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A TRIAL JUDGE'S CREDO MUST INCLUDE HIS AFFIRMATIVE DUTY TO BE AN INSTRUMENTALITY OF JUSTICE*

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The concept of justice for all under equal law equally administered is not self-executing. It becomes alive and has an existence by and through its administration and application by trial judges dedicated to the propositions: That it is their affirmative duty to see that justice is done; that they have been commanded to do justice by rendering to every man his due under the same law, equally, fairly, and impartially applied and administered, without bias, without prejudice, without passion, and irrespective of race, color, creed, economic or social status; that in the first instance, its attainment is dependent upon the fulfillment of the affirmative duties and objectives of the trial judge.

A trial is an inquiry into the truth or falsity of the facts involved and the ascertainment and application of the applicable law. To achieve his purpose and objective in a just manner and with just results, the trial judge must adopt a credo which includes his affirmative duties, and also the vigilance and devotion which are the hallmark of the administration of justice.

What should his credo include as to his affirmative duties? Is he—should he be—merely an umpire, a referee, a symbol, an ornament? Does he have any affirmative duties? It is the purpose of this article to assert and support the proposition: *A trial judge's credo must include his affirmative duty to be an instrumentality of justice.*

Under our system of adversary trials, the only participant impartially seeking the true facts and the applicable law is the trial judge. No party, generally, will knowingly or willingly seek to prove

* It is hoped that this article will serve as some incentive for a further study by our judiciary, so that there will evolve a yardstick, an Oath of Hippocrates for the judiciary which will then be known to, upheld, and expanded by counsel.

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facts or propound law adverse to his interests. It is difficult to criticize such self-interest. Even though counsel's conduct is governed by high ethical standards he is, nevertheless, retained to win. One party may be represented by counsel of greater ability, resourcefulness, diligence, salesmanship, and prestige than the other party. One party may be possessed of greater economic means to enable a better biased preparation and presentation than the other party. The only possible equalizer, the only assurance that justice may be done, whether desired by either of the parties, is the trial judge. The objective and sole justification of our law and courts being justice, the trial judge cannot be negative. He does not serve his purpose or function by being merely an umpire, a referee, a symbol, or an ornament. To aid in seeing that justice be done, he must, even upon his own motion, participate in presenting evidence and determining the facts and the applicable law.

To fulfill that duty and goal he has been vested with, among others, the following affirmative duties, discretions and powers, to be exercised when reasonably necessary upon his own motion. (The order of the following has no reference to, nor attempts to grade, their relative importance.)

(1) The duty, upon his own motion, "to see that as nearly as possible the issues shall be disposed of on their merits"¹ and, therefore, to call attention to omissions in the evidence or defects in the pleadings.

It is not justice to allow a party to rest and then decide against him because he did not produce evidence which could have been produced if his attention had been called to its necessity or because some issue was not properly pleaded. A trial judge should not surprise counsel as to possible omissions of evidence, inadvertence in pleading or failure to consider applicable decisions. He should direct their attention thereto and give them an opportunity to overcome, if they can, the omission and even the neglect. Counsel cannot be expected to know, if not advised, what the trial judge considers lacking.

It is to be regretted that a lack of uniformity of "ground rules" exists among the trial judges of the same court to such an extent that one litigant loses and another wins upon substantially the same evidence and the same questions of law. Can there not, should there not, be the doing by all trial judges of all things reasonably necessary to the end that, with a common ideal and acknowledge-

¹ See *People v. Jones*, 207 Cal. App. 2d 415, 422, 24 Cal. Rptr. 601, 605 (1962). (The authors have not attempted to cite all applicable authorities, contenting themselves merely with citing those illustrative of the law of California.)

ment of duty, the trials of all litigants will be administered by the same rules, in the same general manner and receive the same standard of justice?

Justice does not exist in substantive law alone. Justice in the application of substantive law is dependent on the pre-existent fairness of the procedure—procedural due process—in the trial of the cause. Justice can not exist merely in the application of legal substantive rules to purported facts, the truth, falsity or existence of which was not determined by procedural due process as the cause requires.² Therefore, legal discretion has been vested in the trial judge to do or cause to be done, upon his own motion, all things reasonably necessary as the particular cause requires to promote the ends of justice.³

² "Fairness of procedure is 'due process in the primary sense'. . . . It is engrained in our national traditions and is designed to maintain them. In a variety of situations the Court has enforced this requirement by checking attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of fair play enshrined in the Constitution. . . . [B]y 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. . . .

"The requirement of 'due process' is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

"Fully aware of the enormous power thus given to the judiciary and especially to its Supreme Court, those who founded this Nation put their trust in a judiciary truly independent—in judges not subject to the fears or allurements of a limited tenure and by the very nature of their function detached from passing and partisan influence." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 160-64 (1950) (Frankfurter, J., concurring). See also *Commeford v. Baker*, 127 Cal. App. 2d 111, 116-20, 273 P.2d 321, 324-27 (1954).

³ See *People v. Frahm*, 107 Cal. App. 253, 259, 262-3, 290 Pac. 678, 680, 682 (1930) (dismissal of a co-defendant so that he might become a witness for the People upon suggestion of the trial judge). "It is time it was understood that a trial judge does not sit as a mere referee in a contest of wits between counsel in the case, but that it is not only within his province, but is his duty, to see that as nearly as possible the issues shall be disposed of on their merits; and it is not out of place for him to call attention to omissions in the evidence or defects in the pleadings which are likely to result in a mistrial." *Farrar v. Farrar*, 41 Cal. App. 452, 457, 182 Pac. 939, 991 (1919). "The duty of a trial judge differs from that of a juror with respect to expressing an opinion on any subject of the case before its

(2) Counsel's lack of diligence or competency should not be allowed to reduce the trial to a farce or sham and thereby deny justice to his client. The cause is the parties', not counsel's. The duty exists in civil as well as criminal causes. Counsel's and the trial judge's failure to perform their duty may result in a denial of the litigant's constitutional and inherent right to "effective aid in the preparation and trial of the case."⁴

"It is the duty of a trial judge to see that a cause is not defeated by mere inadvertence . . . or by want of attention . . . and to call attention to omissions in the evidence or defects in the pleadings which are likely to result in a decision other than on the merits . . . and within reasonable limits by proper questions to clearly bring out the facts so that the important functions of his office may be fairly and justly performed. . . ."⁵ Therefore, it has been held error for a trial judge to fail to suggest to plaintiff's counsel that the complaint be amended to allege an assignment of the chose in action sued upon, when he granted a nonsuit, denied a motion to set aside the judgment, refused to reopen the case and refused to grant leave to file an amended complaint.⁶

(3) The trial judge, in furtherance of justice and though it be against the will of a counsel, should, upon his own motion, suggest, and even compel, the attendance of witnesses and the production of evidence which may prove or disprove facts in controversy. Upon his own motion, he should appoint and call expert witnesses.⁷ This

submission. Some trial judges advise their young associates that they can save themselves reversals by keeping their mouths shut; and so they can. But avoiding reversals should not be sought at the expense of a fair trial, and often the latter requires an expression of the conclusions of the trial judge up to the moment, in order that counsel may be advised what course to chart." *Gary v. Avery*, 178 Cal. App. 2d 574, 579, 3 Cal. Rptr. 20, 23 (1960). CAL. CODE CIV. PROC. § 187.

