some real reform of our system of civil procedure, we shall feel that our work has served its purpose.

8. It goes without saying that the reforms which we recommend could not be implemented overnight, even if they were found to be generally acceptable. They would create a number of transitional problems, not the least of which would be the need for the courts and the practising profession to learn how to use them—that is, in effect, to undergo a period of retraining. Besides, no reform of this magnitude ought to be put into effect until one can be reasonably sure that it will work, and will show in practice the benefits predicted for it in theory. Any new procedure ought therefore to be subjected to the experimental test of a "fair run" alongside the existing one.

9. As a matter of history, we began by concentrating on "small claims," of the kind and size which are now litigated in the county courts, if they are litigated at all. We reached our conclusions about this part of the system at about the same time as the Consumer Council (now sadly abolished) published its own report on the subject, "Justice Out Of Reach."[1] That report said almost everything that we would have wished to say, and said it a good deal better, though we would perhaps disagree in one or two matters of detail. In our view, its recommendations should at least be given a try. We therefore addressed a letter to the Lord Chancellor[2] supporting these recommendations, and turned our own attention to the rest of the field, that is to say the kinds of case which would normally be litigated in the High

Court. But much of what we have so say on that subject is of general importance, and applies to small claims also.

10. This Report was prepared for the Council of JUSTICE by an Advisory Committee which worked under the chairmanship of Sir John Foster. The main initiative for embarking on the inquiry came from Lord Shawcross, who was then Chairman of JUSTICE. It was made possible by generous donations he obtained from Foundations and City institutions, to whom we owe our warm thanks. Jonathan Rickford, who was then a member of the staff of the London School of Economics, directed the research and prepared the first draft. He was assisted by Mrs. Victoria Paterson. Succeeding drafts of the Report were developed by Paul Sieghart, and in its final form it takes account of detailed comments and suggestions received from members of the Committee, members of the Council and others. It goes without saying that, as with any document of this kind, not everyone who has seen it must necessarily be taken to agree with everything it says. The Council of JUSTICE wishes to express sincere thanks to Lord Devlin and to all those who have contributed to a Report which is based on a great deal of thought and consideration, and which it is hoped will stimulate not only wider discussion but also a much needed reform of English civil procedure.

We have not thought it sensible to include a separate summary of conclusions and recommendations. Our main proposals are however summarised in Chapter 6.

REFERENCES

1 H.M.S.O., 22·5p.
2 Reproduced as an Appendix to this Report.

CHAPTER 1

DEFINITION, IMPORTANCE AND OBJECTIVES

What is civil procedure?

11. If a member of any society is injured by someone else's breach of the law and cannot persuade the wrongdoer to put matters right, he is usually (though not quite always) entitled to a remedy. He obtains this by a process which involves an application to a court, a decision by the court on the merits of the case, and the enforcement of that decision (if necessary) by the legal arm of the state machine.

12. The Rules of Civil Procedure comprise all those rules which regulate the methods and forms whereby the wronged citizen may validly apply to the courts to gain such an enforceable remedy. Those rules which limit the manner in which facts may be proved during any such legal process are known as the Rules of Evidence in civil cases, and it is a matter of definition whether or not they are thought of as forming part of the Rules of Civil Procedure.

13. Our concern is with the Rules of Civil Procedure as thus defined, including the Rules of Evidence in civil cases. By civil cases we mean actions by private persons, whether individuals or companies, against others (whether private persons or not) which seek to enforce rights, or to obtain remedies for wrongs. We are not here concerned with the rules which regulate the application of the power of the state to criminal wrongdoers, that is to say persons who have broken rules of law to which penalties rather than remedies are attached. Nor are we concerned with the special procedures laid down for the adjudication of those disputes between private persons on the one hand and organs of the state on the other, which are regulated by our administrative law through a system of specialised administrative tribunals. [1]

The importance of the subject

14. Amongst other things, our civilisation depends upon the protection of the individual and the maintenance of his security: his personal (physical) security, his security in his home, and his security in his possessions and his legitimate expectations. It is of the greatest importance to the community that all its members should be equally protected in these legitimate interests once their extent is defined by substantive law and that, should an infringement take place, a speedy and effective remedy guaranteed by the state should be available.

15. On the other hand, it is of no less importance that such a remedy should not be enforced *against* anyone without a very careful assessment of the claimant's case. Were it otherwise, the claimant's privilege to mobilise the power of the state on his own behalf might easily be abused, with oppressive consequences.

16. The Rules of Civil Procedure lay down the conditions in which the state will intervene at the behest of the private citizen, and are therefore of great importance. They ought to, and to some degree inevitably do, reflect the ideology of the community just as much as do those rules of criminal law and constitutional law which regulate the application of the state's power in other fields.

17. Even where, as is often the case, the wronged citizen can gain the remedy to which he is entitled without needing to resort to the judicial machinery (as, for example, by a settlement or other arrangement), the Rules of Civil Procedure will affect the parties' calculations of the form and extent of the remedy which should be conceded. The influence of these Rules is therefore both important and pervasive, and every citizen ought to be concerned about their nature and effect. The issues which they can raise are fundamental ones, of humanitarianism on the one hand and civil liberty on the other.

Objectives of the rules

18. It follows from the role which the Rules of Civil Procedure must play that they must be designed to ensure that:

(1) the *facts* on which a claim is based are accurately found and appropriately arranged, so that the real situation can be identified;
(2) a correct and appropriate *rule of law* is found and applied; and
(3) the *remedy* prescribed by that rule of law can be adequately enforced.

19. These three objectives, however, may need to be modified in the light of other considerations. Economy, for instance, requires that a disproportionate amount of time, money or other resources is not spent upon the process. Both economy and justice require that decisions be applied consistently and that they serve not only as the basis for the immediate remedy but also as a guide to conduct in the future for others. Justice also requires scrupulous impartiality, the avoidance of oppression, and reasonable speed. A further, more tenuous, requirement is that the process be a final and psychologically satisfying disposition of the issue for the parties involved. Nor should it be forgotten that, particularly in England, we depend to some degree for the reform and development of the law upon the pressure of " hard cases " [2]. It is said that hard cases make bad law, but in a flexible system they can help to mould the law, or at least to demonstrate the need for reforms.

REFERENCES

1. There is a good case for a reassessment to be made of the principles on which claims are at present allocated between tribunals and courts, but this question falls outside our terms of reference. We have, however, learned much from the methods, good and bad, which tribunals have developed for handling heavy case-loads quickly and economically.

2. Where there is no ready remedy the growth of the law may be stunted: *cf. Privacy and the Law*, a Report by JUSTICE (1970), paras. 119–121.

CHAPTER 2

A BRIEF HISTORY OF CIVIL PROCEDURE IN ENGLAND

20. In the Middle Ages, the system of civil procedure developed at common law in the royal courts required a claimant to formulate a claim within the range of a limited number of standard writs which were obtainable from the Royal Chancery in London. The issue of such a writ would constitute notice of the claim and of its nature, and the parties and their advocates would then gather before the court to settle the "pleadings." The advocates would make oral pleas before the judge in order to settle the issue between them. The pleas would then be recorded by a clerk upon the Court Roll, and this record would constitute, as it were, the boundaries of the issue to be decided. Historians believe that pleadings were originally quite flexible in form. For example not only fact, but also evidence (*i.e.* the way in which facts were to be proved), and conclusions of law were regularly pleaded. From early times, once the pleaders, aided by the promptings of the judge, reached an issue of fact, the judge could put that issue to a jury, often together with instruction on the law after argument by the advocates. The jury itself, being drawn from the community in which the dispute arose, would be expected to know, or perhaps to have found out, the true facts. It was only later that the jury became an independent arbiter of fact, and witnesses would then be called, examined and cross-examined much as they are today.

21. Towards the close of the Middle Ages oral pleading fell into disuse. Pleadings would be settled in writing by the parties' representatives, and exchanged. Only later would they be transcribed into the Court Roll. The jury hearing, however, remained substantially unchanged. With the loss of "court control" at the pleading stage, stringent rules grew up to ensure that the parties' unsupervised efforts at pleading nevertheless produced an issue which was sufficiently simple and comprehensible for the minds of an often uncouth and uneducated jury. Thus the rule grew up, amongst others, that the issue must remain single; one issue and one only. This meant that pleading alternative defences, denying more than one allegation in an opponent's pleading, was usually forbidden. Only one point could be taken at a time, and any other point not taken would be deemed conceded. The parties had to choose their ground and, having chosen, fight upon that ground alone. This and other "logical" rules of pleading led to the elevation of pleading techniques to the status of an exact science, about which arguments of great abstruseness and learning would take place with no regard to the merits of the case. Desire to take no risks on points of pleading, combined with lawyers' conservatism, led to an almost superstitious regard for old forms. Pleadings became long and involved, burdened down with outdated phrases describing forms and procedures whose purpose was long since lost beyond recall in the mists of time. But the strict attitude of the judges made such scruples necessary; the very slightest technical defect

might be grounds for an objection by the other side which, if accepted by the judge, could lead at best to delay and at worst to disaster. Thus the loss of the flexibility of oral pleadings, and of the opportunity for early court control which they provided, led to one of the worst excesses of formalism that the common law had seen.

22. Mainly during the seventeenth and eighteenth centuries, the legislature made a number of attempts to reduce the inequities and technicalities of this pleading system. Various Statutes of Jeofail [1] permitted amendment when technical slips had been made; two statutes [2] at the opening of the eighteenth century required that objections on technical matters should be pleaded in such a way as to give notice of the grounds, and allowed a defendant to make more than one plea in his answer to the plaintiff's "declaration" (*i.e.* the statement of his claim).

23. More significantly, the judges, perhaps finding the single issue principle more irksome or that jurors had become more intelligent and cases more complex, began to allow parties in a steadily widening range of cases to plead, in reply to any pleading of the other side, the "general issue." This plea took the form of a flat denial of all that the other side had said, and thus allowed its proponent to fight the case at the trial on one or more issues of his own choosing, and to change his tactical ground, at the expense of his opponent, according to the way the case developed. Meanwhile the jury trial remained much as before, though the judges were developing increasingly stringent rules of evidence to prevent material which they considered potentially confusing from coming before the jury.

24. In spite of these early attempts to mitigate the rigours of the old rules, professional conservatism and the dead hand of history kept much of the old system alive, its complexities multiplying as the years passed. A strong and popular movement for procedural reform stimulated by the Benthamites gathered strength in the early nineteenth century, culminating in the setting up of what is in substance our present system under the Judicature Acts of 1873–75. But almost fifty years were needed to achieve it.

> "The procedure of the Common Law as it emerged at the close of the eighteenth century consisted of so complicated a mass of rules, of all dates, and of so many fictions and dodges to evade inconvenient rules that the task of erecting upon its foundation a rational system was long and complicated." [3]

25. The problem was, as it still is, to devise a system which gives the parties enough freedom and flexibility to reach an issue which embodies the merits of the dispute as the law sees them, without either

(1) lapsing into such indiscipline that matters are never properly sorted out until the trial, if then; or
(2) resorting to such rigorous regulation that much valuable time and energy is spent in enforcing procedural rules, at the expense of justice on the merits.

26. Between 1800 and 1875 three great commissions struggled with the problem (1829–31; 1851–60; 1872–74). The first of these, under the influence of Stephen (the author of a practitioner's handbook on special pleading), recommended that power to issue procedural rules should be given to the judges, and that rules should be devised to restrict the pleading of the general issue, on the ground that this device worked unfairly by allowing

the party using it to take the other side by surprise at the trial. Under cover of the general issue, unexpected issues could be raised. Accordingly, in the famous Hilary Rules of 1834, the number of issues which could be raised under the general issue was dramatically reduced. This swing towards discipline proved to be disastrous. In the years succeeding 1834 it became even more common for cases to be decided on technical points of pleading than before: "pleading ran riot." [4]

27. The Common Law Procedure Commission of 1851–60 made further determined attempts to modify the old system. Its recommendations on many points were accepted, and implemented with success. Trial on Assize at Nisi Prius, for example, lost many of its medieval trappings. But it remained for the Judicature Acts 1873–75 to develop a new system of pleading based upon the pleading of "all the material facts" on which the party pleading relied (as opposed to law or evidence), and upon a largely uniform procedure, regardless of the kind of case, or the kind of court before which the parties were to appear.

28. At the same time the old procedure before the Chancellor in the Court of Equity, which depended on equally elaborate forms combined with a system of fact-finding which was inquisitorial, delegated and largely written, was also abolished in favour of the new common law system, with appropriate modifications. Procedure in equity, originally intended as a means of supplementing the inadequacies of the common law, had become even more complex, dilatory, formal and corrupt than the common law itself; finally it had to be reformed on the common law model.

29. Meanwhile the relationship between pleadings and trial remained more or less unaltered. The decline in the use of juries in civil cases had already begun [5], but the rules of civil procedure under the Judicature Acts system placed, if anything, even more stress upon the resolution of all issues before the jury, in the final climactic hearing in open court.

30. Since 1875 the power to make procedural rules has been vested in a committee of practitioners and judges. This arrangement has on occasion been sharply criticised. [6] But popular interest in the subject seems to have declined, and no pressure group exists today to promote improvements in the system on behalf of the people it is there to serve, *i.e.* the ordinary litigants. (The commercial community is an exception: by resorting increasingly to arbitration it has provoked substantial improvements in the system for trying commercial cases.) The few experiments which have been made in reforming procedure since 1875 have proved largely unsuccessful.[7]

31. Meanwhile increasing numbers of citizens need to resort to the system to recoup losses suffered in an increasingly complex, fast-moving and affluent society. While most goods have become relatively cheaper as our systems of production have become more efficient, the corresponding legal processes needed to ensure the legitimate enjoyment of these same goods have become more expensive than ever. The jury has virtually disappeared from our civil trials, yet this revered institution still casts its dead hand over our procedure, requiring that all things be made plain in one continuous, final and all-embracing trial. Only our law of evidence has taken the first tentative steps towards recognising that the jury has gone.[8]

32. The state itself has appreciated that our system of civil trial is outmoded, and for a wide range of claims where state funds are at risk it has erected a system of simple, cheap and expert tribunals, to handle claims

frequently more important both relatively and absolutely than those for which the ordinary citizen has to resort to the "expensive luxury" of the courts. Meanwhile formalism is still rampant there. The language, dress and ritual of our barristers and judges is redolent of the eighteenth century. Litigation, to those who know, is a thing of horror to be avoided at all costs. Yet there are few alternatives. The administration of justice is the first and most important state monopoly. For private disputes the only possible alternative is arbitration. This can sometimes be simple and cheap for commercial men, though even here there is always the possibility of recourse to the courts on a wide range of grounds, and once it is invoked the advantages of arbitration rapidly disappear.[9] Even the assumption of cheapness is often an illusion. Arbitrators' and Umpires' fees are frequently very substantial and in many instances the proceedings include pleadings, discovery and the full-scale use of solicitors and counsel. In any case, resort to arbitration can only be had by consent, and few men will submit to it if they think it presents an advantage to the other side without a corresponding advantage to themselves. Only in the commercial court have arbitration's competitive effects been felt. Lord Beeching, fresh from a reappraisal of our railway system (another state monopoly) in the light of our modern needs, has made significant progress in modernising our system of courts.[10] But what goes on in and around those courts is also due for reappraisal.

REFERENCES

1. "Jeofail," the Law-French title of a plea, "I have made a slip."
2. The "Statutes of Anne," 1704, 1708.
3. Sir W. Holdsworth, *History of English Law*, Vol. IX, 262.
4. See Whittick, "Notice Pleading" (1918) 31 Harv.L.Rev. 507.
5. W. R. Cornish, *The Jury* (1971 ed.), 81–84.
6. *E.g.* "Report of the Royal Commission to examine the Conduct of Business in the King's Bench" (1913) 40–42; E. R. Sunderland, "English Struggle for Procedural Reform" (1926) 39 Harv.L.Rev. 725.
7. Further developments from 1875–1914, see S. Rosenbaum "Studies in English Civil Procedure" (1914) 63 Pd. L. Rev. 105, 505 *et seq.* In the first few decades after 1875 the use of pre-trial procedures seems to have been much more extensive than it has been in recent years.
8. Civil Evidence Acts 1968 and 1972.
9. The Arbitration Acts are a good example of the way in which the state often refuses to allow laymen to settle their disputes in their own way, and insists on providing them with protection (whether they want it or not) against the possibility of an error of law or miscarriage of justice.
10. Royal Commission on Assizes and Quarter Sessions, 1969, Cmnd. 4153; Courts Act 1970. The effect of this Act has been to reduce very markedly the waiting time between setting down and trial, as to which see Chap. 3 below.

CHAPTER 3

ENGLISH CIVIL PROCEDURE TODAY

33. The very wide variety of kinds of case with which the existing system of civil procedure is intended to deal makes it difficult to describe the conduct of cases generally in anything other than somewhat abstract terms [1]. Also, the system is extremely complex [2], and we can therefore describe it only in outline.

Before issue of proceedings

34. When someone believes that he has suffered a legal wrong for which he wants a remedy, his first resort will usually be to a solicitor. Sometimes adequate help and advice may be available from the local Citizens' Advice Bureau, or from social workers or other sources. (There is a strong case for the extension of this kind of help for ordinary people, and a few community Law Centres are beginning to be set up, but this question lies outside our terms of reference.) However, for the great majority of cases a solicitor will, sooner or later, need to be called in, though some plaintiffs may delay in doing so for fear of expense or for some other reason, and some large companies will use their own legal staff for as long as possible without calling in outside help to handle problems which may give rise to litigation.

35. Once seized of the case, the solicitor will wish to gather enough reliable information about the issues to enable him to advise his client, to negotiate and to provide him with ammunition for the coming battle. This will usually begin by negotiation with the other side, but it may, in a small minority of cases, lead to litigation and even trial of the issues in court. The solicitor will receive a partial account of the story from his client, and he may be able to get other information with relatively little difficulty or cost from some reliable third party, such as the police report in a road accident case, or from documents in his client's possession, such as letters or statements of account. In most cases he will wish to confirm or extend this picture by interviewing other witnesses, a process which he will often not conduct himself but will delegate to an assistant or even a different firm better placed to contact and interview the witness in question [3].

