

THE COURT OF APPEAL IN ENGLAND

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OVER two centuries of separate legal development have created a wide gulf between the American method of handling appeals and that found in England. In England, oral arguments are unlimited in duration and are the principal form of appellate advocacy, written briefs being virtually unknown; in the United States, oral arguments are limited in duration and ordinarily of secondary importance to written briefs. In England, the appellate judges do most of their work in open court, sitting about five hours a day throughout an entire term, and operating without the help of law clerks or secretaries; in the United States, the judges do most of their work in chambers, and they rely heavily upon law clerks and secretaries. In England, decisions are ordinarily pronounced orally immediately upon the close of oral argument; in the United States, they are ordinarily reserved and handed down in written form. In England, relatively few decisions are published, so that there are relatively few precedents to be cited in future cases; in the United States, virtually all appellate decisions are published, and precedents are becoming so numerous as to be almost unmanageable.

These are some of the major differences between the two national patterns. They have been the subject recently of concentrated attention by jurists on both sides of the Atlantic. In July of 1961, a team of American judges and lawyers¹ went to London to study English appellate procedure and in January of 1962 a team of English judges and lawyers² came to the United States to

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Much of the information upon which this paper is based was furnished by Lord Evershed, recent Master of the Rolls, Lord Denning, present Master of the Rolls, and Lord Justice Diplock of the Court of Appeal. The writer is deeply indebted to all of these men, but, of course, they bear no responsibility for the opinions expressed herein. Thanks are also due to Mr. R. P. Colinvaux and Miss J. F. Lamb, Editor and Assistant Editor respectively of the *Law Reports*, and Mr. C. Lacey Fisher, Assistant Librarian of the Bar Library for their help in understanding the English doctrine of precedent, particularly as it is affected by law reporting.

1. The American team consisted of the following: William J. Brennan, Jr., Associate Justice of United States Supreme Court; Charles S. Desmond, Chief Judge of the New York Court of Appeals; J. Edward Lumbard, Chief Judge of the United States Court of Appeals, Second Circuit; Walter V. Schaefer, Chief Justice of the Illinois Supreme Court; Archibald Cox, Solicitor General of the United States; Stanley Mosk, Attorney General of California; and Delmar Karlen, Professor of Law, New York University, and Director (then Associate Director) of the Institute of Judicial Administration.

2. The English team consisted of: Lord Denning, Master of the Rolls (then a Lord of Appeal in Ordinary); Lord Justice Diplock of the Court of Appeal; Sir Seymour Karminski, Judge of the Probate Divorce and Admiralty Division of the High Court; Sir Jocelyn Simon, President of the Probate Divorce and Admiralty Division of the High

study American appellate procedure. The goal was to discover the strengths and weaknesses of both systems with the thought of making such improvements in local procedure as might be suggested by insights gained from the study.

This article grows out of the interchange³ just described. Some of the differences pertain to the people involved—judges, lawyers, and supporting personnel, some to the mechanics of hearing arguments and rendering decisions, some to the nature and form of the law being applied. The article deals with one of the courts intensively investigated by the American team and thus reveals, by implication at least, the wide divergence between the English and American approaches to appellate decision making. It also reveals some of the experimental changes now being made as a result of the study, and it may suggest the possibility of further innovations worthy of consideration.

General Description and Place in Judicial Hierarchy

For most civil cases, the Court of Appeal is both the first and the final appellate court for England and Wales.⁴ Above it is the House of Lords, but very few cases go that far; and below it are the Divisional Courts of the High Court, but their civil jurisdiction is relatively narrow. The Court of Appeal hears virtually no criminal cases,⁵ since such cases normally go to its counterpart, the Court of Criminal Appeal.

Cases reach the Court of Appeal either from the County Courts or from the civil side of the High Court. A brief description is required here.

The County Courts are manned by some 80 judges, and organized into circuits covering all of England and Wales.⁶ Their jurisdiction is exclusively civil, but quite broad, excluding in general only matrimonial cases, defamation cases, and cases involving a substantial amount of money (over £400 in law actions, £500 in equity matters).⁷ Most of the proceedings are to collect small claims and are uncontested.⁸ Of the relatively few that are contested, trial is almost always by the judge alone, the jury having virtually disappeared in the

Court (then Solicitor General of England); Sir George Coldstream, Permanent Secretary to the Lord Chancellor and Clerk of the Crown in Chancery; Sir Dingwall Bateson, Past President of the Law Society; Arthur Goodhart, Master of University College Oxford and Editor of the *Law Quarterly Review*; and Norman Marsh, Director of the British Institute of Comparative and International Law.

3. The interchange was sponsored jointly by the British Council and the Institute of Judicial Administration. Funds for the American share of the project were supplied to the Institute by the Walter E. Meyer Research Institute of Law, a philanthropic foundation managed by trustees drawn mainly from the law schools of Columbia, Harvard, New York, and Yale Universities.

4. Scotland and Northern Ireland have their own separate judicial systems, although appeals lie with the House of Lords. As for Commonwealth nations, their appeals, if heard by any English Court, go to the Privy Council.

5. The only exceptions are (1) rare cases which may come before the Court under the Fugitive Offenders Act, 1881, or (2) Contempt of Court cases.

6. JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* 23 (3rd Ed. 1960).

7. *Id.* at 25-26.

8. *Id.* at 27-29.