⁴ *Powell v. Alabama*, 287 U.S. 45, 71 (1932), quoted and followed in *People v. Ibarra*, 60 Cal. 2d 460, 464, 386 P.2d 487, 490, 34 Cal. Rptr. 863, 866 (1963). "It has also been said that the power of the judge to do justice by ordering a new trial is not impaired even though the moving party is technically estopped to claim error or has waived his right to complain." *Shaw v. Pacific Greyhound Lines*, 50 Cal. 2d 153, 159, 323 P.2d 391, 394 (1958). See also *Malkasian v. Irwin*, 61 Cal. 2d 738, 394 P.2d 822, 40 Cal. Rptr. 78 (1964). "Defendant's laziness in opposing the motion does not relieve the court of the necessity of determining plaintiff's motion on the merits." Honorable Philbrick McCoy in *Alexander v. Cedars of Lebanon*, Superior Court of Los Angeles, No. 774034, October 29, 1964.

⁵ *Lombardie v. Citizens Nat'l Trust & Sav. Bank*, 137 Cal. App. 2d 206, 209, 289 P.2d 823, 824-25 (1955).

⁶ *Miller v. Republic Grocery, Inc.*, 110 Cal. App. 2d 187, 192, 242 P.2d 396, 399 (1952). *Cf.*, *Hellings v. Wright*, 29 Cal. App. 649, 656, 156 Pac. 365, 368 (1916). See also *Kurtz v. Kurtz*, 189 Cal. App. 2d 320, 327, 11 Cal. Rptr. 230, 234 (1961).

⁷ "One of the powers necessary to the administration of justice is the power to obtain evidence upon which the judgment of the court can be exercised. Mr. Greenleaf, speaking of the law courts, says: "Every court having power definitively to hear and terminate any suit has, by the common law, inherent power to call for all ade-

is now codified in the California Evidence Code as to witnesses in general⁸ and as to the appointment of expert witnesses.⁹

The paucity of the exercise of that discretion at the pretrial conference to appoint medical experts in actions for damages for personal injuries or wrongful death or upon policies of disability or life insurance in the face of authorization by statute and rules of court (such as Rule 26 of the Los Angeles Superior Court Rules) and notwithstanding provision for the payment of such expert's fees by the county is difficult to understand and justify. Jurors and trial judges are left with the heavy task of attempting to determine questions in expert fields without impartial expert assistance. It cannot be gainsaid that experts are consciously or unconsciously conditioned to testify in support of the contentions of the side by which they are retained, regrettably without full regard for the ethical duty of attempting to honorably and learnedly testify to the application of the principles of their profession to the facts involved.

Theoretically, counsel are to cite all applicable authorities though contrary to their contentions. Generally, in practice, this is not done. It is doubted, in light of the existing theory that trials are "adversary" and, therefore, "trials by combat," that counsel should be required to do so. The co-author trial judge does not expect that counsel will do so. Counsel are generally forced by the facts of their cause to assert an extreme position. Somewhere in between the contentions of each side lies the applicable law. The failure or omission of counsel to brief or suggest the applicable law does not relieve the trial judge from, nor modify, his duty, by independent research, to find, determine and apply the applicable law to the facts as found by him.¹⁰

quate proofs of the fact in controversy, and to that end summon and compel the attendance of witnesses before it." *Burns v. Superior Court*, 140 Cal. 1, 6, 73 Pac. 597, 599 (1903); *School Dist. v. Superior Court*, 58 Cal. 2d 180, 192, 373 P.2d 439, 447, 23 Cal. Rptr. 375, 383 (1962) (court on own motion requiring exchange of appraisals in eminent domain, and holding trial in abeyance until done). See also *Swartzman v. Superior Court*, 231 Cal. App. 2d 195, 41 Cal. Rptr. 721 (1964); *People v. Casillas*, 60 Cal. App. 2d 785, 793, 141 P.2d 768, 722 (1943); CAL. CODE CIV. PROC. §§ 128(6), (8), § 177(3).

⁸ CAL. EVID. CODE § 775. That this is not a new concept, see *Marin Water & Power Co. v. Railroad Comm'n*, 171 Cal. 706, 154 Pac. 864 (1916), in which the court stated, "It is now conceded that judicial tribunals have power to call and examine witnesses in furtherance of justice and against the will of either party." *Id.* at 713, 154 Pac. at 867; *Wood v. Silvers*, 35 Cal. App. 2d 604, 97 P.2d 265 (1939); *Walker Mining Co. v. Industrial Accident Comm'n*, 35 Cal. App. 2d 257, 95 P.2d 188 (1939); *Roth v. Moeller*, 185 Cal. 415, 197 Pac. 62 (1921). See also the Legislative Committee comments to CAL. EVID. CODE § 775 in which it is stated that, "The power of the judge to call expert witnesses is well recognized by statutory and case law in California: . . . The power of the judge to call other witnesses is also recognized by case law."

⁹ CAL. EVID. CODE § 730.

¹⁰ "It is always the province of the trial court and of counsel to elicit the truth

In *People v. Krough*,¹¹ a stipulation was entered into during trial that the matter be submitted upon the transcripts of the preliminary hearing and statements were made in chambers by counsel that the court might decide the case from the information given it as to what the transcripts contained so that the court need not actually read the transcripts itself. On reversing, the district court states,

While it is permissible in this state to try a case on the record of the proceedings had at a preliminary hearing when the defendant and counsel agree to such a procedure, it is clear that the trial court, before deciding a case so submitted, must read and consider the record as contained in the preliminary transcript. Here, the trial judge clearly indicated that he would decide the defendant's case from the information given the court [by counsel] and that he would not actually need to read the transcripts themselves. Such a galloping administration of justice cannot be permitted.¹²

It has also been held that though no objection was made concerning the lack of jurisdiction of the court, it was the court's duty to raise it.¹³

(4) The powers and legal discretion vested in the judge should be liberally exercised.¹⁴ He should, when necessary, upon his own motion: appoint a guardian ad litem to represent an infant or incompetent;¹⁵ order indispensable or necessary parties to be brought

regarding any issue." *Koeberle v. Frigauza*, 66 Cal. App. 323, 327, 226 Pac. 35, 37 (1924).

¹¹ 232 Cal. App. 2d 150, 42 Cal. Rptr. 614 (1965).

¹² *Id.* at 152, 42 Cal. Rptr. at 615-16.