36. The solicitor must therefore attempt to gather the facts in the form of documents and signed statements from his client and other witnesses, until he has enough material to justify him in opening negotiations with the other side if he is representing the plaintiff, or to enable him to resist the demands of the plaintiff if he represents the defendant. Considerable skill is needed to elicit the relevant facts from witnesses who are often reluctant, evasive or inarticulate, and to extract the vital letters or invoices from a pile of documents. Sometimes it is only when new facts emerge from new witnesses that questions which should have been asked of witnesses already seen become apparent. This process can be slow and labour-intensive, and accordingly expensive; in the interests of his client, the solicitor must therefore exercise his judgment to save time and money in due proportion. Yet a reasonably comprehensive and accurate knowledge of the nature and details of the dispute must always be an essential pre-requisite of a fair settlement or an efficient trial.

37. Very often one party to the dispute is much more in the dark than the other. The extreme example is the widow whose husband has been killed in an accident and cannot testify how the accident took place. But in many other cases one party will have significantly easier access to the facts than his opponent.

38. While all witnesses, other than the parties themselves, may be approached by either side, they tend to feel allegiance to one camp only and to be unwilling to make statements to the representatives of the other. Sometimes solicitors or employers will advise them not to do so [4]. Any such disparity will be reflected in the bargaining position of the parties, which will also be influenced by their relative economic strengths, in that a plaintiff who cannot afford to be kept out of his money (say a man with family commitments, or a company with liquidity problems) will be prepared to settle for less, and a well-advised defendant will be aware of this.

39. Some defendants (for example some insurance companies) will not suggest any settlement figure until proceedings have actually been started. Some plaintiffs' solicitors similarly feel that only once proceedings have started can they hope to get a realistic offer from defendants. On the one hand, it may only be by starting proceedings that the plaintiff can show his determination to press his claim; on the other hand, once proceedings have started each side can force the other to run up costs by refusing to negotiate. Again, as we shall see, a party may have to rely on the rules of civil procedure to disclose to him the substance of the case he has to answer, and only then will he have the opportunity to assess objectively his claim or defence.

40. Thus a party's willingness to negotiate will be determined by his assessment of his own case and of his opponent's, by his own need for money and by his opponent's, and by the imminence of proceedings. No doubt this last factor has influence in part because judicial proceedings involve expense; however, as we shall see, the stage of proceedings at which many settlements are reached is at the court-room door immediately before the final hearing, when the greater part of the expense has been incurred. Perhaps, therefore, the willingness of the parties' advisers to settle at that moment may also be the result of their more adequate preparation of the material for presentation to an objective third party, *i.e.* the judge.

41. If the parties' representatives fail to reach agreement on a settlement, or if for one reason or another one party is unwilling to negotiate, the plaintiff's solicitors must sooner or later start proceedings. From this point on, the Rules of Civil Procedure directly govern what the parties may or may not do.

42. Most actions in the High Court go through five readily identifiable phases:

(1) issue and service of Writ and entry of Appearance;
(2) exchange of pleadings;
(3) preparation for trial;

(4) trial;
(5) enforcement of the judgment.

The same phases can be identified in the county court.

Writ and appearance

43. The High Court Writ of Summons is an impressive document, by which Her Majesty the Queen personally summons the defendant to appear in her court. It is witnessed by the Lord High Chancellor of England and sealed by the High Court of Justice. From it, the defendant will usually discover more about the Queen's style and titles, and the Christian names of the current Lord Chancellor, than about the plaintiff's claim. [5]

44. The defendant thereupon has to "enter an Appearance" by filing a form with the court and sending a copy to the plaintiff. If he does not, the plaintiff can get judgment in his absence, and this is in fact the way in which many debts are collected from debtors who are unwilling to pay, but are even less willing to incur the costs of an action which they are bound to lose in the end.

Pleadings

45. When the plaintiff has served his Writ and the defendant has entered his Appearance, a fortnight or more will have elapsed and the parties will not have been brought any nearer the resolution, or even the identification, of their dispute. The latter is the object of the pleadings, in which each party is supposed to set out "in summary form . . . the material facts on which [he] relies for his claim or defence, as the case may be, but not the evidence by which these facts are to be proved," [6] and the rule enjoins the parties to be "as brief as the nature of the case admits."

46. Clearly, the defendant cannot set out the facts on which he relies for his defence until he knows what the plaintiff's claim is, and how he puts it. The first pleading in order of time is therefore the plaintiff's Statement of Claim. This can either be endorsed on the Writ itself, or served with the Writ, or served within fourteen days after entry of Appearance. The Defence is meant to be served within fourteen days after service of the Statement of Claim. If the defendant has a counterclaim against the plaintiff, he sets it out in his Defence. In that case, the plaintiff has a further fourteen days in which to serve a Defence to Counterclaim. In certain cases he may wish to serve a Reply even if there is no counterclaim, and for this the rules also allow fourteen days. In theory, there can be further exchanges of paper, successively called Rejoinder, Surrejoinder, Rebutter and Surrebutter, but these need express leave from the court and are very rarely seen today.

47. So as to ensure that the trial does not degenerate into a roving inquiry into all manner of things whose connection with the real dispute between the parties is at best marginal, it is one of the functions of the trial judge to confine the evidence and arguments before him to the issues which have been defined by the pleadings. It is therefore of paramount importance for these documents to have been drafted with great precision and care, by specialists who know the substantive law and the rules of procedure, and who can foresee what might happen at the trial in various eventualities. In practice, therefore, they are drafted (except in the simplest cases) almost

exclusively by counsel. (This also gives the solicitor a complete defence if he is later sued by his client for negligence in drafting the pleadings.) Pleadings are still taken very seriously at the trial, and it is still theoretically possible for a party with a good case to lose it because it has not been properly pleaded. Yet, at the time when the pleading is drafted, the party on whose behalf it will be served may well not know all the relevant facts, especially if these are in the possession of his opponent. Pleadings therefore tend to be drafted in such a way as to leave all possible options open.

48. If at a later stage (sometimes even at the trial itself) a party wishes to change his mind about the way he puts his case, he may want to amend his pleading. Once all the pleadings have been exchanged, he can only do this with the leave of the court, and the court will usually give leave only on condition that he pays all the costs "of and occasioned by" the amendment—but not until after the trial is over. Since this may mean payment for a good deal of wasted work on both sides, such an amendment can prove expensive, and that is another reason why pleading requires great care. It is also one of the main reasons why most pleadings—whether Statements of Claim or Defences—are couched in a logical cascade of alternatives, each introduced by the time-honoured phrase "Further or in the alternative, if (which is denied) . . . " It costs nothing to add these when the pleading is first drafted: it may be very expensive to add them later.

49. Pleadings are served by the parties on each other, but not on the court. While all this is going on, therefore, the court still knows nothing about the issues in the case. In practice, the time limits for service of the various pleadings are rarely adhered to. Before counsel can draft a pleading, he needs at least some material on which to base his draft. This means that the solicitor needs to have made at least some inquiries, to have taken written statements from at least the most important witnesses, to have made copies of the most important documents in his client's possession, and to have written his instructions to counsel. Both solicitors and counsel are often over-worked and may not be able to do justice to their work in the time available, especially if it depends on inquiries from others, who may not always be readily accessible. A practice has therefore grown up by which solicitors are often willing to extend each other's times for the service of pleadings. It is questionable whether their clients always know of these extensions, or would always agree with them if they knew. In the rare cases where extensions are not granted, the solicitor's remedy is to apply to the court for extra time. Provided he can put up a reasonably plausible case—difficulty in getting hold of clients or witnesses, difficulty in getting papers back from counsel, sickness or holidays in the office—he will usually get one or more extensions of fourteen days each.

50. However, sooner or later the pleadings will be "closed," and in a technical sense at least the issues to be tried will have been defined. But these issues will still resemble an abstract diagram more than a detailed map of the area of disputes since one of the principal duties which the pleaders on both sides owe their clients is to keep open for them the widest possible area for manoeuvre at the trial, while scattering as many hurdles as possible into the manoeuvring area of the opposition. Pleading therefore resembles nothing so much as naval warfare before the advent of radar, when each side made blind forays into the sea area of the other, while giving away as little as possible about the disposition of his own forces.

Preparation for trial

51. The next phase in the prosecution of the law suit is "discovery." This is a tedious and labour-intensive job for the solicitors. First, all documents which could conceivably be relevant to any of the issues in the action have to be extracted from the client (and the fact that a file does *not* contain a document may make the whole file "relevant"). Then they have to be read with care, and almost inevitably their contents will show that there are others which the client has not yet disgorged. When the bundle looks reasonably complete, a list of every document has to be made, verified by affidavit if the Order for Directions (see paragraph 53) so requires, and exchanged against the list of the other side.

Lists are complicated by being divided into those documents which the party now has and will disclose, those that he now has and will not disclose on the ground that they are "privileged," and those that he has had but has not now got in his possession or control. The question of privilege alone can raise difficulty and time-consuming arguments.

When the two lists have been collated and the documents mutually inspected, each side will ask the other for copies of the documents he has not got already. Almost inevitably once more it will become clear that some documents have been lost, forgotten or overlooked. They will have to be searched for, copied, sent to the other side and the list of documents amended, or by consent "treated as amended." "Inspection" is a lengthy meeting between representatives of both firms of solicitors at which each inspects the documents in the possession of the other. All this is painstaking and important work, on which success or failure at the trial may depend. It requires many hours of undisturbed concentration, the writing of a good many letters, and much time on the Xerox machine. If one side is recalcitrant about the disclosure of some documents or class of documents which there is reason to suppose they have, or have had, in their possession, a fresh application for "specific discovery" may have to be made to the master (see paragraph 53).

52. Because of the mounting expense of this phase of the proceedings, often reflected in requests from the solicitors to their clients for the payment of more money on account of costs, it is a phase when many actions are settled—especially if the collection of documents for discovery shows that they will not help one's client's case, and more favourable terms of settlement can therefore be expected if the other side has not yet had a chance to see them. But there are other reasons too: inspection of documents is often the first real chance that each side has to assess the true strength of the other's case, and it provides the only occasion before the trial itself when the solicitors are bound to meet, and can casually talk about settlement, without being suspected of weakness by being the first to ask for a meeting.

53. So far, all the court knows about the action is that it has issued the Writ, filed the Memorandum of Appearance, and collected £10 (or £6 if the amount claimed is less than £750) in court fees. Now for the first time it will have the opportunity of seeing what the case is about, and—in theory at least—to influence its subsequent conduct. This opportunity is furnished by the "Summons for Directions," a document (usually) issued by the plaintiff as a result of which the representatives of both parties are summoned to appear before a master, who is the court official charged with the

supervision of lawsuits before they come to trial, and with resolving any disputes between the parties about how they should be conducted during that period. According to the rules, the plaintiff is supposed to issue this summons within one month after the close of pleadings; if he does not, the defendant can issue it instead. In practice, it is often issued much later. To save typing, the standard form of Summons now contains printed items covering a wide variety of provisions which one or other of the parties might ask for in the form of "interlocutory orders," that is to say orders of the court regulating how the action should be prepared and fought, but not deciding any issue in the action itself.

54. Amongst the interlocutory orders which the master has power to make on the Summons for Directions (but only if one or other, and in some cases both, of the parties asks for them), the following deserve special mention:

(i) Orders allowing the amendment of pleadings, or for trial without pleadings.
(ii) Orders to give further and better particulars of matters not fully enough pleaded.
(iii) Orders for further discovery of documents.
(iv) Orders for the administration of interrogatories (written questionnaires addressed to the other side which have to be answered in writing, and on oath).
(v) Orders for inspection of the subject-matter of the action, or for the preservation of some item of evidence.
(vi) Orders on evidence, *i.e.* how some facts are to be proved. The normal rule of proof—that there must be oral testimony by an eye-witness, in person, to the judge at the trial—may be varied in favour, for example, of proof by a sworn written statement, or by hearsay evidence, or by other suitable means.
(vii) Orders limiting the number of witnesses. This power will usually be exercised to limit the number of expert witnesses called by either side. The master will sometimes encourage the parties to agree a joint expert report. But the practice of relying solely on such reports has on occasion been severely criticised by the Court of Appeal, especially where the facts involved are complex, and constitute one of the major issues in the dispute.
(viii) Orders for the examination of a witness before the trial. Such orders are not normally made except when the witness is *in extremis*, or abroad.
(ix) Orders to admit facts. An unreasonable refusal to admit a fact ought in theory to transfer the cost of proving that fact to the refusing party.
(x) Orders for the appointment of an independent court expert "to inquire and report on any question of fact or opinion." This is very rarely exercised.
(xi) Orders for the trial of a "preliminary issue," of fact or law, separately before the trial. There is a tendency only to make such orders where the result of the preliminary issue is bound to decide the case one way or the other.
(xii) Orders fixing the time for setting down, and the place of trial, and determining whether or not there should be a jury.

55. In theory, therefore, the court has an armoury of powers amply sufficient to ensure a fair and prompt dispatch of the cases which reach this stage. But their effectiveness depends very largely on the extent to which the parties' advisers are willing to ask for them to be used, and on the degree of robustness which the court is willing to exercise in making and enforcing such orders. In both these respects, the actual practice leaves something to be desired. Instead of the "stock-taking" which the Summons for Directions was designed to achieve, it is more often a two-minute formality, in which two very junior clerks from the respective firms of solicitors appear before the master, themselves knowing little if anything about the case, and with no authority to agree to any orders which might provoke a sense of urgency, or involve extra expense, in the pursuit of the litigation. The master too is under pressure: although he will be handed the pleadings at the hearing, he will not have seen them before and will certainly not have time to read them in detail. Nine times out of ten, he will be asked only to make an agreed order for "trial by judge alone at Middlesex, set down forty-two days after inspection, costs in cause." He initials the form, the two clerks disappear, the next pair take their place. Even if he had wanted to, he could not have made any order which was not asked for by at least one of the parties.

56. There are a number of reasons for this timidity on the part both of the parties and the court in the use of the available powers. The parties' solicitors are concerned in the first place with trying to save their clients' money. Litigation is expensive enough already without adding to its cost by doing unnecessary work; only just over 1% of all cases which are begun by Writ ever come to trial [7]; when an action is settled, it is important for the client that as little as possible of the total sum recovered should have to go in payment of the lawyers' costs. If any order other than an agreed formal one is to be made on the Summons for Directions, it will almost certainly mean going to counsel for advice before the Summons is issued, and briefing him to attend the hearing. This can cost quite a significant sum, and though it may be an excellent investment if the action ever does go to trial, the additional cost militates against a quick and satisfactory settlement. Moreover, any order other than a formal one is bound to mean that the solicitor will have to devote a good deal of extra time (and therefore cost) to the case to ensure that the order is carried out. Solicitors, with few exceptions, are hard-working and by no means frightened of putting in extra effort on a case, but they are desperately understaffed and most are considerably over-worked. Consequently any extra effort required on one case may mean that other clients, equally deserving, will have their cases delayed still further. The solicitor may therefore tend to avoid creating a situation where work has to be done which falls out of the ordinary routine (and therefore probably cannot be delegated) unless he can see clearly that the client will obtain a benefit, either by improving the chances of settlement or by simplifying the ultimate trial.

57. For their part, two influences operate on the High Court masters. First, the court has always seen itself as furnishing a public service to litigants, which they are free to use if they wish, and to leave unused if they do not. The court does not regard it as its function to force parties to conduct their disputes in any particular fashion: provided they agree on what is to be done, and it falls within the rules, the court will agree also. Secondly,

masters who have shown an enthusiasm for robust common sense in making interlocutory orders have too often found their decisions criticised at great length, and even greater expense, in the Court of Appeal and sometimes even the House of Lords, where they have not infrequently been overrruled. Judicial enterprise in the Bear Garden (the colloquial name for the area of the Royal Courts of Justice in which the Queen's Bench masters sit) has not often been rewarded by praise in the rarefied atmosphere of the appellate courts. And it is worth pointing out in this connection that the masters are only deputies to the judges, so that any of their orders can be appealed (or, in the Chancery Division, adjourned) as of right to a single judge, from whom a further appeal lies (with leave) to the Court of Appeal, and thence (again with leave) to the House of Lords. Any party with a long purse concerned to delay the trial of an action may therefore regard any unusual order made by a master as a heaven-sent opportunity to put off the trial, in extreme cases for a year or more, by testing the order in a series of superior courts. Even if he loses all the way up, he will not have to pay his opponent's costs until after the trial of the action.

58. When, at last, there is what looks like a reasonably complete bundle containing all relevant documents from both sides, when all Further and Better Particulars of the pleadings ordered by the master have been served and any Interrogatories answered; in short, when most of the Order for Directions has been complied with, the time has arrived for Advice on Evidence. At this point, everything goes back to counsel, who now has another opportunity to take stock of the situation as a whole and to specify the final preparations for trial.

59. To write a useful Advice on Evidence, counsel has to rehearse in his mind's eye every possible scenario for the trial. Who will make the opening speech? What documents will have to be handed to the judge? Will the witnesses have to have a bundle of correspondence to refer to? Whose job will it be to prepare these? What are the issues as defined by the pleadings? For each of these, which party has the burden of proving it? What admissible evidence is there to prove it? Do the statements of the various witnesses cover not only what they have to prove, but also the matters on which they are likely to be cross-examined? Are any documents still missing? Above all, what could go wrong during the performance, and what contingency plans need to be made to cover such eventualities?

60. When the solicitor receives the Advice on Evidence from counsel, there is once more a great deal of work to be done. Some of the witnesses may have to be seen again, and their statements of evidence expanded to deal with the points which counsel has raised. They will have to be warned of the likely date for the trial. Bundles of documents for use at the trial have to be agreed with the other side, and more copies run off and collated. Notices to Admit or Produce Documents may have to be served. Finally, the action has to be set down for trial, and the brief to counsel prepared.

61. Although it is the litigant himself who is counsel's client, it is the solicitor who is personally responsible for counsel's fees. The brief fee is incurred on the delivery of the brief, whether or not the trial in fact takes place. Accordingly, the solicitor will need to ensure that he has enough money in hand from his client to cover the brief fee before he delivers the brief. At that point of the sequence, therefore, both parties will again come under pressure from their solicitors to pay over substantial sums of money;

barristers are specialists in advocacy, much as surgeons are specialists in operations, and the brief fee (with additional daily fees called " refreshers " if the trial takes longer than one working day) is likely to be a substantial fraction of the total cost. All this is ultimately subject to the law of supply and demand. For that reason, this is another stage where many actions are settled.

Trial

62. A trial in the English High Court retains much of mainly historical ritual. The judge, wigged and robed, presides from a raised throne and the barristers, also wigged and robed, look up to him literally as well as metaphorically. Ushers, also robed, gravely carry documents from one place to another, witnesses take their solemn oaths on Holy Books. Every word spoken while the evidence is given is written down in shorthand by the court reporters or recorded on tape for subsequent transcription if required.

63. To a visitor who has no connection with the case, the proceedings seem pitched in a low key, and may even appear boring because of the snail's pace at which they seem to move. But this impression is deceptive: what is going on is a fight, a pitting of strengths and wits against each other, a display of aggression mitigated only by the ritual of a complex set of rules and conventions. For the parties, it is the climactic moment of the whole lawsuit. For the barristers, it is much like a pianist's concert performance: the concentration is total, every nerve is stretched to ensure that every note in the score is played, and that there is not a single wrong one. But unlike a concert, there is no score, and there can be no rehearsals: at every turn a different and unexpected piece may suddenly have to be played. Above all, therefore, the barrister must be able to " think on his feet," to respond instantaneously to every move in the game, and to bring into play a variety of contingency plans to meet any eventuality.

64. Meanwhile, the solicitors on both sides need to ensure that there is no slip in the stage-management, and that the movements foreseen in counsel's choreography will be smoothly carried through. The moment a witness is called, he must appear; when a document is required, it must be there (with the necessary number of copies); if the judge wants a mystery cleared up overnight, the solicitors must solve it; and a mass of urgent, last-minute and often unexpected problems must be resolved behind the scenes.

65. The trial is therefore dramatic, but unlike the drama of the theatre or the concert hall it is unique and unrepeatable. Because until the present century all the facts had to be found by the jury, and because it would have been difficult to reassemble the same twelve citizens again if they had once been allowed to disperse (by which time they might anyway have been subjected to all sorts of outside influences), the English civil trial is single and indivisible. There is no going back, no time for second thoughts. While it takes place, everyone concerned in it concentrates on nothing else: once it is over, it is irremediable.

66. Before any evidence can be called, the judge has to be told what the case is about. It is a matter of constant surprise to laymen—and to many lawyers from other countries—that an English judge traditionally sets out on the trial of an action without knowing anything about it beforehand except the names of the parties in the printed cause list (he has the

pleadings, but he does not always read them). It is therefore the job of counsel—usually counsel for the plaintiff—to explain the whole case to the judge: to read the pleadings, the letters and the other documents, out loud *verbatim*, and to summarise what all the witnesses he is calling will say, and how his client views the issues. This " opening speech " may not take more than an hour or so in a simple case, but in a more complicated one it can run into days. When all the plaintiff's witnesses have given their evidence, the defendant's counsel has the right—which he almost invariably exercises—of making a second " opening speech " in which he explains how *his* client views the issues.

67. Apart from the order of speeches, the Rules of Civil Procedure governing the trial are very largely the Rules of Evidence. These are complex and technical, but they have two principal functions: to ensure that the evidence put before the court is the best, *i.e.* the most direct, which can be found, and to exclude anything which experience has shown to be prejudicial or unreliable. For example, a witness may tell the court what he saw, but not what someone else told him he saw. He may say that his wife looked startled, but not that she said " Oh, my ! " [8] To prove a document strictly, its maker has to be called. There are constant objections about the form—let alone the content—of the questions which may be put to witnesses. Each rule has a number of exceptions, and there are often exceptions to the exceptions. Unlike the rest of the Rules of Civil Procedure, the Rules of Evidence have not been codified, but are enshrined in a patchwork of past decisions and reforming statutes. But the principal object of the whole system was to ensure that the jury would not be influenced by matters which more intelligent and experienced men would be able to distinguish and reject, but which might arouse their uneducated prejudices. As in the case of the indivisibility of the trial itself, here too the phantom jury in the empty jury box still dictates the forms of procedure.

68. When the evidence is concluded, counsel for each side again address the judge on fact and law. Finally, the judge delivers a reasoned judgment —either immediately, or after a few days for reflection. The shorthand writer records it, and transcribes it later if the losing party wishes to consider a possible appeal, or if the law reporters think it sufficiently important to be published in the books.

69. At the end of the judgment, there is a brief argument about costs. As a general rule, these " follow the event," that is to say that the losing party is ordered to pay those of the winner, as well of course as having to pay his own. (This is called " the indemnity rule.") Though there is power to order specific items of unnecessary costs incurred during the interlocutory stages to be paid by the party who was responsible for them, it is rarely exercised.

70. But the costs which the loser must pay to the winner are those which the winner is subsequently held to have *necessarily* incurred so as to enable him to win his case *from the time when the writ was first issued*. If for example it was thought necessary to take a statement from, and secure the presence of, a witness who was not in the end called to give evidence at the trial, the cost of so doing may not fall to the loser's charge. The adequate preparation of a case is bound to include a good deal of work designed to guard against contingencies—" necessary " if the solicitor is to do his job properly, but not " necessary " in the light of hindsight as the case emerged in

court. The main item of the solicitor's costs in the final bill falls under the heading of "Instructions for Brief" and can include some (but not all) the work undertaken before the issue of the writ. In a case of any size there will inevitably be a substantial amount of investigatory work which does not in the end form part of the brief. Accordingly the winner can still be left with a bill to pay which in a typical case can amount to up to a third of his total costs. Hence the saying "If you win, you're out of pocket; if you lose, you're ruined."

Enforcement

71. In the overwhelming majority of lawsuits in which the plaintiff succeeds, the judgment is one for damages which the defendant is ordered to pay him. Whether that order can be enforced depends principally on whether the defendant has enough money. If he has not, no Rules of Civil Procedure will get it out of him. If he has, he usually pays up. It is for the cases where he can afford to pay but proves recalcitrant that the Rules of Civil Procedure relating to enforcement of judgments exist. Like much of the rest of our civil procedure, these rules have given rise to a good deal of complaint. They have recently been considered by a strong committee under the chairmanship of Mr. Justice Payne.[9] We fully support the recommendations made by that committee, and hope that they will be put into effect before much longer. We have not therefore considered this facet of civil procedure any further ourselves.

Different kinds of case

72. It will not have gone unnoticed by lawyers that the sequence of events which we have described is that followed by the bulk of cases in the Queen's Bench Division, where most High Court litigation is in fact tried. Contested cases with witnesses are also fought in the Chancery Division: the procedure there is in theory identical, but by reason of a long tradition matters in that division proceed with even more formality and attention to technicalities, and the sense of unreality is even greater, than in the Queen's Bench Division. For other types of action in the Chancery Division, and for litigation in the Family Division, there are special rules of procedure different in a number of respects from what we have described.

73. In the county courts, the basic principles are much the same: the main difference until recently was that there was no Summons for Direction at all, and most of the orders which the High Court has power to make on that Summons had to be specifically applied for.

74. Finally, there are many rules which deal with less common situations which may arise. There may be more than two parties. One or more of them may be abroad. Special kinds of litigation have special rules of their own, and there also have to be rules for appeals. We need not trouble with these here; we have given enough of a picture of what happens in the general run of cases to be able to pass to a critique of the existing system.

REFERENCES

1. For an account of our procedure as it applies to motor accident cases the reader is referred to *Trial of Motor Accident Cases*, a Report by JUSTICE (1967) 14 *et seq.*

2. The current edition of the *Annual Practice*, the practitioner's handbook of High Court Procedure, runs to 3218 pages.

3. Various estimates put the overhead cost alone of the time of a partner in a major London solicitors' firm at £10 to £15 per hour.

4. Our rules do sometimes require the disclosure of evidence which is in the control of one of the parties, and there is a tendency to extend such provision (*e.g.* S.I. 1971, No. 1955), but such exceptions are a departure from orthodox philosophy.

5. Unless, that is, the Statement of Claim is endorsed on the Writ, or is served with it. This is optional under O. 6, r. 2 (17), of the Rules of the Supreme Court ("R.S.C."), and is fairly common today.

6. R.S.C., O. 18, r. 7.

7. Judicial Statistics 1970; 1971 Cmnd. 4721; and see para. 203 below.

8. Unless, that is, he avails himself of the procedure for the admission of some hearsay evidence which is now available under the Civil Evidence Acts 1968 and 1972.

9. "Report of the Committee on the Enforcement of Judgment Debts" 1969 Cmnd. 3909.

CHAPTER 4

A CRITIQUE OF THE SYSTEM

75. From the outline of the system given in the last chapter it is clear that it does not lack procedural devices for those who are willing to use (or sometimes to abuse) them. In theory it is flexible; in practice it works badly. It is too slow, too expensive, too cumbersome and too formalistic. The roots of these defects do not lie in a lack of simplicity, but in the underlying principles and practices upon which the system itself, and the preconceptions of those who administer it (judges, masters, barristers and solicitors) are based.

76. The main defects stem from four characteristics of the system:—

(1) It depends almost entirely on party-prosecution;
(2) it is insufficiently "open";
(3) it depends too heavily upon the all-embracing trial; and
(4) there is a tendency to formalism at the expense of robust common sense.

Party-prosecution

77. The prosecution of the case is largely in the hands of the parties' representatives from the beginning until the trial. The court has no real power to intervene. Moreover, the parties' representatives can, and often do, adjust the rules among themselves to suit their own convenience, which is no doubt often, but by no means always, consonant with their clients' best interests.

78. This emphasis upon party-prosecution leads to the following important consequences:

(i) excessive delay;
(ii) late investigation of the facts and danger of surprise at trial;
(iii) lack of discipline in the conduct of proceedings;
(iv) late or unfair settlements; and
(v) the possibility that the decision is on an issue of the parties' choosing, and not on the best possible picture of the events in question.

(i) *Delay*

79. We have already suggested that the strict time provisions in the rules can be extremely unrealistic. Unless both parties' solicitors are prepared to waive many formalities, and also give continuous and exclusive attention to a particular case, the precise time schedule can well prove to be an impossibility. Even then, difficulties such as the temporary non-availability of counsel, parties or witnesses, or delayed communications, can arise and can necessitate extensions of time. Solicitors, not unnaturally, are aware of these facts and are willing to agree to reasonable extensions.

Sometimes delay can be deliberate for perfectly sound reasons; on the other hand it may well be that a defendant has nothing to gain by pressing for action by a plaintiff. It is certainly true that for a combination of good and bad reasons delays do become excessive. Where this occurs mainly for the convenience of lawyers (both solicitors and barristers), the client may well be unaware that his interests are not being fully served.

(ii) *Late investigation*

80. The lack of any supervision of the parties' representatives, even at the stage of pleadings, can too often result in cases reaching a late point before any genuine attempt is made to investigate the facts thoroughly. A defendant may, for example, resolutely deny liability throughout the period of negotiation before proceedings are started, without troubling to investigate the substance of the plaintiff's case. Even at the stage of pleadings he may merely serve a defence putting the plaintiff to proof of his case, and admitting nothing. As the rules now stand such a plea permits the defendant to wait before spending money on fact-finding, and then at the trial to produce in support of his bare denial an explanation of which he has given no previous notice. As the Winn Committee [1] put it, the defence is a "blot upon our procedure" in this sense. A plaintiff too may formulate a statement of claim containing a wide range of alternative allegations and may persist in them in the hope of hitting on some sound line of argument later, perhaps on discovery. This "lucky-dip" aspect of our system is theoretically mitigated by devices such as applications for particulars and notices to admit facts, but these are only palliatives in practice. Nor is a possible penalty for breach of the rules in the ultimate order for costs a real sanction; careful and discriminating orders for costs by judges at the end of trials are rare. Even if they were more frequent, so remote a sanction would have little effect on the minds of the parties' representatives at the early stages in the process, particularly since the chances of settlement are then still high.

81. Perhaps more obviously, late investigation is a bad thing in itself. Frequently two, three or more years elapse between the events which give rise to litigation and the trial. It is very desirable that witnesses should be approached and their accounts of the facts recorded as quickly as possible. Not only is uncertainty eliminated in the early stages, but testimony is perpetuated for later reference and the refreshing of memories. Again, the longer the time which elapses between the events and their investigation, the more difficult and expensive will it be to trace witnesses at all, even if they can still remember anything useful. A vicious circle is thus set up: investigation is left till later; it thus becomes more expensive and less likely to have a commensurate pay-off; so it is left till later still in the hope that something else may turn up, and perhaps in the end it is never carried out at all.

(iii) *Indiscipline*

82. The lack of supervision by the court and the lack of any discipline which might be required by the rules does not end when cases reach the Summons for Directions. The master's armoury of powers (see para. 54) which should in theory allow him to intervene at this point to ensure that the case is fought fairly, with its scope appropriately limited and the real issues clearly defined, is in practice useless unless one of the parties applies

to him to intervene. The master has not even seen the pleadings in advance, so he has no opportunity to assimilate even the outline of the substance of the case which they contain. Nor are solicitors encouraged by experience to ask for robust intervention by the court. Moreover, even constructive response to the court's own suggestions is dependent on agreement, and agreement is not likely if it involves a chance of advantage to the other side within the varying and unforeseeable possibilities which the existing system allows.

(iv) *Unfair settlements*

83. To be fair, a settlement must reflect the strength of the case, in fact and in law, on either side. If investigation is late, this will either delay fair settlements or lead to early settlements which will be unfair as they will be based on incomplete knowledge of the facts. Thus the dilatoriness which tends to arise from the principle of party-prosecution produces settlements which either come later than is necessary, or which fail to reflect adequately the true merits of the case. Again, in so far as late investigation is less effective than early investigation, even late settlements will be less fair than they could be. In any case late settlements involve increased costs, and this tends to affect unfairly the weighing of the relative merits of the parties' cases.

(v) *Decisions on incomplete facts*

84. Because it is for the parties and not the court to decide what evidence is to be presented it is open to them—quite properly as the Rules now stand—to avoid the calling of vital witnesses because neither of them is willing to risk the damage which that evidence might do to his case. A decision will thus be reached on an incomplete—if not actually distorted—view of the facts. It cannot be right for the expensive and elaborate machinery of justice to be used to decide disputes on the basis of incomplete information.

The " Closed " System

85. Not only are the parties almost entirely responsible for the investigation of the facts and the progress of the proceedings in our system, but they do it independently. The system is designed to keep much of the information available to each party in watertight compartments. Each side quietly gathers facts and discloses to the other only those required by the pleading and discovery rules. This, with the desire to keep every option open for as long as possible, makes litigation very much a game of guesswork until the trial.

86. This second main feature of the system has mischievous effects of its own, and also adds to some of the mischievous effects of party-prosecution. The closed system itself leads to:

(i) unnecessary work and expense; and
(ii) unfair settlements;

it also reinforces the problems of

(iii) indiscipline;
(iv) surprise, which we have already noticed as resulting from party-prosecution, and
(v) it adds another facet to the danger of cases being tried on incomplete facts.

(i) *Unnecessary work*

87. Each side must do its own investigation independently. Neither is bound to help his opponent by informing him of evidence, or even of names of witnesses, which he knows may be crucial later, however readily available this information may be to him.[2] The opponent must use his own money and ingenuity to find them for himself. If he lacks money or his representatives lack energy, the information may not emerge until the trial, if then (see below).

(ii) *Unfair settlements*

88. A fair settlement, as we have already said, should reflect the true merits of the case on both sides. An advisor who is in the dark about his opponent's case will have no means of assessing the likely outcome of the trial. Inevitably the dominant factors in his mind will be, first, his client's financial situation and the value to him of early money and, second, the assessment of an extremely uncertain risk of failure. His opponent's mind will be working along similar lines and each will be doing his utmost to ensure that the other does not find any weakness in his case. Such forensic blind-man's-buff cannot be in the real interests of the litigants, nor of the community.

(iii) *Indiscipline and surprise*

89. We have noticed that insistence on party prosecution, and the lack of intervention by the court, can lead to tactical manoeuvring and the danger of surprise at the trial. This defect might be at least reduced if the parties could exert greater pressure on one another. But in the field of investigation the closed system altogether prevents the parties from ensuring that their opponents can really back up their allegations. Even if the opponent can support what he alleges, the other side will not normally discover how he does it until the trial, and then he runs the risk of being taken by surprise.

(iv) *Decisions on incomplete facts*

90. Leaving the investigation and presentation of the case to the parties may lead to the suppression of one aspect of the facts (para. 84) but the closed system may allow one side not only to gain an unfair advantage at the settlement stage (para. 88), or to spring the new material upon his opponent at the trial (para. 89), but also to suppress that aspect at the trial too. He will not call the unfavourable witness and, with luck, his opponent will never discover him. The decision will then be given on facts which are incomplete. Obviously facts cannot be gone into in infinite detail, but we doubt the desirability of deciding cases on facts which have, by the action of both parties, been rendered incomplete or even distorted, and we are certain of the undesirability of deciding cases on facts which have been so arranged by one party at the expense of the other.

91. In short, the high degree of formality created by our rules tends to obscure the real facts and issues as the case proceeds towards trial. Starting with parties who each found their cases on facts and arguments as they see them, the latitude which the rules provide leads to increasing confusion, rather than to the degree of clarity needed if the dispute is to be disposed of quickly and justly.

The all-embracing trial

92. A third fundamental characteristic of our system is the extraordinary prominence which it gives to the oral hearing at the end of the process. The theory is that at this stage all should be made clear, fact and law, by oral presentation in person before the body charged with deciding the case. This feature is of course closely associated with the emphasis on party-prosecution, but in the interests of clarity it deserves separate treatment together with the particular evils which follow from it.

93. The emphasis placed on the trial:

(i) leads to a high degree of formality which characterises this stage of the proceedings;
(ii) makes the system inflexible;
(iii) is expensive in time, money and manpower.

(i) *Formality*

94. The trial is an extremely formal occasion. It is questionable whether the ancient formalism of High Court trials (which county courts generally do their utmost to imitate) is appropriate for decisions of matters of great importance to litigants and witnesses in an egalitarian age. This formality, combined with the process of examination and cross-examination, producing the successive building-up and breaking-down of witnesses, tends to raise tensions and emotional involvements hardly conducive to the dispassionate resolution of complex disputes. Cross-examination may well be one of the glories of our system, and as a means of eliciting the truth from an evasive witness it probably cannot be bettered. But whether this rigorous, formal, and extremely expensive process needs to be used as extensively as it is, is another matter.