¹³ "The proper procedure would have been for the court to take notice of the absence of the indispensable parties which the litigants had evidently overlooked, order them to be brought in by plaintiff, and to dismiss the action without prejudice if they were not brought in." *Irwin v. City of Manhattan Beach*, 227 Cal. App. 2d 634, 638, 38 Cal. Rptr. 875, 878 (1964). *Cf.*, *People v. Rosenberg*, 212 Cal. App. 2d 773, 776, 28 Cal. Rptr. 214, 215-16 (1963); *People v. Bruce* 230 Cal. App. 2d 324, 342, 40 Cal. Rptr. 877, 889 (1964).

¹⁴ In *Feigin v. Kutchor*, 105 Cal. App. 2d 744, 234 P.2d 264 (1951), an action for claim and delivery, in his opening brief plaintiff contended that the answer was insufficient in failing to deny plaintiff's right of possession. In his brief defendant asked leave to amend his answer, and in its memorandum decision, filed after the cause was submitted, the court ordered that: "Defendant's Second Amendment to Answer be filed"; plaintiff claimed error. In affirming, the court stated: "If counsel for plaintiff was aware of such omission in the answer, it was his duty as an officer of the court to make an objection or motion on that ground A trial is more than a contest between opposing counsel, and a trial judge is more than an umpire in a battle of wits between opposing counsel. The administration of justice is not improved by slavish adherence to technical rules of pleadings, but counsel and court should cooperate in having the pleadings so shaped that the controversy between the parties litigant may be fully and fairly determined upon its merits and in accordance with substantial justice [I]t was not only within the power of the court to permit the amendment, but it was its duty to do so." *Id.* at 748, 234 P.2d at 267.

¹⁵ CAL. CODE CIV. PROC. § 372.

in;¹⁶ strike sham, irrelevant or redundant allegations;¹⁷ dismiss fictitious and sham actions;¹⁸ by summary means, prevent frustration, abuse or disregard of process;¹⁹ order writings produced without the necessity of subpoena;²⁰ order brought in all persons whose absence will prevent the rendering of an effective judgment between the parties or which will seriously prejudice any party, or whose interest would be inequitably affected by a judgment between the parties,²¹ including joinder to enable the determination of other causes of action arising out of the transaction or occurrence involved in the action.²²

(5) There still are some counsel and trial judges who dispute the right and duty of a trial judge to participate in the examination of witnesses. Their denial of the right and duty of a trial judge to do so is without substantial support in the law of this state. The law of this state confers upon the trial judge the power, discretion and affirmative duty, predicated upon his primary duty and purpose "to do justice," to, in any proceeding, whether criminal or civil, with or without a jury, participate in the examination of witnesses whenever he believes that he may fairly aid in eliciting the truth,²³ in preventing misunderstanding,²⁴ in clarifying the testimony or cover-

¹⁶ CAL. CODE CIV. PROC. § 389.

¹⁷ CAL. CODE CIV. PROC. § 453.

¹⁸ *Lincoln v. Didak*, 162 Cal. App. 2d 625, 629-31, 328 P.2d 498, 501-02 (1958).

¹⁹ *Neal v. Bank of America*, 93 Cal. App. 2d 678, 682, 209 P.2d 825, 827 (1949).
But see *Younger v. Superior Court*, 136 Cal. 682, 684-85, 69 Pac. 485, 486 (1902) (A judge cannot dismiss cause without notice to the parties of hearing.).

²⁰ See *Morehouse v. Morehouse*, 136 Cal. 332, 337, 68 Pac. 976, 978 (1902); *McKinley v. Southern Pac. Co.*, 80 Cal. App. 2d 301, 315, 181 P.2d 899, 908 (1947), where it is said, "... no party has a right to refuse to produce any report or document which may have a bearing upon the facts of the pending litigation." See also *Walker Mining Co. v. Industrial Acc. Comm.*, 35 Cal. App. 2d 257, 262, 95 P.2d 188, 190 (1939); CAL. CODE CIV. PROC. §§ 1990, 2065. We are not at this point concerned with constitutional rights or privileges under CAL. CODE CIV. PROC. § 1881, to be Division 8 of the CAL. EVID. CODE.

²¹ See *De Olzabal v. Mix*, 24 Cal. App. 2d 258, 262, 74 P.2d 787, 789 (1937); *Solomon v. Redona*, 52 Cal. App. 300, 306, 198 Pac. 643, 645 (1921) (imperative judicial duty not a matter of discretion); CAL. CODE CIV. PROC. § 389.

²² See *Farrar v. Farrar*, 41 Cal. App. 452, 457, 182 Pac. 989, 991 (1919) (dictum); *State ex rel. Bachelder v. Murphy*, 29 Nev. 149, 85 Pac. 1004 (1906) (dictum).

²³ Even in a jury trial, it has been held that no error was committed when a judge undertook to question certain witnesses because he "was obviously seeking to elicit or clarify testimony on material points, and it is the right and duty of a judge to conduct a trial in such a manner that the truth will be established in accordance with the rules of evidence." *People v. Corrigan*, 48 Cal. 2d 551, 559, 310 P.2d 953, 958 (1957). See also *People v. Rigney*, 55 Cal. 2d 236, 241-44, 359 P.2d 23, 25-27, 10 Cal. Rptr. 625, 627-29 (1961); *People v. Randall*, 226 Cal. App. 2d 105, 109, 37 Cal. Rptr. 809, 812-13 (1964); *Jaeger v. Chapman*, 95 Cal. App. 2d 520, 213 P.2d 404 (1950); *People v. Golsh*, 63 Cal. App. 609, 615, 219 Pac. 456, 458-59 (1923).

²⁴ Though the judge's examination be unfavorable to a party, it is "the bounden duty of a judge of a trial court to take part in the examination of a witness whenever he believes that he may aid . . . in preventing a misunderstanding." *People v. Ottey*,

ing omissions,²⁵ in allowing a witness his right of explanation,²⁶ and in eliciting facts material to a just determination of the cause.²⁷

(6) Though no objection or motion be made by counsel, or over counsel's objection, the trial judge's affirmative duty, upon his own motion, includes the duty: to exclude or strike incompetent or inadmissible evidence;²⁸ to exclude or strike improper conduct or argument of counsel; and to do whatever else is reasonably necessary, particularly in a trial by jury, to prevent prejudice to a party or a miscarriage of justice.²⁹

Unless the court [on its own motion] promptly strikes out an improper question and rebukes counsel for asking it, the damage is done. If opposing counsel objects and his objection is sustained, the jury may well speculate on what the answer would have been. If no objection is made, the witness's denial still leaves the damaging impli-

5 Cal. 2d 714, 721, 56 P.2d 193, 196 (1936). *Accord*, *McClure v. Donovan*, 33 Cal. 2d 717, 736, 205 P.2d 17, 28-29 (1949).