(ii) *Inflexibility*

95. The strength of the presumption that every decision should be left until the trial also causes great inflexibility. In a good many cases progress towards a settlement could be greatly facilitated if one or more issues of fact or law could be disposed of in the early stages, or if one or more points of claim or defence which are not realistic could be eliminated from the settlement equation. The master has power to order the separate trial of a preliminary issue of law, but the lack of initiative of most advisors at this stage (or the opposition from the party more likely to lose) prevents it from being much used. Even when a preliminary issue is ordered, the order will often be reversed on appeal, since the Court of Appeal tends to discourage the fragmentation of the trial.

(iii) *Expense*

96. The dominant trial is also expensive in time, money and manpower. At first sight one might think that a single proceeding at which all the many outstanding issues are sorted out and decided at once, in the presence of the parties, their representatives, and all the relevant witnesses, would be likely to prove an economical method of disposing of a problem. But in practice it is not so. In the nature of things it is not possible to predict accurately how long it will take to examine a given witness, or to argue a given point. When many witnesses and many points have to be decided all at once this unpredictability becomes greater, and the danger grows that either the courtroom will be left empty for long periods and judge-time

wasted between cases, or (more likely with our present system of judicial administration) that all the participants in the next case will be kept waiting for substantial periods while an unexpectedly long trial is completed. Long trials also keep busy witnesses and litigants waiting unnecessarily for long periods while areas of the case are explored to which their evidence is not relevant. If a settlement is reached just before the hearing, as frequently happens, this obviously causes less dislocation to the schedule if the hearing was to be a short one. But settlements at the courtroom door are still a notorious cause of wasted judge-time. For all these reasons many short hearings are preferable to few long ones.

Formalism as against common sense

97. After the Judicature Act of 1875 the higher courts in England, albeit with some misgivings, set out to treat procedural questions with the flexibility and concern for real merits which the old common law system had so conspicuously lacked. Nevertheless there is still a disquieting tendency in the High Court and the Court of Appeal to quash a decision or mode of proceeding adopted by a master which, though practical, happens to infringe some technical provision of the rules or some alleged " principle " of procedural law.

98. Another effect of formalism is that it renders it almost a necessity for a party or his advisers to utilise the available rules for making the other side's task more expensive and more difficult. This can be done for example by applying for an interlocutory order—such as further and better particulars, interrogatories or specific discovery of documents—to which the party applying is arguably entitled under the Rules, though in reality it is unlikely to help his case more than marginally, if at all. If the order is granted, it will involve the other side in a great deal of work, and therefore of time and expense, so that the trial is further delayed and his morale suffers. If the order is refused, the party who applied for it appeals, first to the judge, then if necessary to the Court of Appeal, and possibly even to the House of Lords. Each appeal delays the trial for more weeks, months or even years, and involves further expense.

99. The only sanction against such tactics lies in the award of costs against the party who unsuccessfully adopts them. But the order for costs, at worst, will be that the loser should pay the winner's costs " in any event," that is to say, regardless of the outcome of the trial, *but only after the trial itself is over.* Where the economic position of the parties is unequal such tactics can in effect be highly oppressive. The party with the longer purse can more easily engage in them, while his opponent may be driven to accept an unfair settlement.

REFERENCES

1. " Report of the Committee on Personal Injuries Litigation " 1968 Cmnd. 3691, para. 266.

2. But he is bound to disclose to the other side—unless they are " privileged " from production—all the *documents* in his possession even if they help the other side's case or weaken his own.

CHAPTER 5

CIVIL PROCEDURES IN SOME OTHER COUNTRIES

100. Our system of Civil Procedure is the admiration of many experts in foreign systems, especially those who have not had occasion to use it themselves. They rightly admire the ability and integrity of our lawyers and say that either the speed or the thoroughness of our process (but not usually both) compare favourably with civil procedures in most large and industrially developed countries. Now any attempt to "transplant" rules or institutions which work well in one environment to a foreign context is likely to lead only to "rejection" and ultimate failure. Nevertheless we believe that useful lessons can be learned from a variety of foreign systems. A direct transplant is unlikely to "take," but with appropriate adaptation a foreign device may well prove itself in a new context. An example of this is the American "Pre-Trial," an idea originally based on our Summons for Directions but now, though not beyond controversy, well-established in the United States, with a character entirely American.

101. In this Chapter we shall, therefore, examine some significant features of the systems of civil procedure in use in five countries. We have chosen France and Germany as representative of two radically different approaches of the Civil Law to these problems, the United States and Canada as modern Common Law systems, and Scotland as the "foreign" system operating in an environment most nearly like our own. All these countries exemplify the relatively strict control of the parties and their representatives which we have found to be lacking in our own system. The French, German and the United States systems achieve this, or attempt to do so, through the intervention of an active court at a relatively early stage. Canada and United States also place weapons in the hands of both parties which ensure early disclosure. Scotland on the other hand attempts to achieve the same effect by means of rules and practices, particularly of pleading, which are more stringent than our own.

102. Before examining these systems, we must make one important preliminary point. It is sometimes said that the English procedure is "adversary" or "accusatorial" whereas foreign systems, particularly continental ones, are "inquisitorial," and that inquisitorial systems are fundamentally inconsistent with English notions of fair play and impartial justice, so that any attempt to engraft an inquisitorial system on to our system of justice represents a fundamental attack upon the ideals which our lawyers and judges have worked out so patiently over the centuries. Although such an uncompromising proposition is clearly too over-simplified to be wholly true, we think that it is based on a sound legal instinct in one respect at least, and that is the form of procedure when witnesses are being examined. If that examination is conducted largely by the judge—as it is in those countries which have what we loosely call an "inquisitorial" system—there is a strong tendency for the judge to "descend into the

arena" and so jeopardise his impartiality. It is extremely difficult to weigh a witness's evidence with detachment when one also has to subject him to the pressure of hostile cross-examination so as to test his veracity. We therefore think it important that, whatever other reforms we may recommend, we should not abandon our existing court procedure of examination, cross-examination and re-examination of witnesses by the parties' advocates, with the judge playing the role of an uninvolved observer who does not take any major part in the forensic battle. But we also think it important that this aspect of an "inquisitorial" system should not be confused with features of continental and other systems which, while differing from our own, carry no danger of leading the judge to enter the fray at the risk of losing his detachment.

France

103. French procedure since the reforms of 1965 resembles our own in that the lengthy procedure of fact-finding and pleading culminates in a hearing or *audience* at which the whole case is argued before the full court.

104. However, there is a fundamental difference. The court is composed of three judges, one of whom, the *juge des mises en état*, is normally seized of the case from its commencement, when it is enrolled, through subsequent hearings when the parties first file their initial pleadings (*conclusions*), until the time of the *audience*.

Investigation and fact-finding

105. It is very rare for any findings of fact to be made at the *audience*. Investigation and proof of facts take place under the guiding hand of the *juge des mises* by means of *enquêtes* (examinations of witnesses before the judge), *comparutions personnelles* (*enquêtes* of the parties), and *expertises* (reports based on investigations by experts appointed by the court). The record of all these processes (not normally verbatim) together with the pleadings (*conclusions*) of the parties (which continue to be exchanged until the *audience*) are compiled into a *dossier*, together with a summary by the *juge des mises*, and normally form the whole of the evidence before the court at the *audience* upon which the *avocats* will base their argument.

106. The *conclusions* perform a function similar to our pleadings, but they are much less formal and precise. They are meant to set out a full factual account of the basis of claim or defence, and since the *juge des mises* is charged with examining them and placing them on the *dossier* there is an opportunity for the court to ensure that they perform this function. In the past, when the preliminary judge was less active, early *conclusions* were often "banal" and lacking in real content [1] and to some degree this seems still to be true. Like our pleadings, *conclusions* fix the issues, limit the argument and prevent judgment being given in default. Rights of amendment are limited within the cause of action but are otherwise quite generous.

107. The fact-finding devices already mentioned serve the purpose of investigation as well as final proof. They thus avoid the duplication or even triplication of effort found in our own system.[2] Either party or the *juge des mises* may call for an *enquête*. One or more witnesses will be called for oral examination by the *juge des mises* who will have been informed of the issues of which clarification is sought, and will have enunciated them in

the order calling for the examination. The parties' lawyers will normally be present and may suggest questions, but the questions may only be actually put by the judge. (The system is therefore inquisitorial in the full sense.) Even though a party has called for an *enquête* and specified the questions with which the *enquête* is to be concerned, this does not prevent the *juge des mises* from interrogating the witnesses on other matters which he thinks important. He may also call a witness not asked for by either party. When each witness has completed his testimony it is read to him and he signs it.

108. Any decision of the *juge des mises* on incidental issues of evidence or procedure at this stage is subject to appeal to the full court. Further appeals on the point may however be taken only when the whole case has been decided. The *juge des mises* has no power to decide questions of substance, whether of fact or of law.

109. The *juge des mises* has a continuing duty to supervise the case from the very beginning when it is placed on the roll (at which point it will first have been assigned to him personally) until the *audience*. Under the new regime introduced by a decree in 1965 and modified in 1969 and 1970 the *juge des mises*, quite apart from having the right to initiate these fact-finding procedures, also has an extended general supervisory power. He may fix or extend time limits for the issue of *conclusions* (and under the new regime time limits have been abolished [3]) or other procedural steps; he may call the parties' representatives to a conference at any time if he considers it appropriate; he may call for any document he sees fit to call for and may show it to the other side (though a party may refuse to disclose it—French discovery is much narrower than ours—and such a refusal may result in an appeal). The *juge des mises* will also prevent documents being produced at the last minute before the hearing. Further, he may submit any question of fact to an independent body, perhaps an official investigator, or *huissier*, for his report or *constat*.

110. An *expertise* (report of a court expert) will cover more technical matters than a *constat*, perhaps a question of medical fact, or of engineering. The *expertise* too may be ordered either by the *juge des mises* on his own motion, or on application by either of the parties. Unless the parties agree to be bound by it, the *expertise* does not bind the court and it is open to argument at the *audience*. However, unless the evidence against the expert opinion is overwhelming, it is very difficult to overturn a properly-conducted *expertise*. If new evidence comes to light it is open to the *juge des mises* or the full court to order a second *expertise* in an appropriate case.

111. The record of all these proceedings, together with all the documents in the case (including letters, maps, plans and photographs), will be presented to the court in a *dossier* ready for the *audience*, together usually with the *juge des mises's* "report" on the case. The three judges at the *audience* (of whom the *juge des mises* will normally be one) will have to read all this material carefully beforehand.

112. The *audience* itself will be brief and relatively informal. Trials lasting more than an hour or so are rare. The *avocat* on each side will speak to the *dossier*—in a somewhat rhetorical style, though the modern style tends to pay more attention to facts—and the judges will frequently intervene. The argument will be about the inferences to be drawn from

the facts which are before the court in documentary form, and of course about issues of law, which will have been elaborated in the *conclusions*.

Conclusions on the French system

113. What evidence we have (and comparisons are extremely difficult) suggests that at present the average French case is at least no cheaper and no quicker to conduct than the average English one. However, the procedure of *mise en état* with its much increased court intervention was only instituted in 1965 and in its early years was employed in only a few higher courts. It is still spreading and is generally regarded as successful. Two basic criticisms of the new system have been urged in France. First, the reforms were introduced with inadequate preparation. There are not enough *juges des mises* with far too many cases on hand to be able to give adequate attention to all of them. Secondly, the French profession still seems to regard the new powers of the court as an unjustified incursion upon its own freedom, and is unwilling to co-operate with them.

Germany

114. The German system resembles the French in many respects, but since in most of the German states the reaction from the mediaeval and formalised written procedures came much later and was correspondingly more extreme, the system elaborated in the *Zivilprozessordnung* of 1877 ("ZPO") embodies heavier stress on orality, informality and direct communication between judge and parties, an abhorrence of formal rules and standards of proof, and a bias towards documentary evidence of the kind which still prevails to some extent in France.

115. The French *mise en état* reform of 1965 seems largely to have been modelled on the German concept of the continuing trial, but the fundamental difference between the two systems is that in Germany the court—whether in full session or in the person of a single "reporting" judge—has not only procedural powers to direct the conduct of the case, but also power to decide questions of substance *at any stage*.

116. The normal sequence of German procedure is made up of

(1) party-writings (*Vorbereitende Schriftsätze*, preparatory writings), preparing the way for
(2) a hearing, at which the parties and counsel will argue before the judge, followed by
(3) proof-taking, followed by
(4) a judgment or decision.

If the judgment or decision is not conclusive of the dispute the whole process may be begun again.

Preparatory writings

117. Each case is begun by a complaint which puts the plaintiff's demands, the remedy sought and the factual (and sometimes also the legal) "grounds and object" of the claim. It must also, like all subsequent writings, make "offer of proof" of all facts alleged by disclosing the names of witnesses and by designating, or enclosing copies of, the relevant documents.[4] Parties who fail to give reasonable notice in their writings of arguments to be put forward at the hearing, or who fail to comply with time limits (see below), may be penalised in costs, or the case may be

ordered to proceed to a hearing without the benefit of writings on the defaulting party's behalf.

118. The writings may contain much that is of only slight relevance to the issues, together with contentions of law and of fact, and the offers of proof. They are of considerable importance in the sense that the judge or court will read them before proceeding to the hearing and will use them to base lines of examination of witnesses and objections to the other side's arguments of law. Thus though the principle of orality is theoretically paramount and the writings are intended only to clear the ground for the hearing, in practice they may well determine the way in which the hearing proceeds, or even in some cases make hearings on some points unnecessary.

Hearings (or "Conferences")

119. Hearings are conducted either before a full court of three or before a reporting judge, who will exercise the power of the full court, subject to a few restrictions: in theory, for example, he is bound to refer to the full court a proof-taking which involves serious doubt as to the credit of a witness. It is ideally the task of the reporting judge to get the case into a state where it can be referred to the full court for disposal at one short hearing.

120. There will usually be a preliminary hearing before the reporting judge, at which the parties will appear personally with their representatives, and before the argument is formally started by the putting of the demands, the judge will make orders "in order to dispose of the litigation at a single session if possible," [5] to secure the attendance of witnesses, the acquisition of appropriate documents and so on. The court may also examine the parties in person informally before the formal argument begins in order to increase its knowledge of the case on obscure points, and encourage a settlement or withdrawal by either side, when such a solution seems called for (*cf.* the American Pre-Trial, *infra*).

Finding and proving of facts

121. As in France, questioning of witnesses and parties is in the hands of the court, not the parties' representatives. While it is not unlawful in Germany (unlike France, where it is professionally improper) for parties' representatives to approach witnesses before the hearing (and the parties themselves are sometimes encouraged to do so) this is regarded as undesirable, and judges will discount substantially the evidence of a witness known to have been approached by counsel. The judge will normally examine a witness himself and then ask counsel and the parties if they have any questions. The examination is however overwhelmingly dominated by the judge and any but a minimum of supplementary questions from the parties is likely to reflect on his competence and antagonise him. Here too, therefore, the procedure is inquisitorial in the full sense.

122. It must be stressed that at proof-taking, as at every other stage, the proceedings are quite informal and flexible; the judge may break off at any time to put questions to the parties or call for argument on a point, all in accordance with his overriding duty to ensure that the case proceeds in a convenient and expeditious fashion. This duty, the cornerstone of the ZPO, is set out in paragraph 139.

> "The presiding judge shall ensure that the parties make full statements regarding all important facts and make all appropriate motions, in particular that the parties enlarge on insufficient statements as to the facts which they plead and that they indicate means of proof. To this end ... he shall discuss the case ... with the parties and ask questions. The judge shall also draw to the parties' attention the doubts which arise in the mind of the court."

In particular, the judge or court will frequently resort to direct oral examination of the parties on difficult points without the protective facade of counsel. Similarly, the court is bound to advance any theory of law which may seem appropriate and suggest it to the parties. The court will make its own decisions about proof-taking and may employ only part of the means offered by the parties, or even means of its own devising, such as an *expertise*. Time limits again will be fixed at the court's discretion and requests for extra time will have to be argued not only before the court but frequently in the presence of the parties.

Decisions and appeals

123. The case will thus proceed through a series of hearings (or one continuous hearing with adjournments), each session terminating in an order as to how the case should proceed from then on, together perhaps with a decision on a particular issue. Issues of fact in particular, which are regarded as peculiarly for the decision of a judge who has seen the witnesses, are frequently divided in this way. Such decisions or orders are frequently subject to appeal on fact or law and in many cases if an appeal is not taken at once the parties are bound by the decision which cannot, at least in theory, be reopened should there be an appeal on the final judgment. On appeal the court has even more power over the process than at first instance, and may, for example, call for a rehearing of witnesses where their demeanour is regarded as important. This is frequently necessary as the record kept of proof-taking is only in the form of a precis of what has been said, dictated by the judge to a clerk at intervals of a few minutes.

Conclusions on the German system

124. The German system has a number of advantages: it is extraordinarily flexible, it eliminates the danger of surprise and with it the need for complex discovery devices, and thus gives little or no opportunity for the tactical manoeuverings which deface our own system. The system does not, as does the French one, rely upon evidence of fact being communicated in writing for a decision by a court the majority of whom have not seen the witnesses; it avoids the rigid formalism of the older Civil Law systems, and at the same time allows for the maximum of impartial supervision by the court.

125. However, this last feature also has less beneficial aspects. A strong court tends to mean weak counsel; although the disparities achieved by the rich client who hires a more persuasive spokesman are eliminated, the corresponding weakening of counsel's role may lead to parties being inadequately protected both against the court and each other. There is some evidence that skilful liars are more able to convince a court in Germany than in England. Perhaps this is due to the German inquisitorial system of fact-finding: on the other hand, it is sometimes claimed (though we think without much truth) that honest witnesses can destroy themselves under the rigorous stresses of cross-examination in England. The German

system also requires a very large number of judges, and quality at the lower levels must inevitably suffer. The continuing (or rather episodic) trial may, if not rigorously controlled, lead to long delays, particularly while experts' reports are obtained. This is a perennial problem with procedures which attempt to fragment the hearing (see for example the Grant Committee's findings as to the genuineness of preliminary pleas-in-law under the Scottish system, *infra*). The stress on orality and the conference approach leads to less importance being attached to pleadings than in our system; indeed it was at one time quite frequent for defendants to appear at the first session before filing any notice of intention to defend. An attempt was made in 1967 to resolve both these latter problems (delay and lack of preparation), which are interrelated, by proposing that defendants be required to give notice of intention to defend and if necessary be required to file a defence before the first hearing, that time limits for the filing of party-writings be insisted upon more stringently, and that all efforts be made to ensure that cases were resolved at a single hearing. Special "Schnellkammern" were set up experimentally in a number of major German conurbations to try out these improvements, with—in the words of one German commentator—"spectacularly good" results. In 1967 more than 80 per cent. of the cases decided in these courts required only one hearing.