²⁵ ". . . for the purpose of elucidating or making clear any points that might otherwise remain obscure." *People v. Reid*, 72 Cal. App. 611, 617, 237 Pac. 824, 827 (1925). "Where a witness is evasive, contradictory or confused, he has the right and duty to clarify the answers." *Polioudakis v. City and County of San Francisco*, 129 Cal. App. 2d 137, 142-143, 276 P.2d 126, 130 (1954). See *People v. Holland*, 158 Cal. App. 2d 583, 587, 322 P.2d 983, 986 (1958); *Hughes v. Quackenbush*, 1 Cal. App. 2d 349, 359, 37 P.2d 99, 104 (1934); *Bell v. Moloney*, 175 Cal. 366, 370-71, 165 Pac. 917, 919 (1917).

²⁶ "Questions may be asked for the purpose of giving a defendant an opportunity to explain his reasons for having made certain statements or giving him an opportunity to reconcile, if possible, apparently conflicting statements which he has made." *People v. Morris*, 138 Cal. App. 2d 317, 326, 292 P.2d 15, 21-22 (1956).

²⁷ ". . . it has been repeatedly held that if a judge desires to be further informed on certain points mentioned in the testimony it is entirely proper for him to ask proper questions for the purpose of developing all the facts in regard to them. Considerable latitude is allowed the judge in this respect as long as a fair trial is indicated both to the accused and to the People. Courts are established to discover where lies the truth when issues are contested, and the final responsibility to see that justice is done rests with the judge." *People v. Lancellotti*, 147 Cal. App. 2d 723, 729-31, 305 P.2d 926, 930-31 (1957). See also *People v. Grebe*, 105 Cal. App. 2d 27, 32-33, 232 P.2d 564, 567, (1951); *Karwoski v. Grant*, 30 Cal. App. 2d 171, 177-78, 85 P.2d 944, 947 (1938); *Gerson v. Kelsey*, 4 Cal. App. 2d 158, 163, 40 P.2d 543, 545 (1935).

²⁸ See *Bodholt v. Garret*, 122 Cal. App. 566, 569, 10 P.2d 533, 534 (1932). See also *Hoel v. City of Los Angeles*, 136 Cal. App. 2d 295, 307, 288 P.2d 989, 996 (1955) (wherein, though counsel did not initially object to the questions that elicited objectionable, prejudicial and inadmissible answers, the situation was "one that called for the court to take action on his own motion because necessary in furtherance of justice The court should have exercised this supervisory power . . . and when he concluded on motion for new trial that he should have done so, the granting of the motion was eminently proper. Even if the moving party was technically estopped to claim error, that fact would not impair the power of the court to do justice by granting the new trial.").

²⁹ "The duty of the court is not confined to passing upon such portions of testimony as may be excepted to, but extends to the preservation of the rights of litigants and a proper disposition of the matters in controversy." *Parker v. Smith*, 4 Cal. 105, 106 (1854). See also *Hickambottom v. Cooper Trans. Co.*, 186 Cal. App. 2d 479, 486, 9 Cal. Rptr. 276, 280-81 (1960); *Dastigir v. Dastigir*, 109 Cal. App. 2d 809, 816-19, 241 P.2d 656, 661-63 (1952); *People v. Atkinson*, 40 Cal. 284, 285 (1870).

cation or inference of the question in the record. In such circumstances, for opposing counsel to object is generally more damaging than to permit the question to be answered without an objection. The court is no longer confined, if such ever was the rule, to the role of sitting as a mere arbitrator between opposing counsel. It is the function of the court to see that errors or extraneous matters are not brought into the case, which might have the effect of clouding the issue or confusing the jury. Where improper questions are asked, the court is acting within the proper scope of its duty in striking out the offending question whether or not objections had been previously made thereto.⁸⁰

It is also the trial judge's duty, upon his own motion: to protect witnesses from irrelevant, improper or insulting questions; to allow them to be detained only so long as the interests of justice require; to allow them to be examined only as to matters legal and pertaining to the issue;⁸¹ to advise them of their right not to give an answer which will tend to incriminate them or one which will directly tend to degrade their character, unless it be the fact in issue or a fact from which the fact in issue would be presumed;⁸² to advise them when not represented by counsel of their rights under the "confidential communications" statute;⁸³ to exercise reasonable control over the mode of interrogation to make it as rapid, as distinct, as little annoying to the witnesses, and as effective as possible for the extraction of the truth;⁸⁴ to allow inquiry into a collateral fact only when directly connected with the question in dispute and essential to its proper determination or when affecting the credibility of witnesses.⁸⁵ The protection to which witnesses are entitled "could

⁸⁰ Fortner v. Bruhn, 217 Cal. App. 2d 184, 190, 31 Cal. Rptr. 503, 507 (1963). See Beagle v. Vasold, 65 A.C. 161, 417 P.2d 673, 53 Cal. Rptr. 129 (1966) (re attorney's arguments); Gantner v. Gantner, 39 Cal. 2d 272, 278, 246 P.2d 923, 929 (1952); Hoel v. City of Los Angeles, 136 Cal. App. 2d 295, 307, 288 P.2d 989, 996 (1955) (re exclusion of public and press during trial); People v. Yuen, 32 Cal. App. 2d 151, 159-160, 89 P.2d 438, 442 (1939); Scripps v. Reitly, 38 Mich. 10, 15 (1878).

⁸¹ CAL. CODE CIV. PROC. § 2066.

⁸² People v. Barker, 232 Cal. App. 2d 178, 42 Cal. Rptr. 651 (1965); People v. Kramer, 227 Cal. App. 2d 199, 38 Cal. Rptr. 487 (1964); Kilpatrick v. Superior Court, 153 Cal. App. 2d 146, 314 P.2d 164 (1957); CAL. CODE CIV. PROC. § 2065.

⁸³ People v. Atkinson, 40 Cal. 284, 285 (1870); CAL. CODE CIV. PROC. §§ 1881, 2065, 2066.

⁸⁴ CAL. CODE CIV. PROC. § 2044.

⁸⁵ CAL. CODE CIV. PROC. § 1868. See State v. Bacon, 13 Ore. 143, 9 Pac. 393 (1886), in which the court said, "By placing such inquiries within the sound discretion of the court, the past lives of witnesses are not liable to be ransacked or exposed; for against such unreasonable and oppressive cross-examinations the power of the court may be interposed, on its own motion, to protect the witness and prohibit such questions. In the liberality allowed on cross-examinations, to promote the ends of justice, a sound discretion will never sanction inquiries, the sole purpose of which is to disgrace the witness and not to test his credibility. And whenever such is the object of it, it is the duty of the court to disallow it, and to confine the cross-examination to proper limits." *Id.* at —, 9 Pac. at 399. See also People v. Kramer, 227 Cal. App. 2d 37, 38 Cal. Rptr. 405 (1964) (conviction reversed where judge did not, on his own motion, advise defendant not represented by counsel of his right not to testify and the consequences if he did).

be more often extended by the judges with a salutary effect upon judicial proceedings.”³⁶ When an attempt is made to impeach a witness or to show his bias, prejudice or hostility by evidence of prior statements inconsistent with his present testimony, and he answers “yes” or “no” as to whether he made such statements, his right of explanation should be protected.³⁷ When he has been compelled to answer a question “yes” or “no,” his right to explain his answer, if he desires, should be afforded him.³⁸ Whenever the witness testifies to facts as to which a written memorandum exists which may be properly used to refresh his memory, that right should be granted to him.³⁹ If necessary, he should be advised of such rights by the trial judge.

The fundamental duty “to do justice” requires the trial judge “to be most vigilant and vigorous in protecting individuals, as well as minority and majority groups, against encroachment upon their fundamental liberties,”⁴⁰ though no objection be made by counsel or the right to be unknown to the litigants or their counsel.⁴¹ Whether

³⁶ *People v. Durrant*, 116 Cal. 179, 212, 48 Pac. 75, 83 (1897) (dictum).

³⁷ CAL. CODE CIV. PROC. § 2052.

³⁸ See *McGuire v. Baird*, 9 Cal. 2d 353, 355, 70 P.2d 915, 916 (1937).

³⁹ CAL. CODE CIV. PROC. § 2047.

⁴⁰ *In re Porterfield*, 28 Cal. 2d 91, 103, 168 P.2d 706 714 (1946).

⁴¹ *People v. Phillips*, 42 Cal. Rptr. 868 (1965) (A hearing was granted by the Supreme Court. Its decision is reported in 64 A.C. 629 414 P.2d 353, 51 Cal. Rptr. 225 (1966). No reference was made by it to the statement of the District Court of Appeal, hereinafter set forth.) The defendant had been convicted by a jury of second degree murder. Upon the request of counsel for the defendant, no instruction had been given on manslaughter. The District Court of Appeal reversed for failure of the trial court on its own motion to instruct on manslaughter. The court stated: “Trial counsel have an undoubted right to use strategy and tactics in the trial of an action for which they have assumed responsibility. However, in a criminal case such strategy and tactics cannot invade the rights of the state.

“The right of adverse parties to indulge in strategy and tactics in any case, and especially in a criminal case, is subject to the inherent power of the court to prevent the abuse of the fundamental rights of litigants, to seek the truth and to see that justice is done.

“A judge is not placed in that high situation merely as a passive instrument of the parties. He has a duty of his own independent of them, and that duty is to investigate the truth.

. . . .

“The state in a criminal case is a party to the action and has an overriding public interest which must be safeguarded by the court.

“This overriding public interest is not to convict or punish anyone. It is to expose all the evidence in respect of the crime charged and to deal justly with a defendant in accordance with the law as applied to the acts found by the court or jury from the evidence. If, after presentation of all the evidence, a jury or judge acquits, such an acquittal is as much a victory for the State as if there is a finding of guilt. The State has fulfilled one of the primary obligations for its existence and has been vindicated by the trial, irrespective of the outcome. This premise does not permit the State to be a party voluntarily or involuntarily to a gamble which will either free a defendant or punish him for a crime in excess of that which the evidence warrants when there is a lesser crime for which he could be convicted on the evidence and

the proceeding be civil or criminal, the protection of such fundamental rights as life, liberty and property is dependent upon procedural due process. The trial judge's duty to ensure this protection is not delegable to either counsel or appellate tribunals.

The trial judge should, upon his own motion and though no objection be made, refuse to accept proffered stipulations of fact which appear to him to have been made inadvisedly or without knowledge or realization of their legal effect or which could cause a judgment to be unjust and not in accordance with law;⁴² and refuse to accept proffered stipulations of law or of the questions of law involved which are not in accordance with law or do not correctly or completely state the questions involved.⁴³ It is the trial judge's non-delegable duty, upon his own motion, to decide what questions of law are involved and the law applicable to those questions.⁴⁴ He

under the law, if the gamble were not attempted. . . . To properly decide a case, a jury should have all the law applicable to the evidence taken at the trial." *Id.* at 879-80.

⁴² *Bare v. Parker*, 51 Cal. App. 106, 108, 196 Pac. 280, 281 (1921) (Stipulation of facts negated "the theory of plaintiff's case and would have stipulated him out of court. The trial court appreciated the situation and properly refused to permit an inadvertence or want of attention on the part of counsel to work what he conceived to be an injustice.").

⁴³ "[N]o stipulation of parties or counsel . . . can enlarge the power, or affect the duty of the court . . ." *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289 (1917). See *Frazure v. Fitzpatrick*, 21 Cal. 2d 851, 859, 136 P.2d 566, 570-71 (1943) (written stipulation between counsel that cross-complaint be filed and tried at same time as complaint, but trial court on own motion dismissed cross-complaint); *People v. Jones*, 6 Cal. 2d 554, 555, 59 P.2d 89 (1936) (erroneous stipulation of law); *San Francisco Lumber Co. v. Bibb*, 139 Cal. 325, 326, 73 Pac. 864, 865 (1903) ("When a particular legal conclusion follows from a given state of facts, no stipulation of counsel can prevent the court from so declaring it."); *Merchants Fire Assur. Corp. v. Retail Credit Co.*, 206 Cal. App. 2d 55, 62, 23 Cal. Rptr. 544, 549 (1962) ("the pleading speaks for itself and its interpretation is the business of the court"); *Duncan v. Garrett*, 176 Cal. App. 2d 291, 294, 1 Cal. Rptr. 459, 460 (1959); *People v. Singh*, 121 Cal. App. 107, 111, 8 P.2d 898, 900 (1932). See also *Roseleaf v. Chierghino*, 59 Cal. 2d 35, 378 P.2d 97, 27 Cal. Rptr. 873 (1963); *County of Los Angeles v. Stuyvesant Insurance Co.*, 227 Cal. App. 2d 428, 38 Cal. Rptr. 713 (1964); *Brunt v. Occidental*, 223 Cal. App. 2d 179, 183, 35 Cal. Rptr. 492, 495 (1963); *County of Los Angeles v. Bean*, 176 Cal. App. 2d 521, 1 Cal. Rptr. 464 (1959); *Valdez v. Taylor Auto Co.*, 129 Cal. App. 2d 810, 819-20, 278 P.2d 91, 96-97 (1954); *Back v. Farnsworth*, 25 Cal. App. 2d 212, 220, 77 P.2d 295, 299 (1935).