126. It may be that the German system in its desire for informality goes too far even for the convenience of Germans,[6] but it is difficult to believe that nothing can be learned from the flexibility and party-discipline achieved by the German conference method combined with the episodic trial.

The United States of America

Historical Introduction

127. Civil Procedure in all the American States was modelled upon the eighteenth-century English system, until reform came, under the influence of the codifiers in the mid-nineteenth century, beginning with the famous New York Code implemented under the aegis of the great David Dudley Field in 1848. These codified reforms were adopted in the majority of the states by the end of the century. In brief the result was to combine common law and equity, to abolish the forms of actions, to abolish the old system of pleading and to create a system where the parties pleaded the facts constituting a cause of action or defence and the court granted any appropriate remedy on the basis of the facts as found—thus achieving a system similar to, though perhaps somewhat less flexible than, our own since 1875.

128. Since the turn of the century the American literature (which is immense) and the progress of reform reflect a growing disillusionment with pleadings as a procedural device, and growing emphasis upon two devices which are normally used between pleadings and trial, Pre-trial Discovery and the Pre-trial Conference. Both devices were implemented in the new Federal Rules of 1938, upon which many subsequent reforms in the different states have been based. The insistence that pleadings state a complete "cause of action", "facts" and not "evidence," and such features as the insistence that defences be "consistent," had led to insoluble theoretical problems and a multiplication of procedural questions before the court. The Federal Rules system attempts to avoid these problems by

merely requiring that the pleadings give "fair notice" of claim or defence.[7] Bills of particulars were abolished altogether in 1946, while motions attacking pleadings before answering pleadings were served were also substantially curtailed.[8] Even in states where code pleading has been retained (such as California) the availability of more extensive discovery under rules comparable to the Federal Rules has led to relaxation in the particularity of pleading.

Pre-trial discovery

129. The attitude of the American courts to discovery is enshrined in the following words of the Supreme Court:

> "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. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from time of trial to the period preceding it, thus reducing the possibility of surprise." [9]

130. The Federal Rules permit inspection, discovery of documents, and interrogation much as they are permitted in England, but the most significant device for our purposes, unknown to English law, is the *deposition*.[10] Either side may examine the other party on oath on reasonable notice before an officer authorised to administer oaths [11] without leave of the court from a time twenty days after the action is commenced. A subpoena is required for examination of witnesses not party to the action unless they consent. Examination and cross-examination proceeds as at the trial, and the deposition may always be used at the trial "to contradict or impeach the deponent as a witness," and may also be used for other purposes (*i.e.* as evidence *per se*) either against a deponent who appeared on behalf of a company, or if the deponent is dead, sick, far distant or otherwise unavailable, or if the court permits it. Depositions may also be taken, at the instance of any person likely to be a party, to perpetuate testimony before an action has been commenced, after due notice to other likely parties and with the leave of the court, and leave is also required to take depositions less than twenty days after the institution of the action.[12]

131. The following are the main advantages claimed for pre-trial discovery:

(i) witnesses are examined when their memories are fresh;
(ii) there is little opportunity for coaching witnesses at this early stage;
(iii) it binds the party to a version of the facts at an early stage;
(iv) testimony is perpetuated in the case of death, or indisposition at the trial;
(v) false and sham issues are detected and eliminated;
(vi) fuller and earlier knowledge of all aspects of the case on both sides will lead to earlier and fairer settlements;
(vii) such knowledge will also lead to better prepared and better conducted trials in those cases which are not settled.

A number of disadvantages have also been alleged:

(i) it encourages "fishing expeditions" (*i.e.* it allows A to sue B with no case in the hope of finding one on discovery);

(ii) early disclosure by one party allows the other party to trim his case to fit that of his opponent;
(iii) insistence on discovery at inconvenient places or times may be used as an instrument of "harrassment";
(iv) the supervisory powers which the courts have to hear motions claiming that discovery has been abused allows for as much time being spent on disposing of such motions as was formerly spent on stringent pleading rules;
(v) the taking of depositions itself is expensive in time, money and manpower;
(vi) since depositions are expensive, a richer party will use them to gain a tactical advantage;
(vii) tactical advantages in being the first to get discovery may lead to an improper and undignified "race to discover."

132. The merits of the various methods of discovery and the extent of their use have been examined by the staff of the Project for Effective Justice at Columbia University. The relevant conclusions from their survey are as follows.[13] Discovery by oral deposition is the most commonly used discovery device of all; it is used in about one case in two. Lawyers regard it as useful and are prepared to back this up by putting their own pecuniary interest at risk—those retained on a contingency basis use it more often than others. But on the whole it is neither as useful nor as pernicious as is generally claimed. While advantages (i), (ii), (iii), (iv) and (v) above are achieved and so, it is generally accepted, is fuller knowledge of all aspects of the case, nevertheless this leads not to the promotion of early settlements nor to simplification of issues at the trial, but to providing the parties' representatives with more "ammunition" and to reducing the areas of doubt; this in turn seems to have led to a reduction of the settlement rate, and to longer and more complex trials, when discovery has been used. Discovery also seems to lead to stimulated thinking on both sides, an increase in the number of theories adopted by the parties, and thus apparently to more (and not less) surprise at the trial.

133. On the other hand, while most lawyers thought that the use of oral discovery encouraged "fishing" (and many American and some English lawyers would regard this as a gain), it emerged that even the most expensive method, the deposition, was neither as expensive nor as time-consuming (adding about 15 per cent. to the lawyer's time) as had been made out. The use of discovery as a harassing device was also very rare indeed and in so far as it gave any advantage it seemed to help the weak against the strong rather than vice versa. "Racing to discovery" was similarly unimportant. Friction and dispute about the conduct of discovery did arise in 30–40 per cent. of cases and in a maximum of 15–20 per cent. of those problem cases (*i.e.* a maximum of 8 per cent. of all cases) resort was had to the courts by motion. But—significantly for our purposes—these disputed cases were largely about the use of interrogatories. Disputes about the conduct of depositions very rarely went beyond a protest to the other side. Only in very large cases is there evidence to suggest that the use of discovery devices is disproportionate to the gains achieved, and here there is a movement towards more stringent judicial supervision. The frequency of imposition of sanctions for refusal to co-operate in the conduct of discovery was shown to be negligible.

Pre-trial conference

134. The pre-trial conference, often simply designated "pre-trial," "has proved the most popular of all the procedures found in the federal rules."[14] Rule 16 is very similar to our own summons for directions order, but the procedure in practice is very different. The decision whether to call the conference is in the hands of the judge, who also has a wide discretion as to when and how the conference is to be conducted. However, it is generally agreed that the conference should be called shortly before the trial is due (when preparation is well advanced) and be held before the trial judge himself. At the conference the judge will call upon the co-operation of counsel for the parties, who must always attend personally, to "simplify the issues," make suitable amendments to pleadings, limit the number of expert witnesses, determine the advisability of referring certain issues for a decision by a master which can be used as evidence before a jury, and "such other matters as may aid in the disposition of the action." In order to achieve this some courts require counsel to provide pre-trial memoranda giving binding notice of their intention at the pre-trial.

135. How much is achieved by pre-trial depends markedly on the energy and opinions (or lack of them) of the judge. In some hands it may be an "inane preliminary canter." On the other hand some judges go very far in requiring counsel to disclose not only witnesses and documents, but also the evidence which it is believed they will provide, in order to permit "simplification" of the issues. This has led some commentators to take the view that pre-trial resurrects special pleading in a new form. Again, under the "catch-all" power some judges are prepared to go very far in conciliating the parties, inquiring of them for what figure they would be prepared to settle and then robustly proposing a figure of their own, based upon their assessment of the merits, based in turn on counsel's accounts of their respective cases. Other judges feel that such an approach detracts from impartiality, or the appearance of it, at the trial and may even lead in extreme instances to cases being "decided" according to counsel's speciousness rather than on the evidence speaking for itself. The results of the pre-trial are embodied in an order which supplants the pleadings as the record on which the trial is to be based; as opposed to pleadings, such orders can be amended only with difficulty.

136. Pre-trial was originally introduced to clear an unusual backlog of particularly complex cases. It has been claimed that it encourages free exchange of information, and thus eliminates surprise and false issues at trial, as well as promoting settlement by bringing both parties' counsel together without either of them compromising his position by having to make the first move. These advantages are still widely claimed for Pre-trial; however, the Columbia Project study of Pre-trial in New Jersey seems to demonstrate, at least in that state, that Pre-trials do not lead to an increased rate of settlements, nor to a shortening of the trial itself. They thus constitute a net additional burden on the judicial machine. They do however have two positive effects: as expected, they lead to a clear improvement in the preparation and conduct of trials, and also, unexpectedly, they lead to increased recovery for plaintiffs. These conclusions were based upon a study of negligence cases only. However, in response to these findings the New Jersey rule making Pre-trial mandatory has been revoked for most

types of case. Other commentators still insist that Pre-trials save the time spent on them " many times over " in trial time.

Conclusions on the American System

137. Both the Evershed and the Winn committees considered these two main features of American procedure and rejected them as being unsuitable for adoption in England. In particular they were impressed by the expense of using counsel in such preliminary proceedings. Winn [15] also noted that insurance companies opposed pre-trials on the grounds that impartial assessment by judges led to higher expectation of settlements by plaintiffs—hardly a surprising, or in our view convincing, line of argument. But both devices are regarded by the Americans as a necessary adjunct of " liberal notice pleading." In our discovery rules and the summons for directions we have only weak and incomplete substitutes, which do comparatively little to promote the open system which is widely regarded as desirable in the United States. We may refer back here, with emphasis, to the first sentence of the passage quoted in paragraph 129: " mutual knowledge of all the relevant facts gathered by the parties is essential to proper litigation."

Canada

138. The Canadian system represents an interesting blend of English and American practice. Many of the Canadian court rules are verbatim transcriptions of our own, yet both Discovery of Facts by deposition and the Pre-trial Conference are common, though not universal, and, though Canadian research and writing on Civil Procedure is no less sparse and defective than our own, it seems safe to say that both institutions are widely regarded there as indispensable.

139. Discovery of Facts is carried out on the American model with one significant restriction, namely that only parties (or, in the case of companies, their servants) may be examined in this way. Since the scope of questions permitted is very wide and the rules of evidence do not normally apply, this restriction does not prevent adequate disclosure of the parties' cases, as counsel may examine a party as to facts which he only knows by hearsay from witnesses who will be called at the trial. Canadian lawyers regard it as improper, without genuine reason, to lead evidence at the trial which has not been disclosed on discovery.

140. There are specific rules permitting Pre-trial Conferences in only three provinces, but in many others some judges hold informal pre-trial conferences outside the rules. Procedure is similar to that in the United States and similar uncertainties as to the propriety of judicial settlements exist, though in Canada as in the United States a certain robustness seems to be admired by disinterested observers.

Conclusions on the Canadian system

141. Canadian procedurists claim that their modified discovery and pre-trial conferences are very effective at eliminating surprise, while they are less elaborate than their American counterparts. Significantly Canadian procedure is otherwise very like our own; it must be conceded that the lack of a split profession does allow junior lawyers from the office handling the case to attend Discovery and Pre-trials, but this can be overemphasised.

Scotland

142. There are two features of Scottish civil procedure which are significant for our purposes; the rules and practices of Scottish pleadings, and the Scottish provision for decisions to be given on " preliminary pleas."

The Scottish system of pleading

143. There are two written pleadings: the claim and the defence. The claim is always served with the summons and sets out first the remedies claimed (" conclusions "), secondly the facts (" condescendences ") on which the pursuer relies, divided conveniently into numbered paragraphs, and thirdly a brief account or " note " of the claimant's pleas-in-law.[16]

144. Appearance in the Court of Session is entered merely by the defender's solicitor marking his own name, and the name of the advocate, on the printed calling list in the court office. In the Sheriff Court a memorandum like our own is made out.

145. The defence will be lodged within fourteen days of the summons being served. It will contain articulate numbered answers to the claimants' pleas of fact together with a note of the defender's pleas-in-law.[17] There may also be counterclaims.

146. The pursuer is then bound, normally within fourteen days, to make up an " open record " setting out points of claim and defence on each issue respectively in a single document so that the defence's contention on each point immediately follows the claim on that point. Two copies of this document are delivered to the court, six to the defender. The parties then " adjust " the pleadings and the case appears in the " Adjustment Roll." " Adjustment " means amendment by the parties adding and deleting from their own material to allow the points in issue to emerge more clearly.

In Sheriff Court cases the adjustment ceases after fourteen days, and it may only continue if " special cause " is shown. The agreement of the parties does not of itself amount to " special cause." In the Court of Session a period of three months is allowed for adjustment, although this may be abbreviated on the joint application of all parties. The period of adjustment can be extended, but only if appropriate " special cause " is shown. Again the agreement of the parties does not of itself amount to special cause. At the end of adjustment the record is closed by the court and the pleadings may only be altered by amendments, which are allowed only by the court on conditions, and the onus will be on the party amending to show cause why he should not pay the resulting costs.

147. At a civil trial in Scotland, there are no opening speeches, although in civil jury trials junior counsel will normally begin the proceedings with a summary of the closed record. The adjusted closed record—which is rather fuller than our pleadings—is regarded as a sufficient setting for the evidence.

Preliminary points of law

148. Once the record is closed the parties must appear before the court to argue as to the proper course to be taken. If the parties do not differ on the facts the court will order argument (" debate ") on the issues of law. If there is an issue of fact the parties will appear before the court to argue as to the appropriate method of proving the facts,[18] and at this appearance (which will normally be some four weeks after the record closes in Sheriff Court proceedings, and some two to four months after the record closes in

Court of Session cases) either side may also claim that one or more of the pleas-in-law should be taken as a preliminary issue. The court, which will have before it a copy of the closed record, may " pronounce such interlocutor (order) as seems just."

149. Thus at this stage the court is seized of the matter and may make orders appropriate for the conduct of the case and the process of proof or trial on the basis of a closed Record, which sets out clearly and in sequence the position of the parties on every issue of law and fact which may be introduced at the trial. In theory, the closed Record limits the position of each party, who should not try to introduce evidence on any matter which is not indicated in the written pleadings. Similarly, legal conclusions should not be argued if they are not adumbrated in those pleadings, even though the detailed supporting arguments are not themselves specified there.

Conclusions on the Scottish system

150. Scottish procedure is conducted in conditions more like those in England than those in any other system which we have examined. The unusual system of pleading makes it possible to have a well-informed court adopting a dominant position at a relatively early stage in the proceedings and this can be a useful means of providing a flexible approach to argument, proof and trial, as well as a healthy measure of discipline, preventing, for example, the consensual waiver of time limits without good cause, which we have noticed as a major defect in English procedure. No doubt the small size of the Scottish professions, and in particular the closely-knit nature of the advocates' practices at Edinburgh, is partly responsible for the relative success of Scottish procedure. Nevertheless, Scottish pleadings are themselves very like our own, though perhaps somewhat fuller,[19] and one suspects that a number of features of the Scottish system could be suitable material for a " transplant."

REFERENCES

1. J. Vincent, *Procédure Civile*, (1970) (" Vincent "), 463.
2. See Chap. 3, above.
3. Vincent, 462 *bis*.
4. ZPO, 253.
5. ZPO, 272 b.
6. The very controversial *Schnellkammern* represent such a reaction; See P. Arem, *Mündlichkeitsprinzip und Prozess beschleunigung im Zivilprozess*, 1971, Chaps., 6, 7, 8. For a thorough and pessimistic survey of the viability of such strict procedures, see G. Baumgartel and P. Mees, *Rechtstatsachen zur Dauer des Zivilprozesses*, 1971. Professor Arem, *ibid.*, concludes that the *Schnellkammern* have at least demonstrated that very careful writen preparation is necessary for satisfactory oral hearings, and that improvements in the German system can be gained in this way.
7. Federal Rules, Rule 8.
8. Federal Rules, Rule 12 (c) and (f).
9. *Hickman* v. *Taylor* 329 U.S. 495; 507 (1947).
10. Federal Rules, Rules 25–30.
11. Federal Rules, Rule 28.
12. Federal Rules, Rules 26, 27.
13. W. A. Claser, *Practical Discovery and the Adversary System*, 1968, at pp. 51 *et seq.*

14. Fleming James, *Civil Procedure*, 1965, at p. 223.
15. 1968, Cmnd. 3691, para. 354.
16. See *Parliament House Book 1970*; Rules of Court of Session, Rule 70; Sheriff Court Rules; Sheriff Court (Scotland) Act, 1906, Sched. D, Rule 2.
17. Rules of Court of Session, Rule 83.
18. Proof-taking in the Court of Session will very frequently be before a jury. There is a procedure for ordering trial of preliminary points of fact or " preliminary proof " but this is very rare today.
19. In particular, there is an increasing tendency for the parties to call upon each other in their pleadings to produce items of evidence. Non-compliance with such calls is likely to be sanctioned in costs.

Chapter 6

PROPOSED REFORMS

151. Returning from our journey to foreign parts, it is convenient to remind ourselves of the defects we have already identified in our own system. To rehearse these briefly:

(i) The system is too dependent on the parties' representatives' conduct of affairs, and the court has too little opportunity of intervening robustly in the interlocutory stages;

(ii) the system is too "closed," in the sense that there is too little early disclosure by the parties—to each other, or to the court—of what their real case is;

(iii) there is too great an emphasis on the single, final and dramatic trial.

152. Given these defects, lawyers, having their clients' interests foremost in their minds, will often find it necessary to use the licence which our permissive system gives them to out-manoeuvre their opponents. In this they may be doing no more than performing their duty to their clients. But in the result it can be too easy for cases to be won or lost on tactics, rather than on merits.

153. In Chapter 5 we have examined a number of systems which all exhibit more extensive court control of the process, and machinery which ensures earlier investigation and fuller disclosure than does our own. The number of ways in which these ends can be achieved is in fact limited. Procedural rules for dealing with cases can only be enforced in one or more of three ways:

(1) by direct court intervention and special rulings in individual cases;
(2) by general rules backed by real sanctions; and
(3) by regulation of the parties by one another.

In our system, we rely almost exclusively on inter-party regulation, guided by very weak rules until Summons for Directions, and combined with very weak court intervention and a few rather stronger rules from then until trial. Our system thus depends, until the trial, overwhelmingly on party-regulation. In fact, the three possible methods have different advantages and disadvantages, which we must examine at this stage.

Court intervention

154. This is very effective, very flexible and might in theory reduce any inequalities resulting from one side having more skilful representation than the other. But too early court-intervention requires many judges (as in Germany) who will inevitably be of more questionable authority, and carries a danger of unfair decisions of substance or procedure at a stage when the case has not yet "matured," when perhaps vital aspects of the problem have not fully emerged. If judicial intervention is employed at later stages in the case, both these objections become less significant; more

cases will have been settled before intervention is necessary, so that fewer interventions will be needed, and cases will also have had more time to "mature."

Strong rules

155. St. Thomas Aquinas pointed out long ago that if we wished to avoid the expense of an official on every street corner (or, he might have said, a master examining every Statement of Claim) we must have rules laying down general principles about the way in which problems must be resolved. Rules are much cheaper than judges or masters, but they are much less flexible, and hence must be vaguer, than the decisions of an interventionist court. They are also much more remote: if a rule is broken, its breach must be brought before the court at some stage, either when the full record comes up (which in our system is very late) or by complaint from the other side. Even when the issue is presented to the court, there will probably be a dispute about whether the procedural rule has been broken or not, and the merits of the case may disappear in a plethora of procedural arguments. Too many strict rules will, if we are not careful, lead to a "Hilary Rules" situation, and the clogging up of the courts with disputes about disputes.

Party regulation

156. Regulation of the parties' representatives by each other depends on the existence of clearly defined rules which have been regularly sanctioned in the past. This too is cheap, but unfortunately—as we have noticed—the parties' representatives' regulation of one another may be far from perfect. Also particular kinds of case or particular kinds of incidental issue may be specially suited to the application of a rule which, if it is to be properly used, will require real initiative on the part of the lawyer. Strange rules will involve unusual risks, and neither side will be willing to use them. *Via trita, via tuta.* To the extent that our procedure fails today because lawyers do not take steps and use devices which are already available and are in the interests of their own clients, it is vain to hope that party regulation in any form can alone provide a remedy.

157. Any proposals for reform of our system must also cater for certain constraints which cannot realistically be expected to change overnight. We have a serious shortage of skilled judges, and the English tradition is to rely on few, but highly skilled ones. A connected problem is the division of our legal profession. Much of the burden of impartial assessment of cases in the stages before trial, which is borne in other systems by judges, is borne in our system by experienced barristers. The Bar relies heavily on fees for advocacy and still derives proportionately much smaller sums from the drafting of pleadings and other documents at earlier stages in the proceedings. It is therefore of little practical use to devise an alternative system which does not take these constraints into account.

158. Before putting forward our specific proposals, a general non-legalistic point should be made. Our proposals taken separately may well be thought to have little of the radical approach which was contemplated in our terms of reference. But that element can be found if the proposals are seen as a whole, and as part of a positive change in the fundamental attitude to "going to law." The essential aim is to produce a just, speedy and reasonably cheap resolution of disputes. This should not necessarily

involve the playing out of an elaborate ritual process which only reaches its climax in a solemn and comprehensive trial. It is probably common in solicitors' offices for a matter to be classified as "litigation" as soon as it is seen to involve a dispute between parties, whereupon the focus immediately tends to be cast on the trial, and all the intricate preliminary stages are assumed to be necessary. We suggest that the focus should be on the elimination of disputed points, and that the varied procedures available should be used only with a view to the quickest and simplest solution of such points as are genuinely in dispute.

Summary of our proposals

159. With that introduction, we turn to our proposals. These are designed to ensure more court intervention where it will do most good, greater mutual disclosure of evidence at an early stage, and quicker resolution of disputed issues of fact and law. For convenience, we summarise them first, and discuss them later. In a reformed system designed to avoid the defects of the one we have, while taking account of the constraints imposed by the judges, masters and lawyers who are available to us, we think that a "typical" civil action should be conducted according to a scenario on something like the following lines:

(i) The parties should have taken reasonable steps to ensure that they are aware of the general nature and extent of the dispute between them.

(ii) The plaintiff sends his Complaint to the court and serves the defendant with a copy.

(iii) Within eight days (or longer if he resides abroad) the defendant must write to the court—with a copy to the plaintiff—saying whether he intends to defend the action. If he does not, the plaintiff can sign judgment in default.

(iv) The Complaint must set out the plaintiff's whole case, both in fact and in law, in narrative form and somewhat more fully than a Statement of Claim does now, but otherwise on much the same lines. It must say how each allegation of fact will be proved: if by documents, copies must be annexed or inspection offered; if by oral evidence, the names, addresses and occupations of the witnesses must be given. If the plaintiff thinks that there is no real defence to his claim, he can attach to his Complaint affidavits which prove his case, and ask for summary judgment.

(v) Within twenty-one days, the defendant must send the court his Defence, with a copy to the plaintiff. This pleading will be subject to the same rules as the Complaint. If the plaintiff has asked for summary judgment, the defendant can attach to his Defence affidavits showing that he has an arguable defence.

(vi) The master assigned to the action will read both pleadings and the enclosures and, of his own motion, make an order for directions. This order can include (among other things) the following items:

  (a) summary judgment for the plaintiff, if he has asked for it and there is no arguable defence;
  (b) lists of agreed and disputed issues of fact, and of questions of law;

  (c) an order for further pleadings or particulars if anything is not sufficiently clear;
  (d) an order to have any question of fact determined by a written report from someone having special and independent knowledge of that fact;
  (e) an order for affidavits to be sent to the court (and, when they have all arrived there, for copies to be exchanged) dealing with all the oral evidence on any one or more of the issues of fact;
  (f) an order for discovery of additional documents or classes of documents, both to each other and to the court.

(vii) When the master has received any affidavits he has ordered, he will have power to decide himself any issue of fact which proves not to be seriously in dispute, and to order the trial by the judge of any peripheral or "unreal" issues of fact, or of any issue of law, separately, at short notice, with an immediate award of costs (payable within seven days) against the loser.

(viii) It will be open to the master to make further orders which he thinks necessary or desirable from time to time so as to ensure that the case is disposed of expeditiously and fairly (including orders specifying what witnesses are to be called at the trial), and it will be open to any party at any time to apply for an order which he thinks should be made.

(ix) If either party wants the master to make any specific order, they can apply for it at any stage by letter, with a copy to the other side, who can write to say that he agrees, or objects, giving his grounds.

(x) All orders made by masters will be orders *nisi*, made without a hearing. If either party is dissatisfied with any such order, he can write to the court asking for a variation. The other side can write to say that he consents. If the variation is not granted, the applicant can appeal to the judge, where there will be an oral hearing. But the loser will, unless he has consented to the variation or the judge considers that he acted reasonably in refusing to consent, be ordered to pay the other side's costs of the appeal within seven days, and the judge will assess the amount then and there. If there is no application to vary the order, it comes into effect after seven days.

(xi) The trial of all substantive issues—whether of fact or law, and whether separately or together—will take place before the judge and follow largely the present and familiar form, except that where affidavits have been filed, these could, in the judge's discretion, take the place of evidence-in-chief. Also, the judge will have read the file, so that counsel's opening can be curtailed, and often even omitted.

160. These proposals clearly require a full discussion. We think that the most convenient form for this is once again to follow through the successive phases of a lawsuit, and in each phase to see what effects our proposals will have for better or for worse, what alternatives we have considered and why we have not adopted them, and what objections we have identified and how we think they can be answered.

Before issue of proceedings

161. At present, the slow, labour-intensive work of interviewing witnesses and taking statements does not seem amenable to fundamental reform, and little change will be brought about in it by the implementation of our proposals. The process will, however, have to begin at an earlier stage than it often does now because of the pressures of our proposed new rules of pleading, which will require greater disclosure than is required at present. For the reasons given in paragraph 179 below, it may in certain cases be desirable to obtain affidavits from vital witnesses before proceedings are begun. All in all, we anticipate that our proposals would lead to more thorough preparation before proceedings are issued. To us, this appears as an advantage, and it accords with the existing practice of the best solicitors. The costs involved would not be *additional*. They would be incurred anyway and provision should be made for their inclusion in the ultimate taxed bill of party-and-party costs.

Writ and appearance

162. We see no advantage in preserving either the formal parts of the Writ, or the option of a "general endorsement" which is not a Statement of Claim. The former serves no purpose in an age where no-one is intimidated by the Queen's style and titles, and where everyone knows that her courts have full powers to make life uncomfortable for those who choose to ignore their orders: the latter has never been of any benefit to either party. We propose, therefore, that the originating process should appear for what in truth it is: a complaint addressed to the court by the plaintiff about the conduct of the defendant. In this way, the court will have a record of the plaintiff's story on its file from the beginning, making its intervention possible as soon as the defendant has been able to add his version. The defendant's copy of the Complaint should of course be served upon him in the same way as the Writ is served now.

163. In cases of extreme urgency where application for interlocutory relief must be made to the court immediately after the issue of the originating process, there may not be time to draft a full Complaint. In such cases, the court should have power to act notwithstanding that the Complaint is only in skeleton form; it can be filled out later by way of amendment.

164. We have considered whether it might be possible to dispense altogether with the formality of Appearance, but we have come to the conclusion that it is not. In a very substantial proportion of all Writs now issued, judgment is taken by the plaintiff in default of Appearance.[1] These must be cases where the Defendant is so clearly in the wrong—or so impecunious—that he will not even take the trouble of sending a form to the court. We would not wish to deprive plaintiffs of the advantages of securing quick default judgments in circumstances like these, and this is why we propose to retain a similar step in the new system which we recommend.

Pleadings

165. Instead of the existing, very liberal, rules of pleading we propose much more stringent rules requiring the party pleading to substantiate his allegations of fact by an "offer of proof," *i.e.* an indication of the nature and source of the evidence he intends to call when he comes to prove his

allegations. Such offers of proof should be binding: no other method of proving the allegations in question should be permitted at the trial unless some very good cause is shown. But it will be possible for either party to add to his offers of proof during the interlocutory stages—*e.g.* if he finds a helpful document in his own or the other side's possession on discovery, or an unexpected witness turns up.

166. In this way the pleadings will give proper notice to each party not only of the facts which the other side alleges but also of the way in which he intends to prove them. The "offers of proof" requirement should also lead to more careful pleading of allegations of fact, with greater particularity.

167. We do not of course suggest that every Complaint should be accompanied by copies of every single document which may become relevant if the action proceeds to trial. That would put far too great a burden, for instance, on a plaintiff who has to issue a writ against a recalcitrant customer who will not pay a long-outstanding balance on a running account, made up of many debit and credit items. In such a case, it should be enough for the plaintiff to say, by way of "offer of proof," that he will rely on all the documents in a list attached to the Complaint (advice notes, invoices, statements, book entries and so on, sufficiently identified by date and/or number), all of which can be inspected at his solicitors' office on two days' notice. At the same time, we think that the need to prepare such a list will help to ensure that such writs are not issued, as sometimes happens now, merely because the plaintiff's own accountancy is at fault.

168. Our proposed rules for pleading facts should therefore encourage earlier investigation by the parties, before pleadings are drafted, and should eliminate the possibility of Statements of Claim being drafted speculatively or for nuisance value, or to gain time. The broader notice thus required of the basis of the parties' cases should also encourage fairer settlements at this stage.[2] Above all, our proposals should ensure that, whether they like it or not, the parties will help each other to an improved picture of the facts.

169. While the "offer of proof" can be applied straightforwardly to the Complaint, the position is not quite the same for the Defence. In most cases the burden of proving any fact lies upon the plaintiff, and it is taken for granted by lawyers that the defendant may simply "put the plaintiff to proof" of all his allegations without alleging any substance in his defence. We do not dispute this view though we suspect that the interventionist court (see below) will make such bare defences less common. So when the defendant genuinely believes that the plaintiff cannot prove fact X he should still be able to plead "fact X is not known and not admitted." But whenever the defendant wishes to allege specific facts in his Defence, or an alternative or positive explanation of the facts alleged by the plaintiff in his Complaint, or intends to call witnesses to deny the plaintiff's version, he should be required to offer proof in the way we have described.[3]

170. We hope that our proposals would also bring to bear greater pressure than exists at present to encourage defendants who in truth deny dispute only part of a plaintiff's claim to pay whatever they know to be due, and to confine themselves to disputing only what is genuinely challenged,

170A. The present rules which require that certain kinds of inference of fact, notably allegations as to a person's state of mind, should be pleaded with "particulars" (that is "detailed" accounts of the primary facts on which the inference is based) should be retained and extended so as to

require such particulars in all cases where an inference of fact is pleaded and it would therefore be fair to the other party to require such disclosure of the primary facts alleged. Of course an "offer of proof" of these particulars would also be required.

171. It should also be the rule that parties be required to plead their theory of law. This is frequently done in practice today but the requirement that it be done in every pleading will further add to the usefulness of the pleadings as a disclosure device and as an aid to early preparation. Such a rule works very well in Scotland and is admired by many American commentators.

172. We have carefully considered a number of alternative philosophies of pleading which have been suggested to us. In particular, "blind" pleading (that is, the drafting of separate pleadings by each party and their delivery to the court without any disclosure to the other side) and "standard form" pleading (written pleadings in a standard form which requires both sides to disclose and commit themselves to allegations of fact which are likely eventually to be relevant) deserve consideration. The practice of requiring a "Preliminary Act" in collision cases in the Admiralty Court involves the use of both blind pleading and a standard form of pleading. Admiralty practitioners claim that although there is provision in the rules for orthodox pleading as well as Preliminary Acts, the effect of the Preliminary Act system is beneficial in that it establishes, for practical purposes beyond any possibility of alteration, the parties' basic statements of fact on which their respective claims and defences are founded. It is arguable that a similar system could be applied to actions relating to road and other accidents.

173. The advantage of pleading blind is that it precludes the parties from adjusting their stories to fit the pleadings of their opponent. The corresponding disadvantage is that one loses the "notice function" of pleading, so that the parties may plead at cross-purposes, and there is also very great danger of surprise. The standard form is an excellent device for eliciting an account of a matter which the party pleading must know about but wishes to avoid committing himself on, and may also make pleading cheaper as requiring less skill. On the other hand it is inflexible and there will be few classes of case where a standard form detailed enough to be useful will not also require much that is otiose in the individual case.

174. The type of dispute which in many respects resembles the maritime collision is the motor-car collision. Here too the advantages of blind and standard form pleading are likely to prevail over the disadvantages. An experiment on these lines might well be introduced in this field.[4]

175. It is sometimes suggested that parties, or their advisors, do not alway whole-heartedly believe what they plead and that it would therefore be useful if pleadings were sworn, as true to the best of his knowledge and belief, by the party pleading,[5] or his representative, or perhaps both. Pleadings drafted by counsel (as the overwhelming majority in the High Court are) are already required to be signed by them, and the etiquette of the Bar requires that counsel should not sign a pleading unless his instructions contain enough material—in the form of documents, or written statements taken from witnesses—to support what he pleads, at least prima facie. Counsel's oath could therefore add nothing, and we doubt whether that of the party would achieve more. Divorce petitioners have until recently had to verify their petitions on oath, but we know of no evidence that this led to fewer overstatements in the pleadings in that Division, and the practice

has now been abolished. Once a party has convinced himself of the rightness of his cause, he will readily swear to it, and those who are dishonest enough to be willing to swear falsely will do it on paper even more readily than in the witness box. We think that a far more effective guarantee of honesty in pleading will be the power of the active court to call out a particular issue and try it, with an immediate penalty in costs for the loser.

176. Our proposals on pleadings may well attract criticism upon a number of grounds. First, they will require a real change in the philosophy of pleading of a kind which we have not seen for a century. The new pleadings will be a little more elaborate and therefore a little longer than present pleadings. Pleaders will still be required to plead the primary facts which they propose to prove—albeit in more narrative form—but now also to show clearly how they propose to prove them. Practitioners who have spent a lifetime calculating and drafting pleadings in the old way will, no doubt, find such a change irksome. But it is in our view highly desirable in the interests of justice.

177. A more substantial criticism is that such stringent rules can only be effective if they are thoroughly policed. Much can be achieved by education, but quite apart from that, so long as the rules are clear and an active court enforces them firmly and forcefully, it should quickly be possible to achieve a situation where the lawyers obey the rules rather than that the rules obey the lawyers.

178. It may be said that such pleading rules as we propose will transfer the centre of gravity of the process, as it were, to a much earlier point in time, necessitating an early commitment of time and money to a case before pleadings can be drafted. Indeed we hope that this will be so. As a matter of principle we would assert that before any party sets the machinery of justice in motion he should have the ability to back up his claim, and should have made all reasonable efforts to ensure that he can do so. If situations exist where this is genuinely not possible, or is undesirable, it should be possible to apply to the court for relaxation of the rules in that particular case. A party may for example be almost certain that his injuries were caused in some way by the defendant's breach of duty, but be unable to particularise what duty and how the breach caused his injury. Again, it may be argued that in some kinds of case disclosure of the names of witnesses could raise serious dangers that the other side will tamper with the evidence or bring pressure on the witnesses. In our more serious criminal cases, *i.e.* indictable offences, where such dangers would seem to be much greater, the law requires not only the names of witnesses but even their testimony to be unilaterally disclosed to the accused at the committal proceedings, that is before the accused is under any obligation to tell the court his own story. (To some extent it may be a safeguard that bail could be refused if there is reason to think that serious danger of interference exists.) Use of a provision for relaxation such as we propose should therefore be restricted to the rare and exceptional case where real hardship would be inevitable without it.

179. It should, in any event, be possible for solicitors to obtain affidavits (or statutory declarations) from crucial witnesses before the pleading is drafted, or at all events before a copy of it is served on the other side. It will then be very much more difficult for a witness to change his evidence as the result of some improper pressure brought upon him by the party

in opposition. One objection which has been mooted to this proposal is that lawyers (who will almost without exception draft the affidavits) will tend to "slant" the witnesses' evidence for them. We do no think that this danger is real. Both the Bar and the solicitors' profession are perfectly familiar with the problems of drafting affidavits for use in many proceedings in which they are now used, and know that any slanting of such evidence ultimately rebounds on the head of their client, and their own. Under our proposals, this possibility will be accentuated by the fact that in virtually all cases where the action is not settled the witnesses will eventually be cross-examined on their affidavits, when any slanting which has been done will very rapidly become obvious and be visited with judicial criticism and appropriate orders for costs. We envisage that affidavits or declarations should always be strictly factual and should contain no inferences, conclusions or other argumentative processes.