⁴⁴ "It is appellants' theory that, because in their original pleading respondents stood on the contract as a valid contract and did not urge any mistake, they should not be later allowed by the court to change their theory and attack the contract on the ground that the parties entered into it because of a mutual mistake. In thus arguing we believe that appellants take too narrow a view of the functions of the trial court. The basic purpose of our legal system is to do justice between the parties under established legal principles. The trial judge should be more than an umpire deciding which party has succeeded under the ground rules fixed by opposing counsel for the playing of a game. If he reaches the conclusion from the evidence that an attorney for one party has misconceived the basic rights of his client under the facts which he finds to be true he has not only the right, but the duty, to decide the case in accordance with such findings. All that fairness requires is that the new theory, which the judge

must bring to bear upon the cause the experience and the knowledge which he has and the knowledge he can acquire by diligent study and research. He has agreed to be, and is required to be, diligent in the study of the law and its application.

(7) When evidence is received for a specific or limited purpose, the trial judge, upon his own motion, should state for the record, and for the advice and guidance of the jury, the purpose for which it is to be received and considered.⁴⁵ When judicial notice is taken of any matter, he, upon his own motion, must so advise the parties and instruct the jury. They are entitled to know and counsel should be enabled to dispute the right to take such notice. Only thereby can the trial judge create and preserve a record, as his duty requires, so that the parties' right of appellate review is preserved.⁴⁶

(8) When the evidence discloses that the subject of the action is an illegal or void contract or a transaction against public policy or the prohibition of a statute and, therefore, may not be made the foundation of any action either in law or in equity, it is the trial judge's duty, upon his own motion to so judge.

Neither the silence nor the consent of the parties justifies the court in retaining jurisdiction of such an action . . . in cases of this kind it matters not that no objection is made by either party. When the court discovers a fact which indicates that the contract is illegal and ought not to be enforced, it will, of its own motion, instigate an inquiry in relation thereto.⁴⁷

It is the duty of a court of equity, upon any suggestion that a plaintiff has not acted in good faith concerning the matters upon which he bases his suit, to inquire into the facts in that regard. For it is not only fraud or illegality which will prevent a suitor from obtaining equitable relief. Any unconscientious conduct upon his part which is connected with the controversy will repel him from the forum whose very foundation is good conscience.⁴⁸

(9) The affirmative duties of the trial judge arise and exist from the ever-evolving concept of his role in the rendition of justice. The era of fear of trial judges because of bribery, corruption, political pressures, social and economic status, and the arbitrary exercise

decides is the correct one, be disclosed to the opposing party so that he may have a full opportunity to meet it." *Sand v. Concrete Service Co.*, 176 Cal. App. 2d 169, 172, 1 Cal. Rptr. 257, 259 (1959).

⁴⁵ See *Byrne v. Byrne*, 113 Cal. 294, 297, 45 Pac. 536, 537 (1896).

⁴⁶ See *Garner v. Louisiana*, 368 U.S. 157, 173 (1961); CAL. CODE CIV. PROC. §§ 1875, 2102.

⁴⁷ *Morey v. Paladini*, 187 Cal. 727, 733-34, 203 Pac. 760, 762-63 (1922). The defense of illegality may be raised for the first time on appeal. "The trial court had the duty and power to raise it on its own motion. . . . Thus, for the purpose of this appeal we treat the issue as though it were considered below and decided adversely to appellants." *Green v. Brooks*, 235 Cal. App. 2d 161, 168, 45 Cal. Rptr. 99, 103 (1965).

⁴⁸ *Degarmo v. Goldman*, 19 Cal. 2d 755, 764, 123 P.2d 1, 6 (1942).

of autocratic power is diminishing. Each cause calls for and requires the intense interest, diligence, sincere desire and objective to do and render justice not merely for or restricted to the purposes of the trial court, but to allow and assist in an appeal. It is—or at least should be—the desire and hope of every trial judge that if he has failed to do justice in his judgment he be reversed. He should not feel slight or damage to his pride. It is not an answer, nor is it compatible with the theory and objective of the administration of justice, that the trial judge doesn't have the time to do those things which "he would like to do" or which "he knows he should do." Justice cannot and should not be rendered from a fear of the resultant statistics by computers or otherwise. Master calendars may seek to justify their existence by alleged statistics of speed of calendaring and assigning cases for trial. But once a case is assigned for trial, the parties are entitled to, and the affirmative duties of the trial judge compel him to give to the parties and to the cause the deliberate hearing, study, and consideration which the legal and just disposition of the cause reasonably requires. The trial judge can justify his purpose and existence only so long as he sincerely and learnedly renders each party his due. The fetish for computers and mechanical speed as they attempt to destroy the individualism of the litigants and their cause must be opposed by the trial judge if and as it tends to affect the credo which should govern him. Just as the ethics of the market place are not necessarily the ethics of the court, neither are the rules and mechanical facilities designed for increasing production in our industrial society to govern the trial of a cause. The essence of justice is its quality. Its rendition is handmade, laborious and even tedious, but personal and individual. There is a place—a function—to be served by statistics and computers in the operation of our courts. It is not, however, to make or prove a record of speed in the disposition of causes. Its place—its function—should be to attempt to make available a greater quality of justice at a minimum cost so that all seekers thereof may have their day in court.

A trial judge is bound to make and take the time to advise the parties of the basis of his decision by a memorandum opinion, however short, and by precise and specific findings of fact and conclusions of law which are his, which he has found, and which are not prepared by counsel merely to attempt to affirm his judgment on appeal.⁴⁹ The parties, counsel, and the appellate court are entitled to know the precise specific facts found and the principles of law applied. Great power has been conferred upon the trial judge

⁴⁹ See *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 384, 364 P.2d 266, 280 (1961).

in the making of his findings of fact. When findings are made from a conflict in the evidence, they are generally conclusive, and an appeal therefrom is generally ineffective. The trial judge should make specific and precise findings of fact and conclusions of law to prove that he has not acted arbitrarily. Litigants are entitled to know that their cause was not decided by, and the elements of the administration of justice prohibit any decision as a result of, bias, prejudice, personal philosophy, "the seat of one's pants," or the arbitrary exercise of autocratic power. The trial judge's power is great, but it is properly limited to legal powers and legal discretion.

Judicial discretion is that power of decision exercised to the necessary end of awarding justice based upon reason and law but for which decision there is no special governing statute or rule. Discretion implies that in the absence of positive law or fixed rule the judge is to decide a question of his view of expediency or of the demand of equity and justice. The term implies absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy or warped by prejudice or moved by any kind of influence save alone the overwhelming passion to do that which is just.⁵⁰

It is discouraging that the trial judge is not provided with research assistance. In doing research he is forced to drudgery which could be done as well and less expensively by a newly admitted lawyer. The California Superior Court is the only professional and business entity that needlessly uses \$25,000 per year personnel to do what could be done by \$7,500 per year personnel. Nothing, however, does or can justify the trial judge's abandonment of the ideal, the hope, if not the prayer, for justice under law and for his being its instrumentality.⁵¹

Findings should be the trial judge's and not counsel's. Is it not a breach of duty when a judgment is reversed for defects or affirmed on counsel's findings and conclusions of law which in fact and in truth the trial judge did not make? Is not duty violated when the trial judge allows counsel to make findings of fact and conclusions of law for the purpose of affirmance on appeal when the true facts found and the true conclusions of law made do not support his actual judgment?