180. To enable solicitors to obtain affidavits from witnesses who are unwilling to testify, it will be necessary for the court to have a power analogous to the issue of a subpoena to order them to do so, perhaps even before action brought (as in America). No such power exists in our existing rules and its lack has been a matter of some complaint from practitioners who have been engaged in applications for interlocutory relief where all the evidence has to be in affidavit form. It seems that even under our present system such a power would be desirable, and it will *a fortiori* be necessary under any reformed system such as the one we recommend.

181. One effect of transferring the centre of gravity to an earlier point in the process may be that more costs will sometimes be incurred before the proceedings are begun. We think it must follow that, in any system such as the one we propose, these costs too should be treated as incurred in the proceedings and should "follow the event," on judgment or settlement. Were it otherwise, the balance of justice would be upset in favour of the recalcitrant defendant who will not settle at any price.

The intervention of the court

182. In our view, the court should not normally intervene until two pleadings, the Complaint and the Defence, have been served. This is because a very substantial proportion of claims go by default of Appearance, or are settled before Defence, in our present system, and any expenditure of judicial time on these cases would be wasted. The Scottish system, in which the court has to be satifised that the Summons raises a prima facie cause of action before it can be issued, has some attractions, but on the whole we do not regard the additional safeguard which this provides as justifying the court time required. Once the Defence has been sent in, the prosecution of the case, that is the conduct of the *procedural* progress of the case, will under our proposals be in the hands of the court. There will in fact be what the procedural experts call "court-prosecution." However, as we have already said, we do not wish this new principle (which places a judicial officer as it were "in the driver's seat") to affect our traditional methods of conducting fact-finding and arguments on law (what happens "on the road"). We wish, in fact, to retain the principle of "party investigation" in all but those situations where it is clearly unnecessary.

183. It is undesirable that the same judicial officer should be responsible

for the making of decisions on the prosecution of the case (that is, upon the next appropriate steps to be gone through) as well as decisions on the substance, *i.e.* decisions on which of two divergent views of fact or law is correct. Although procedural decisions are quite different in kind from decisions on fact or law, there might be thought to be some danger that a judicial officer might be influenced in his decision on the latter if he has also been involved in the former. We think, therefore, that decisions on substance should be primarily the province of the judges, while decisions on prosecution, or procedure, should be primarily the province of the masters, whose numbers would probably need to be somewhat increased if our proposals were to be fully implemented.

184. The masters should be organised in "teams" (the appropriate number in each team will emerge only, we suspect, on experiment), each team being the responsibility of one or more judges to whom questions of substance will be referred by the masters when they are ready for decision. The judges will also have overall responsibility for the procedural methods employed by their masters and for the co-ordination of these methods between the judicial teams. But certain teams could usefully specialise in certain types of case, so that specialised procedures (within the overall framework we propose) appropriate for cases of particular kinds can be developed with experience.

185. The pleadings in each case will be channelled to a master through a special office which will ensure that each master receives cases of the appropriate type. Once the master has the Complaint and Defence he will prepare his first order. The format of this order will no doubt vary from case to case, but a number of general points can be made here.

186. The first part of the order will be concerned with the facts. The master will deal with the allegations of fact in the pleadings, and will prepare up to four lists of issues of faot. The first list will contain those issues of fact which he regards as agreed between the parties, the second, those which seem to be disputed but which he regards as appropriate to be decided by some outside authority (a typical example might be the state of the weather at a particular place and time, on which a report of the Meteorological Office would normally be conclusive), the third, those issues of fact which appear on the pleadings to be in dispute but which the Master regards as unreal or peripheral, and the fourth, those which are seriously in dispute and central to the action.

187. The second part of the order will be concerned with law. The master will briefly set out the issues of law, if any, between the parties.

188. The third part of the order will be dispositive. It will give the parties instructions on how to proceed. It may for example set a time and place for argument of a particular issue of law which is clearly fundamental, or for the determination of an issue of fact, or it may order that affidavits be submitted on a particular issue of fact by both parties, or that full or partial discovery of documents be given over and above what has already been disclosed in the pleadings. Each of these possibilities is dealt with in more detail below. Thus in the first order of the master there can be set out a full outline of the real issues which are to be dealt with, together with instructions to the parties on the next steps to be taken towards dealing with them.

Trial of issues

190. The normal process for dealing with disputed issues of fact would be in two stages, the first written, the second oral. In the case of offers of oral evidence the master would normally call for affidavits from both sides' witnesses on the point in issue to be submitted to the court, and thereafter exchanged. After reading these, he could come to any of the following conclusions:

(a) Although some particular issue is formally disputed in the pleadings, the evidence on it is all one way. In that case, he could himself decide the issue on the affidavits, and notify the parties accordingly. The party against whom the issue is decided could naturally insist as of right on a full oral hearing of the issue before the judge, but if he lost there he would be automatically ordered to pay the other side's costs of the hearing within seven days, and the judge would assess them.

(b) There are one or more unreal or peripheral issues which should be got out of the way as soon as possible. In that case, he could order an early trial of these before the judge, specifying the witnesses who should be called. Again, the loser would pay the winner's costs immediately. Alternatively, the master could order that issue to be decided by the judge at the final hearing on the affidavits which have been filed, the deponents not to attend unless the judge so orders.

(c) There are only central issues of fact which are seriously in dispute and which should all be tried together. In that case, he would order a date for the trial of the action before the judge in the ordinary way, giving his own estimate of its likely length, and again specifying the witnesses who will be called.

191. In this way, the master will be in a position to reduce the ultimate trial (if necessary, by stages) to what it should be, that is to say an investigation of the real area of dispute between the parties. If, as we recommend, the loser of any issue which is tried separately is ordered to pay the other side's costs of that hearing within seven days, we suspect that it will not be long before the legal profession develops a healthy distaste for the raising of unreal or peripheral issues in pleadings. It should therefore not take too much time before the majority of cases is again tried at a single hearing at which only the real matters in dispute are determined without the encumbrance of any unreal, marginal or peripheral questions which tend to prolong many civil trials today.

192. We envisage that the trial of all issues of fact—whether separately or together—will take much the same form as it does today. We share the conviction of many foreign lawyers that our system of oral examination, cross-examination and re-examination of all witnesses by experienced advocates in the presence of an impartial and uninvolved judge, is the best method of evaluating oral testimony of fact which has yet been devised anywhere in the world (provided, of course, that the advocates are sufficiently experienced not to waste time with questions beginning " I put it to you . . ." or " Are you really telling my Lord . . ."). It will be here, and in the phase of argument on issues of law, that the traditional skills and experience of the Bar will continue to be deployed, rather than in the field of tactics. Where affidavits of witnesses have already been filed, these should

certainly be before the judge, and it should be a matter for his discretion whether they should take the place of the witnesses' evidence-in-chief. There may be cases where this can safely be done to save the court's time (as now commonly happens in the Restrictive Practices Court), but there may be other cases where the judge prefers to see for himself the extent to which the witness is still able, unled, to give his recollection in his own words. This seems to us to be pre-eminently a matter for the discretion of the judge who tries the issue, assisted no doubt by the arguments of the advocates concerned. Since the judge will have had the opportunity of reading the court file, containing all pleadings, orders, affidavits and many of the documents relevant to the issues, a full opening will normally only be necessary where the case is of unusual complexity. The Scots—whose " adjusted closed record " is only a little fuller than our present pleadings —manage quite well without.

193. Issues of law may on occasion need to be separately decided in a similar way. The defendant may plead barely that the plaintiff's claim is barred by the Limitation Acts, or that the defendant did not owe the duty which the plaintiff alleges he has broken. Such issues of law often constitute a large element of uncertainty in the case at an early stage and it is often desirable that they should be dealt with separately.

194. This can be done today by an order for a trial of a " preliminary point of law " [6] and used to be done much more commonly under the old procedure of the demurrer, which still exists in many common law jurisdictions. But quite apart from the difficulty of mobilising such a special procedure, which we saw in Chapter 3, the idea has recently been brought into some discredit on a number of grounds. In Scotland, where the preliminary point of law is common, it has been found sometimes to be a delaying tactic. In this country, unless the parties are prepared to agree the facts upon which the issue of law is to be decided,[7] it frequently happens that the issue of law cannot be clearly or conclusively decided without prior knowledge of certain facts.[8] Sometimes in an attempt to decide such a question without adequate facts on which to base it, an unnecessarily broad rule of law, or one whose scope is unclear, may be enunciated.[9]

195. The argument on law will take place before the judge much as it does today. When issues of law are more complex, however, we think that there is a strong case for the introduction of a written " brief " or memorandum of argument on the American pattern, citing authorities and outlining the arguments to be submitted to the court in advance of the hearing. This, as well as ensuring good preparation on all sides, can also serve a useful function in eliminating issues of law which are not seriously in dispute, and concentrating attention on the crucial issues. Written " briefs " should, however, only be prepared if the master orders them, and he should only order them where there is reason to think that the cost of the time saved in argument will exceed the cost of their preparation, that is to say in really complicated cases.

196. In this way, in a series of phases embodying an order by the master followed by a hearing on substance before the judge, followed if necessary by another order by the master for the next procedural step, the case will finally reach a hearing at the conclusion of which the judge will be in a position to give his final judgement and make the final order of the court. The record will be kept in the orthodox way in case of appeal, and for the benefit of the law reporters.

Interlocutory orders, costs and appeals

197. To save the parties expense in advocates' fees, and to save the time of the masters in listening to argument, we recommend that interlocutory orders made by the masters should be made of their own motion, on the material on the file, and without hearing any argument. Such a procedure would enable masters to make substantially more orders in a working day than they do now, and no startling increase in their numbers may therefore be needed. What will undoubtedly be needed is an increase in the clerical and secretarial assistance which is provided for them, and which even now is hardly consonant with their functions and the importance of the work which they do. We see no reason why the courts should not emulate the more efficient organisations in commerce and industry by acquiring and using the many labour-saving devices which modern office technology has made available: dictating machines, electric typewriters, copying machines, microfilms and all the rest. Intelligent modernisation of office methods in the courts could help the masters to increase their productivity to a very substantial degree.

198. If masters are to make their orders without hearing the parties' representatives, the orders must be orders *nisi* which do not come into force until the parties have had an opportunity of challenging them, and those challenges have been considered and disposed of. The procedure which we propose can be outlined as follows:

(i) The master's order would be sent to both parties by post.
(ii) Within seven days, either party can apply (in writing) for the order to be rescinded or varied, giving his reasons, and sending a copy of his application to the other side.
(iii) If such an application is made, the other side will have a further seven days in which to consent to it or to dispute it.
(iv) At the end of that second period of seven days, the master will make his decision and communicate it to both parties.
(v) If either party is still dissatisfied he can write to the court saying that he wishes to appeal to the judge; in that case, the master (in consultation with the judge) will fix a day and time for the hearing of the appeal and notify both parties.
(vi) The appeal will be heard by the judge, sitting in chambers, by way of rehearing in the orthodox manner.
(vii) Unless the loser has consented to the application, or there are exceptional reasons, the judge will himself assess the winner's costs, and order the loser to pay them to the winner within seven days; such an order will rank as an ordinary judgment.
(viii) If there is no application to rescind or vary, the master's order will come into force within seven days after it has been made: if there is such an application, the order as varied (if it is) will come into force seven days after it has been made in its varied form: if there is an appeal to the judge, his order will come into force at once.
(ix) Appeals on interlocutory orders from the judge to the Court of Appeal should, as now, only be available with leave, and the Court of Appeal should as a rule follow the same principles as to the award of costs.

199. We anticipate that such a system would have the following effects:

(a) The practice of masters in the making of interlocutory orders would quickly become harmonised, and individual differences would tend to disappear so that parties would know what to expect.
(b) Lawyers would be strongly discouraged from advising unmeritorious interlocutory appeals for the purpose of tactical harassment or delay.

200. It will have been observed that, in the system which we propose, communication between the parties' advisers and the court in all interlocutory matters (except for appeals) will be entirely in writing. The master will make written orders *nisi* and send them to the solicitors: the solicitors will send the master all the pleadings, particulars and affidavits which he orders: applications for rescission or variation of orders *nisi*—or, indeed, applications for orders which a party wants made but which the master has not himself thought of—will all be made in writing. We do not envisage that there should be personal appearances before the masters at all. This should, in our view, lead to substantial savings in costs, since it will avoid the need for busy solicitors and legal executives to waste time travelling to and from the court, waiting their turn there, and/or hiring counsel to appear on the client's behalf. Both barristers and solicitors may lose some fees in the process, but their clients will save them without, in our view, suffering any reduction in the quality of interlocutory justice which they will receive from the court. An additional advantage which we foresee is that much more of this work—whose importance should not be underestimated—will be done by experienced solicitors sitting at their office desks rather than by junior clerks who have to be sent to court under the existing system because their employers cannot afford the time wasted in attending on masters' summonses. To discourage unmeritorious applications for interlocutory orders, even by letter, the master should have power to order unsuccessful applicants to pay—forthwith—their opponents' costs of objecting to the application.

201. One additional—and unexpected—consequence of our proposals is that it would become possible to dispense with the existing High Court vacations—especially the Long Vacation during which, for two full months, no pleadings can be served except by consent or by leave, very little progress is made in interlocutory matters, and parties cannot get their cases heard unless they are quite exceptionally urgent. While all this may have been based on sound social and economic ideas when life was slower and more closely dependent on seasonal obligations, such a pleasant historical monument to a more gracious age seems to us to have long outlived its usefulness. We see no reason why judges, masters and other court officials should not take their holidays, like other members of the public service, on a rota system, so that their department continues to be available throughout the year to the public which it serves. No doubt the pressure of work would normally be reduced during the summer months when barristers, solicitors and their clients prefer to go on holiday during their children's school vacations, and the staff in attendance at the Royal Courts of Justice could be proportionately depleted. But under the system we propose, in which all interlocutory matters would be disposed of by post, and in which all hearings (whether on appeal from the master, or for the determination of issues of substance) could take place on dates fixed in advance, with realistic

estimates made by the masters of the hearing time required, we see no need for ever shutting down the courts altogether, except of course on the statutory holidays. The recent reforms of our provincial courts have already led to some progress in this direction, and we can see no reason why the High Court should not follow suit.

REFERENCES

1. In 1971 and 1972, fewer than 40 per cent of defendants sued in the Queen's Bench Division in London entered an Appearance, and 44 per cent. of all cases started there led to judgment without trial (see para. 203 below.)

2. It may not—some of the American research tends to show that increased disclosure leads to greater confidence on the part of plaintiffs and a corresponding unwillingness to settle (see para. 132). English attitudes to settlements are very different from American ones, but should there be a similar development in England we would still regard this as an improvement over the present practice, where settlements at this stage are necessarily " blind."

3. A similar rule will of course be applied to the plaintiff's Reply, if he denies a fact the onus of proving which is on the defendant.

4. We say nothing here of the many recent proposals (including JUSTICE'S own Report, *No Fault on the Roads*, 1974) for removal of this and other types of personal injuries claims from the courts altogether. These would, of course, alleviate problems of congestion and the special procedural problems of these cases at a stroke. The basic defects of our system would, however, still remain.

5. This is a requirement of the system of civil procedure in force in the State of New York, for example.

6. R.S.C., O. 33, r. 3.

7. *E.g. Weller* v. *Foot and Mouth Disease Research* [1966] 1.Q.B. 569.

8. See *Radstock Co-operative* v. *Norton Radstock* [1968] Ch. 605 (C.A.)

9. *E.g. Mutual Life Assurance* v. *Evatt* [1971] A.C. 793 (P.C.); *cf.* (1972) 34 M.L.R. 328.

CHAPTER 7

MISCELLANEOUS MATTERS

202. Having described our proposed procedure in outline, and argued its merits, it remains to deal with a number of specific points which are important in themselves, but which are incidental to the establishment of the general framework of procedure which we have outlined in the previous Chapter. The following matters arise:

(1) Default judgments and early settlements.
(2) Summary judgments.
(3) Time limits.
(4) Evidence and reports by independent experts.
(5) Conciliation and settlements.
(6) Costs and payment into court.
(7) Discovery rules outside the new pleading requirements.
(8) Special jurisdictions within the High Court.
(9) Ancillary Rules.
(10) Jury trials.
(11) Legal Aid.
(12) County Court Procedure.

Default judgments and early settlements

203. At the present time, 90 per cent. of all actions begun in the Queen's Bench Division of the High Court in London are disposed of by a default judgment or settlement before directions are given, and only just over 1 per cent. are finally concluded by a judgment given after trial. Taking the average of 1971 and 1972 (which were very similar), the following percentage figures [1] show how the 90,000 or more actions which were begun in each of these two years were whittled down to a little over 1,000 which were tried:

	Percentage
Writs issued	100
Judgment by default or under Order 14	44
Directions given (on Summons for Directions or on Order 14)	10
Judgment on trial	1

204. So far as we can foresee, the reformed procedure which we propose should not make any substantial difference to this gradual process of attrition. The defendant who now fails to enter appearance or to serve a defence, because he has no answer to the claim, will continue to be able to save costs by allowing judgment to be given against him in default. It looks as if, at the moment, some 46 per cent. of all actions begun do not go by default in this way, but are settled before directions are given. There will be nothing to prevent parties from doing the same under our

proposals; indeed, the fact that the court will give them directions of its own motion (and will presumably charge them for this) may encourage them to settle before it does, and the fact that they will know more of the strengths and weaknesses of each other's cases should make settlements easier to achieve and fairer in their terms. If the action is not settled at that point and directions *are* given, they will be designed to reduce the area of dispute and will thus continue to encourage settlement during the next phase, and compliance with some of them should go further in disclosing the parties' real cases to each other and so facilitating a fair evaluation of what the claim or defence is worth.

205. It may be that the "fixed costs" recoverable on judgment in default of appearance or defence will need some adjustment in the light of the greater degree of preparation which may be required in some cases under our scheme to draw up a sufficient Statement of Claim, but we doubt whether this will involve any substantial change in their present order of magnitude, since the overwhelming majority of cases which go by default are cases where the claim involves no real complexity.

Summary judgments

206. It is a matter of the first importance that any system of civil procedure in a modern commercial setting should provide adequate machinery giving a swift enforceable judgment to a plaintiff who is able to furnish convincing evidence that he has an unanswerable case, against a defendant who cannot show an arguable defence.[2] Under our proposed scheme this presents no difficulties. The plaintiff will simply ask for summary judgment in his Complaint, attach the affidavits of his witnesses to the Complaint and serve copies of both on the defendant: then, unless the defendant within twenty-one days sends the court a Defence accompanied by affidavits which support an arguable answer to the Complaint, the master will determine the plaintiff's claim in his favour. The time taken from Complaint to judgment will be much the same as it is now in favourable circumstances.

Time limits

207. The normal rule at present is that each stage of the proceedings must be completed within a certain time (usually fourteen days, but sometimes seven and sometimes ten or twenty-eight). If one side fails to act within that time, the other may apply for judgment in default. However, as we have noticed, this rarely happens in practice (except on default of appearance with which we have already dealt). We propose that under our system the time limit for Defence (which will involve somewhat more work than at present) should be extended to twenty-one days after service of the Complaint. From this point on, the court will be involved and new principles will apply.

208. For each subsequent step in the proceedings a time limit which is short but reasonable in all the circumstances should be set by the court. But such time limits are useless if they are not enforced, and under the existing system they very largely are not. Indeed, it is the experience of every practitioner of the law that in far too many cases the limits set by the rules are (necessarily, or for convenience) extended by the parties' advisers often more than once, until the time taken from Writ to setting-down vastly exceeds that contemplated by the rules, or else that one party

successfully adopts delaying tactics which postpone the day of reckoning by months, and sometimes even by years. Such a state of affairs is a disgrace to any system of justice, and we therefore think it right to propose some distinctly draconic principles by which these matters should be regulated in the future.

209. If a party's adviser wishes to exceed any time limit set by the court —or the twenty-one days limited for the Defence—he should write to the court explaining the reason for the delay and requesting the desired extension, and send a copy to the other side. If his opponent is willing to consent to the extension, he should send the court a memorandum to that effect *counter-signed by his own client*, or giving a satisfactory explanation of the absence of such a counter-signature. The master will then decide whether or not to give an extension, and will notify both parties.

210. In some cases, however, solicitors will nevertheless fail to comply with time limits. In such circumstances, it might be thought that the master should robustly give judgment against the dilatory party with costs. However, such a "trip-wire" approach would only make clients suffer for the sins of their solicitors, and by no means in every such case would the client recover from his solicitor the whole of the damage he has suffered. A possible solution would be to require the master in such circumstance to refer the case to the judge; the judge would have power to discriminate between client and solicitor and, in extreme cases, to give the opponent judgment and order the solicitor at the same time to pay appropriate compensation to his client for loss of the chance of success; in less extreme cases the judge might permit the case to continue but order the defaulting solicitor to pay the other side's costs arising from the delay. In any such case, of course, the judge would first give the defaulting solicitor a hearing: it is perfectly possible to envisage cases in which a time limit may be overrun without any blame attaching to the solicitor.

211. These proposals on time limits will undoubtedly appear radical and unorthodox to some. Only those few habitually dilatory solicitors, however, need feel disquiet at the prospect. The judiciary can be relied upon to administer such rules in a way which is perfectly fair to the profession. Indeed a similar rule already exists[3] though it seems to be applied more to cases of negligence or misconduct[4] than to delay and is not as strict as the rules we recommend.

Evidence and reports by independent experts

212. In our view, the virtual abolition of the jury in civil trials can safely bring in its train the abolition of many of the traditional rules of evidence in civil cases. Hearsay and opinion evidence, for example, should be generally admissible where there is no jury and it should be a matter for the judge to exclude it only if he thinks it is wholly irrelevant, and to attribute to it whatever weight he thinks it deserves if he does admit it. So long as the evidence is relevant, it seems to us that it ought to be admissible. We see at least two good reasons for dismantling the present system and for letting relevance be the only test. First, our Rules of Evidence today are far too technical, and far too much time is spent in court wrangling about whether or not a particular question or answer is admissible, when the decision on the point is unlikely to affect the outcome of the case. This represents a substantial waste of time and money.

Secondly, some at least of the evidence which is now excluded by the rules could well help the judge to come to the right conclusion. What the plaintiff said to his wife two hours after the accident may be highly material, and the judge can in our opinion be fully trusted to sort the wheat from the chaff. If it is objected that a party should have notice of any hearsay evidence which will be given against him (as under the Civil Evidence Act 1968), then this point will automatically be met by the fact that in most cases the master will, under our proposals, have ordered affidavits which will have been exchanged long before the trial.

213. Expert evidence also merits special consideration. It is frequently the case today that each side engages one or more medical or other experts to represent his own interest, and the result is an acute and sometimes unedifying conflict of testimony, facing the judge with a choice which must often be arbitrary, or dependent upon such incidental factors as the degree of confidence or the demeanour of the opposed witnesses. On the other hand the Continental system of independent court experts whose reports, while not conclusive (agreement apart) carry very great weight and are rarely, if ever, overturned, has been criticised in recent years.[5] The main objection seems to be that court experts should not be allowed to have the last word, since they too are fallible, and sometimes of low quality. On the other hand if one reduces the weight to be attached to the court expert's report and allows evidence to be added on either side, the introduction of the "third man," however independent, is likely to be disproportionately expensive.

214. The concept of the independent court expert is nonetheless a sound one. It is however important that only men of the highest ability, practitioners at the height of their careers and not those on the edge of retirement, should be appointed. In some circumstances it may be useful for such experts to sit with the judge as assessors. But it is also important to remember that even the greatest experts can legitimately draw different inferences from the same set of primary facts, and parties should therefore not be precluded, in proper cases, from calling expert evidence themselves if they wish to contradict the conclusions of the court expert's report. It should be for the masters to decide questions of this kind during the interlocutory stages, and to impose the sanctions as to costs which will discourage the calling of such evidence where there is no real case for it.

215. With these safeguards, a cheap, quick and fair system for dealing with such questions can be set up without the dangers of arbitrariness and of the occasional wild decision which seem to exist on the Continent. Attendance of the parties, and sometimes of witnesses, before the expert, would, of course, need to be compellable.[6]

216. In this connexion, it seems to us that there is much merit in the French procedure under which any party to a dispute—whether or not proceedings have been begun—can call upon a court official (the *huissier*) to observe facts for himself and to make a written report (the *constat*) on what he saw—on payment, of course, of the appropriate court fees. The introduction of such a facility in England could save an enormous amount of time and money for witnesses, lawyers and judges.

Conciliation and settlement

217. In many foreign systems the judge may, or even must, adopt the

role of conciliator and attempt to bring the parties to an agreed result at an early stage. This is a controversial matter. Undoubtedly, if a judge has power to suggest settlement figures, this may seriously harm the appearance, at least, of justice being done. If the master in our proposed system had conciliating powers, this objection would not apply with so much force, since the master would have no power to decide issues of substance. However, early settlement should, we hope, be promoted by the early investigation and, probably more significant, the early disclosure of evidence which the proposed new procedure requires, and it therefore seems just, on balance, to preserve the purely judicial rule of judicial officers and leave questions of settlement, as now, to the parties and their advisers.

Costs

218. The present rule in England, and indeed in most countries in the world, is that the winner takes all,[7] that is to say, that the loser in litigation pays both his own costs and the reasonable costs of the other side. This does not in practice mean that the winner ever emerges "whole" so far as costs are concerned, but it does mean that the wagering element in litigation is very substantially increased. By increasing the risks of the game for both sides, the rule also encourages settlements, but these often do not reflect the justice of the case.

219. Apart from the exceptional situation which we have outlined above, where we regard it as necessary that a party should pay within seven days the costs of an unsuccessful application or interlocutory appeal, or of the determination of an issue of fact or law which the master has thought it right to separate, the basic presumption in favour of the "indemnity rule" should in our view remain. Although we think that orders for costs which discriminate carefully on the basis of the parties' conduct of the case should be encouraged, any more substantial divergence from the indemnity rule would, in our view, dangerously increase the nuisance value of groundless claims.

320. The device known as "payment-in"[8] is also relevant here. A defendant may make an offer of settlement to the plaintiff by paying a sum of money into court. If the plaintiff refuses to accept it within twenty-one days the case will proceed, but if the plaintiff fails at the trial to recover more than the sum paid in he will be liable for his own costs and for those of his opponent from the time when payment was made, subject only to the direction of the judge, which is very rarely exercised in the plaintiff's favour in such circumstances. A defendant may make successive payments, adding to the amount previously offered, until the plaintiff accepts the total.

221. This rule has some valuable effects. It both "opens" the parties' consideration of the amount in issue, and deters a plaintiff with a strong case from pressing unfairly for more than is reasonable. It can, on the other hand, produce a harsh result because all the costs may depend on a very small difference between the sum paid in and the amount awarded. This works both ways, and it is true that even if the rule (as suggested below) allowed for a reasonable margin, a small difference above or below the new line would still be capable of producing such a consequence. It is not easy to propose any substantial change in the rule without sacrificing some of its merits. However, we think that the rule should be relaxed

so that a plaintiff should not be burdened with the costs of a case in which he obtains judgment for 80 per cent. or more of the sum paid in. This, we think, would encourage more realistic payments-in, and deter successive additions to the amount so as to discover the point at which the plaintiff's nerve will eventually break. It can also be argued that the defendant should not be burdened with the costs if the plaintiff does not obtain judgment for substantially more (perhaps 20 per cent.) than the sum paid in. In the framework of the new procedure which we propose, some of the speculative elements inherent in the rule (whether varied as suggested or not) could be eliminated. The master's powers would enable a divergence of view on liability to be separated from the question of quantum, thus avoiding the classic tactic of using alleged doubt as to liability as a factor in assessing damages. The master could also require that the basis of calculating any sum paid in, as well as any sum claimed, should be made known.

Discovery

222. The documents upon which each party relies will be disclosed at the time of pleadings. Copies (or, if the documents are voluminous, lists) will be sent to the court and to the other side, and at that time there should be free access to the originals. Once the court intervenes, questions of discovery should be for the master and he should make appropriate orders according to all the facts and circumstances of the case appearing from his files. The expense of full discovery of documents could thus be avoided in many cases where it is not necessary, and a more flexible approach to the subject developed.

Special jurisdictions within the High Court

223. Although our proposed procedure is capable of being used throughout the High Court for the processing of all types of case, the special features of some cases are bound to lead to the procedure being developed in different ways. For instance, although " witness actions " in the Chancery Division could be prepared and tried in much the same way as our " typical " lawsuit, proceedings for the redemption or foreclosure of mortgages, or the specific performance of contracts for the sale of land, or the reduction of the capital of a limited company, would need various modifications. Again, special provisions would no doubt continue to be needed for divorce and custody suits, and for construction summonses. But there is no reason why the principles which underlie our proposals should not also inform the special rules required for special types of case: for example, in cases where much depends on documentary evidence it may be possible for matters to be decided more speedily without the need for many or lengthy hearings, once the master has given appropriate orders for arranging the material to be presented to the judge. In every field the stress should be upon allowing the masters and judges to develop the procedure which produces the best balance of justice, speed and economy within the system which we have outlined.

Ancillary Rules

224. The present Rules of the Supreme Court contain a number of rules dealing with special cases and procedures, such as service of process

abroad, interpleader, representative actions, third party procedure, and the like. If our proposals were adopted, some consequential changes would no doubt need to be made in these, but their substance would remain unaffected.

Jury trials

225. The arguments for and against the retention of jury trials in those civil cases where a party's personal honour is involved—such as actions for defamation and fraud—continue to ebb and flow, and it is not our function here to add to that debate. Clearly, where a case *is* tried by jury, all the facts still in issue at the time of the trial must be tried together, and many of our existing rules of evidence will have to be retained, having been developed for that very occasion. But we see no reason why even in such cases the interlocutory proceedings should not be dealt with in the flexible and robust manner which we propose, especially bearing in mind the great expense of a jury trial and the even greater consequential need to keep it as short and as relevant as justice can make it.

Legal aid

226. The legal aid system which we have developed in the past two decades or so is, historically speaking, a very recent addition to our system of civil litigation. Although it has enabled many to obtain redress who would not otherwise have been able to afford to go to law, it is still far from perfect and presents a number of anomalies, with which we cannot be concerned here. As time passes and reforming statutes smooth some of its rougher edges, its adaptation becomes closer, but there is no doubt that a radical reform of our system of civil procedure, such as we propose, would require a number of consequential changes in the legal aid system also. Since the latter is by its nature an adjunct to the former, we see no reason why this should present any major problems. But the breaking down of the procedure into parts should not create the need for repetitive applications for aid, as that could produce serious unfairness for the aided party.

The county court

227. The first steps have already been taken to integrate the High Court and the county court systems, following the recommendations of the Beeching commission. Cases within the county court jurisdiction (less than £750 in most circumstances) usually present much the same problems as High Court cases, but in these cases the pressures of economy are even greater. For claims in excess of £200, we think that the machinery which we have proposed should present the most convenient framework here too. But in contested cases where less than £200 is involved, we regard it as most important that a special Small Claims Court with a simple, economical, and essentially inquisitorial procedure be set up, and we support the general approach on this question of the Consumer Council's paper " Justice out of Reach." Our letter on this subject to the Lord Chancellor is reproduced as an Appendix to this report.

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1. We are indebted for these figures to Master Elton of the Queen's Bench Division.

2. This procedure is at present provided by R.S.C., O. 14 in the High Court, but only about 2 per cent. of all claims in the Queen's Bench Division are currently being disposed of in this way.

3. R.S.C., O. 62, r. 8; and see *Myer* v. *Elman* [1940] A.C. 282, 290.

4. Only for "a serious dereliction of duty," *per* Lord Maugham, at p. 292.

5. See, for a general survey, *L'expertise dans les principaux systèmes juridiques d'Europe* (1969).

6. *Cf.* Winn Committee, 1968 Cmnd. 3691, para. 312.

7. R.S.C., O. 62, r. 3 (2).

8. R.S.C., O. 22.

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Appendix

Letter to the Lord Chancellor from the Chairman of the Executive Committee of Justice, *June 1971*

SMALL CLAIMS COURTS

You asked us to let you have the views of Justice on Small Claims Courts, and I am now in a position to send you, with the authority of our Executive Committee, the considered recommendations of the Advisory Committee which is responsible for our current enquiry into trial procedure.

This committee considered the problem of small claims for eight months in 1970, before moving on to consider civil procedure in general. Having discussed a very wide variety of possible solutions to the problem and examined many types of existing procedures for resolving disputes both in England and abroad, the committee concluded that a special court for small claims, similar to, although not identical with, the Small Claims Courts in the United States, was the appropriate solution.

This conclusion was also reached in July of last year by the Consumer Council, many of whose research findings were in agreement with those of our committee, and whose proposals we broadly endorse. In our view these proposals have been subjected to much ill-informed, thoughtless and prejudiced criticism, indicating that the critics are not aware of the real nature of the problem. We set this out briefly below.

A person who seeks to prosecute or defend a claim worth less than £200 has at present no practicable remedy, especially if the claim is in any way complicated. It is simply not economic to fight such claims; solicitors do not get sufficient return in costs to want to handle them, and even the conscientious and public-spirited solicitors who do so cannot with a clear conscience advise a client to take a claim to court and run the risk of losing perhaps double or triple the sum in issue by way of court costs should something go wrong. In broad terms, the stakes in these small claims actions are too high in proportion to the possible return. Furthermore, dishonest traders are well aware of this fact and will on occasion laugh in the face of Citizen's Advice Bureaux and Local Authority Consumer Officers who attempt to get satisfaction on behalf of their clients. In effect, the Rule of Law does not obtain in this field.

Furthermore it is most important to appreciate that this is only true for the individual litigant. Substantial businesses with a large number of small debt claims to process can and do press them to a speedy and cheap conclusion by means of the county court. These businesses have their own debt collecting departments or use agencies which are familiar with county court procedure. County court staff do their utmost to help defendants who show the slightest inclination to defend such claims, but the vast majority go by default. Thus the county court system, as at present administered, effectively discriminates in favour of the large creditor for whom a remedy is provided, and against the individual claimant who has no remedy. If, for example, a

company sells goods on credit, it has a remedy available to recover the price, with costs. The consumer who buys that product has no such remedy for damages however blatantly the goods fail to satisfy the standard laid down by the Sale of Goods or Hire Purchase Legislation.

This is in our view an undesirable situation that needs to be remedied.

Could the county court procedure be improved and adapted to satisfy this clear need? Two matters are to be borne in mind here.

First, county court judges, and to a lesser extent registrars, are steeped in the adversarial tradition and not accustomed to eliciting facts from litigants in person, or to helping them to present their case in full. It is true that they do their best to do this when both parties appear in person, but when one side is represented, as is usually the case, judges and registrars cannot abandon their position of impartial independence and enter the arena. This puts the litigant in person at a serious disadvantage and makes the services of a solicitor a necessity. This is true whether the litigant is claiming or defending. What is needed is a strong humane judge with good legal qualifications and a readiness to intervene, combined with a procedure of robust informality which allows the ordinary litigant to stand up for himself and prevents the more articulate or the legally qualified from gaining any undue advantage.

Secondly, it must be appreciated that, to make it possible for individuals to pursue such claims, and for witnesses to attend, hearings must be held in the evenings after ordinary working hours, and also on Saturdays.

While any possible improvement to the county court system is naturally to be welcomed, and while, if they were willing to satisfy these two requirements, county court registrars would make excellent Small Claims Court judges, we feel that the need for informality and the need to provide a service which offers, and is seen to offer, a convenient remedy for the individual requires that a completely fresh start be made. We accordingly favour the establishment of a wholly new Small Claims Court. We do not consider that the reforms we consider desirable can be fitted into the county court system.

Finally, we must say something on the question of legal representation. On balance, we agreed with the Consumer Council that legal representation in the Small Claims Court should not be permitted. This is desirable to preserve the atmosphere of informality and to protect the financially weak. However, so long as the judges in such courts are sufficiently robust and so long as the indemnity rule with regard to costs does not obtain, we feel that no great harm would be done by legal representation. A situation would then arise much as now exists in the Industrial Tribunals.

We must however stress that this matter of legal representation is not fundamental to the problem. Discussion of it should not be allowed to obscure the real issue, which is the need to provide a remedy where often no effective one at present exists. The proposals may provide informal justice and fall short of desirable perfection, but we believe that by any standards they must be regarded as better than the denial of justice inherent in the present system.

I should perhaps add that we may find on further examination that some of the detailed points in our proposals need modification.

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