⁵⁰ *People v. Surplice*, 203 Cal. App. 2d 784, 791, 21 Cal. Rptr. 826, 831 (1962). See also *Martin v. Alcoholic Beverage Control Appeals Bd.*, 55 Cal. 2d 867, 362 P.2d 337, 13 Cal. Rptr. 513 (1961).

⁵¹ See CAL. CODE CIV. PROC. § 632.

Who shall prepare the findings? Rule 52 says the court shall prepare the findings. The court shall find the facts specially and state separately its conclusions of law. We all know what has happened. Many courts simply decide the case in favor of the plaintiff or the defendant, have him prepare the findings of fact and conclusions of law and sign them. This has been denounced by every court of appeals save one. This is an abandonment of the duty and the trust that has been placed in the judge by these rules. It is a noncompliance with Rule 52 specifically and it betrays the primary purpose of Rule 52—the primary purpose being that the preparation of these findings by the judge shall assist in the adjudication of the lawsuit.

I suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeal they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case.⁵²

(10) The trial judge is and should be bound by *stare decisis*, leaving to the appellate courts the privilege, taken unto themselves, of judicial legislation.⁵³ The parties are entitled to know by what law their rights, duties, and obligations are governed and determined. The trial judge may state, by his conclusions of law, that he so ruled only by reason of the compulsion of a prior decision; and that he believes such decision to be contrary to law, but that he is restricted from overruling it. Only chaos could exist if we had as many "law-givers" as we have judges in our trial courts.⁵⁴

(11) In addition to the affirmative duty to determine and apply the law applicable to the facts found, the trial judge has the duty, upon his own motion, to instruct the jury on all material questions of law reasonably necessary to a fair verdict.⁵⁵ The affirmative duty developing in civil causes in time will be coextensive with the affirmative duty in criminal causes. Rights exist and are being adjudged in each type of cause. There is no substantial reason why

⁵² United States v. El Paso Natural Gas Co., 376 U.S. 651, 656-57 n.4 (1964). The duty is non-delegable, CAL. CODE CIV. PROC. § 632; DeBurgh v. DeBurgh, 39 Cal. 2d 858, 873, 250 P.2d 598, 606 (1952); Auer v. Frank, 227 Cal. App. 2d 396, 406, 38 Cal. Rptr. 684, 690 (1964); Mason v. Ennes, 172 Cal. App. 2d 99, 104, 342 P.2d 79, 82 (1959). See Cargnani v. Cargnani, 16 Cal. App. 96, 99, 116 Pac. 306, 307 (1911).

⁵³ See Auto Equity Sales v. Superior Court, 57 Cal. 2d 450, 369 P.2d 937 (1962).

⁵⁴ Blankman v. Parson, 73 Cal. App. 218, 225, 238 Pac. 728, 731 (1925).

⁵⁵ See People v. Henderson, 60 Cal. 2d 482, 490, 491, 386 P.2d 677, 681 (1963); People v. Holt, 25 Cal. 2d 59, 64, 153 P.2d 21, 24 (1944). See also People v. Morse, 60 Cal. 2d 631, 656, 388 P.2d 33 (1964). CAL. CODE CIV. PROC. §§ 608(14), 2061. "Although the instructions offered by the plaintiff do not cover the issues of the case sufficiently and some were faulty, the responsibility remained on the Court to instruct the jury on the controlling legal principles." Trejo v. Maciel, 239 A.C.A. 541, 552, 48 Cal. Rptr. 765, 772-73 (1966).

trial judges should have a lesser duty in a civil cause than in a criminal cause. In each the same inherent and constitutional rights exist. In each the affirmative duty of the trial judge is the same. In each the parties are entitled to justice under law. A denial of these rights in a civil cause because a lawyer may not have performed his duty is contrary to the litigant's rights and the trial court's duty. It is a throwback to the regrettable era when trial judges were in fact only umpires and referees, and when litigants may have had cause to believe that our courts were controlled by political strength, wealth, and power. Today, to the lowest and humblest, to the weak, the poor, and to the strong, the same law applies, to be equally administered by a judge. That is as true in civil causes as in criminal. The trial judge's duties are the same in both.

It is our considered opinion and prognostication that, when counsel for a party in a civil case be so inept or negligent that he does not submit and, therefore, the trial court does not give instructions on the principal elements of the applicable substantive law, our appellate court will hold that the trial court should have done so on its own motions.⁵⁶ Juries in a civil cause are generally only the judges of the facts. The trial judge is its legal adviser, the beneficent guardian, the repository of the law for its and the parties' benefit. The trial judge must necessarily advise them of the controlling principles of law applicable to the facts. As early as 1747, upon the impeachment against Simon Lord Lovat for high treason, the Lord High Steward stated to the accused as among the court's and his duties:

Your Lordship can never doubt of the greatest Fairness and Candour in the Management of a Prosecution carried on by the House of Commons, intrusted and highly concerned to preserve the Rights and Liberties of their Fellow-subjects. Neither can you entertain the least Doubt of a just and impartial tryal, nor the law of the Land, and the Custom and Usage of Parliament (an essential Part of that Law), constitute the Rule of Proceeding; and the Decision and Judgment rest in the Breasts of these Noble Lords your Peers, who are to try you upon that Honour, which is inseparable from them, and to judge you by that Law, which is the great Security of Themselves and their Posterity.

It is my duty to put your Lordship in mind of some Things, which may be of Use to you in the Conduct of your Defence; but in

⁵⁶ "[W]hile instructions on some of the vital issues were not submitted by any of the parties at all, the court was not relieved of the responsibility to properly instruct the jury on the controlling legal principles applicable to the case . . . so that the jury would have a full and complete understanding of the law applicable to the facts." *Distefano v. Hall*, 218 Cal. App. 2d 657, 672, 32 Cal. Rptr. 770, 780 (1963). See *Perry v. San Diego*, 80 Cal. App. 2d 166, 181 P.2d 98 (1947). *But see* *Hodges v. Severns*, 201 Cal. App. 2d 99, 20 Cal. Rptr. 129 (1962).

this I shall be the shorter, since at your own Request, Counsel have been already assigned you, with whom you must be presumed to have advised

When the Managers for the Common shall have gone through their Evidence, and closed what they shall think fit to offer by way of Charge, then will be your Lordship's Time to make your Defence. In doing this, you and your Witness will be heard with the greatest Attention and Equity.

Before I conclude, I must beg the Indulgence of the House to add one Thing more. If your Lordship shall desire to have the Use of Pen, Ink and Paper to take Notes in order to your Defence, I presume it will be permitted; and if, in the Course of Your Tryal, you should happen to omit any Advantage which in Law and Justice ought to be allowed to you for your Defence, such is the Candour of my Lords your Judges, that I trust I shall meet with their Approbation in giving you notice of it.

That the Lord High Steward was zealous in the performance of his duty in giving to the accused notice of the omission of such advantages is evidenced from the following: Lord High Steward to Lord Lovat:

But is is necessary for me to inform your Lordship, that it is incumbent upon you to lay a Foundation of Fact, to show, that the Person produce as a Witness is a Tenant or Tacksman under your Lordship within the Description of this Act of Parliament: And Your Lordship may either show this fact, by calling Witnessess of your own, for that Purpose; or by putting the Question to the Persons now produced by the Managers.⁵⁷

A trial judge should never allow the rights of a party to be prejudiced merely to subserve the constant importuning to "speed up work." When the parties have finally arrived at trial, they are entitled to, and it is the trial judge's duty to give to them and to their cause, the calm and deliberate hearing, consideration, and study that the ideal of justice demands.⁵⁸ The desire for speed, and the pressures from the Master Calendar Department cannot justify denying to any litigant a fair opportunity to fully present the evidence upon which his claims or defenses rest. Nor can it justify the failure to search for, and to give mature consideration to, the applicable law.⁵⁹ Each cause is entitled to, demands, and must be given consideration as the most important of matters "to the end that justice may be done between the parties."⁶⁰ The duty is not

⁵⁷ 18 S.T. —. [Eighteenth century spelling has been modernized for ease of reading. Ed.]

⁵⁸ See *Theatrical Enterprises, Inc. v. Ferron*, 119 Cal. App. 671, 676, 7 P.2d 351, 354 (1932).

⁵⁹ See *Blankman v. Parson*, 73 Cal. App. 218, 223, 238 Pac. 728, 730 (1925).

⁶⁰ See *Webber v. Webber*, 33 Cal. 2d 153, 199 P.2d 934 (1948).

lessened when a party does not appear and defaults. He is entitled within the limitations of a default proceeding to the same justice which he would receive if he were present and represented by learned counsel. The appearing party must be required to prove his case by the same preponderance of evidence and by the same applicable law as when trying and deciding a contested case. The trial of a cause in which a party has defaulted is still an inquiry and examination of the facts and law in issue to determine where justice lies. The entry of a party's default should not be construed to deny or deprive him of his legal rights under law, whether of liberty or of property.⁶¹

CONCLUSION

Justice must exist in procedural due process as in substantive due process. Procedural due process is not merely for the parties but, additionally, for the court itself. Only thereby can it maintain its conscience and dignity. Only thereby can it appeal to, and justify the trust and confidence of the people.

The cost of litigation is constantly rising; it is approaching a prohibitive point. Trial courts and trial judges are partially to blame. If, by a trial judge's failure to exercise his discretion, a party becomes financially unable to appeal, is he not partially to blame? If a cause can be handled so as to enable a party to test the court's jurisdiction or an important question of law by a writ, should not the trial judge do so? If the power under Code of Civil Procedure section 631-8 is not exercised, does it not cause the parties and the court additional and unnecessary expense?⁶²

Counsel are and should always be partisan advocates, but they do not make the facts; they receive and try a case as it is. Therefore, of necessity, their position at times is extreme; somewhere in between is generally the truth of the facts and the applicable law.

It is too much to be expected that a trial lawyer, a partisan advocate, will usually admit, out of sense of duty to the ideal of justice, facts or law which would destroy his client's cause of ac-

⁶¹ See *Tregambo v. The Comanche M. & M. Co.*, 57 Cal. 501, 505 (1881); *Plott v. York*, 33 Cal. App. 2d 460, 463, 91 P.2d 924, 926 (1939) (In an action against employee and employer upon theory of respondeat superior, employer defaulted and verdict in favor of the employee, held: Court properly refused to enter judgment against defaulting employer "for the reason that upon the whole record it appears that plaintiff has no right of action" and did not commit error in allowing counsel for defaulting defendant to present argument and briefs in opposition to motion for judgment).

⁶² See *Egan v. Crowther*, 74 Cal. App. 674, 678, 241 Pac. 900, 901 (1925).

tion or create a liability. To counsel trial is a contest, a battle of wits in and out of court, and to the strongest belong the spoils. It is a fact that, due to the nature of partisans and to the necessity for economic and professional success, which you may decry if you will, only in ideal theory is counsel truly concerned with absolute justice. To counsel justice exists only when he has won. That is one of the causes of, and necessities for, the trial judge's judicial imperative.

It must always be remembered that the cause is that of the parties, of the people, of the government, and of the judiciary to see that justice is done.⁶³ "A court represents the citizen's last stand—a place wherein his grievances may be heard and determined, and irrespective of the correctness of the determination, there should be no restriction on the completeness of the hearing, save only in so far as recognized and salutary rules prescribe."⁶⁴

A failure or omission to affirmatively render justice to litigants cannot be justified by claiming that no statutory means or methods exist. The court has inherent power within its jurisdiction to, if necessary, create and adopt any suitable process and mode of proceeding and all means necessary to carry the court's jurisdiction into effect to attain the objectives for which it exists.⁶⁵

It apparently cannot be repeated too often for the guidance of a part of the legal profession that a judge is not a mere umpire presiding over a contest of wits between professional opponents, but a judicial officer entrusted with the grave task of determining where justice lies under the law and the facts between the parties who have sought the protection of our courts.⁶⁶

"The continued existence of courts or of the social organization of which they are a part rests entirely on the confidence of the citizen. And when permitted procedure demonstrates a court to have become but a poorly functioning machine, arbitrarily controlled and operated, its usefulness is gone."⁶⁷ To maintain the confidence of the citizen, to insure procedural due process, and to achieve a just disposition of the cause of the parties, a trial judge's credo must include his affirmative duty to be an instrumentality of justice.

⁶³ *Commeford v. Baker*, 127 Cal. App. 2d 111, 116, 273 P.2d 321, 324-25 (1954).

⁶⁴ *Theatrical Enterprises, Inc. v. Ferron*, 119 Cal. App. 671, 676-77, 7 P.2d 351, 354 (1932).

⁶⁵ See *Citizens Util. Co. v. Superior Court*, 59 Cal. 2d 805, 812, 382 P.2d 356, 362 (1963); *Tidewater Associated Oil Co. v. Superior Court*, 43 Cal. 2d 815, 825, 279 P.2d 35, 41 (1955); *Weissman v. Lakewood Water & Power Co.*, 173 Cal. App. 2d 652, 657, 343 P.2d 776, 779 (1959).

⁶⁶ *Estate of Dupont*, 60 Cal. App. 2d 276, 290, 140 P.2d 866, 873 (1943). See also *Burns v. California Milk Transp. Inc.*, 89 Cal. App. 2d 70, 76, 200 P.2d 43, 47 (1948).

⁶⁷ *Theatrical Enterprises, Inc. v. Ferron*, 119 Cal. App. 671, 677, 7 P.2d 351, 354 (1932).