County Court.⁹ There are no shorthand reporters; records on appeal must be based upon the judge's longhand notes. As his judgment is usually given orally at the conclusion of the oral argument there are no judge's notes of this and it is usual for counsel to make their own longhand notes and, in the event of appeal, to agree on a draft which is submitted to the judge for his approval. On questions of law, appeal lies as of right to the Court of Appeal if the claim exceeds £20 or the remedy sought is an injunction. Otherwise leave must be granted by the County Court judge. On questions of fact, appeal lies as of right when the amount in controversy exceeds £200.¹⁰

The High Court handles all civil cases which are beyond the jurisdiction of the County Court, as well as some which are within that jurisdiction. If a case, which could have been brought in County Court, is brought in the High Court, it may be transferred or allowed to continue under the threat that the plaintiff's costs, which, if he is successful, will be only such as he would have recovered if his action had proceeded in County Court.

The High Court is divided into three divisions: the Queen's Bench Division, consisting of the Lord Chief Justice and 34 puisne judges and handling important criminal cases as well as contract, tort, and other "common law" cases; the Chancery Division, consisting of seven puisne judges,¹¹ and handling what formerly were known as equity matters; and the Probate, Divorce, and Admiralty Division, consisting of a President and 11 puisne judges and handling those matters indicated by its title.

The Chancery Division sits only in London. Although the judges of the Queen's Bench Division normally sit in London, they also hold court elsewhere "on assize," hearing important civil and criminal cases.¹² The manpower of the Probate, Divorce, and Admiralty Division, which sits both in London and a limited number of assize towns, is reinforced by commissioners, including county court judges, who hear divorce cases (defended as well as undefended) in London and in 42 "divorce towns" throughout the United Kingdom.¹³

As in the County Court, very few civil cases in the High Court are heard by jury.¹⁴ All cases are appealable as of right both as to law and fact to the Court of Appeal.¹⁵ The record on appeal consists in large part of a verbatim transcript of proceedings below taken by shorthand.¹⁶

Place and Time of Sitting

The Court of Appeal sits only in London. Because of the size of England and Wales, because transport to London is good, and because the legal pro-

9. *Id.* at 65.

10. *Id.* at 80.

11. The Lord Chancellor is also a member, but in practice he does not sit.

12. JACKSON, *op. cit. supra* note 6, at 34.

13. *Id.* at 50-57.

14. *Id.* at 65.

15. *Id.* at 79.

16. *Ibid.*

fession is heavily concentrated in that city, this does not seem to cause undue inconvenience.

The Court sits in four divisions of three judges each, with each division hearing appeals five days each week during term times. The personnel of the individual divisions is changed from time to time. Each division convenes daily at 10:30 in the morning and runs to 1 p.m. and then again at 2 in the afternoon, running until 4:15 p.m. Until very recently it was the practice of the court, if a case concluded at 11:30 in the morning or 3:30 in the afternoon, to proceed immediately to the hearing of another. Now the custom is developing in such circumstances for the court to rise, reserving its decision until the beginning of the next regularly scheduled session. This allows the judges time to confer and to draft the critical parts of the judgment. The new practice is possible because of the recent enlargement of the court from three divisions to four.

The hours for holding court have a significant influence on the way in which appeals are handled. They are well adapted to the English practice of concentrating upon one case at a time and ordinarily rendering a decision immediately upon the close of argument. They would be ill-adapted to the American practice of hearing several appeals at a time and customarily reserving decision. Little time in chambers is provided for the English judges to study papers or to write opinions. Hence, when a decision is reserved, the judges are usually forced to work on it evenings or weekends.

Personnel

In practice, the Court of Appeal is composed of the Master of the Rolls and 11 Lords Justices of Appeal, sitting in four divisions of three judges each. The Lord Chancellor has power to assign High Court judges to assist temporarily when circumstances require additional manpower, but in view of the recent enlargement of the Court (from nine judges sitting in three divisions to 12 judges sitting in four divisions), this should not be necessary except in case of absence for illness. The Lord Chancellor also has power to assign Lords Justices of Appeal to act as High Court judges in trials of first instance.

The administrative head of the Court is the Master of the Rolls who determines the composition of each division, and the cases which are sent to it. It is customary to send "common law" cases to a division composed of two judges who, while at the bar, practiced in that branch of the law and another whose training was in a different branch; to send "equity" cases to a division having a majority of judges trained in equity, and so forth.¹⁷ Fresh assignments of judges to divisions are made at the beginning of each term.

17. In the United States, little effort is made to utilize the specialized knowledge of particular appellate judges. Most appellate courts sit *en banc*, and the few which sit on panels of divisions determine their composition on a mechanical rotation basis, rather than with any view toward specialization. Furthermore, in a great many courts the assignment of opinions is also done on a rotational basis, so that a judge who has specialized in criminal law is

The Master of the Rolls presides in the division in which he sits and ordinarily delivers the first and "leading" opinion in each case heard by it. In each of the other divisions, the senior Lord Justice assigned to it presides. The presiding Lord Justice has discretion to invite other members of the division to deliver the leading opinions in particular cases and some of them often do so.

The judges hold office for life during good behaviour, but are subject by a recent law to retirement on pension at age 75.¹⁸ This age limit applies only to members of the Bench who were first appointed in 1960 or after. Politics seem to play no role in their selection today. To be appointed, a man must be a barrister of at least 15 years standing or a High Court judge.¹⁹ Most Lords Justices on the Court of Appeal have previously served as trial judges on the High Court. All of the present members have done so. They are appointed by the Crown on the recommendation of the Prime Minister who is, however, guided by the Lord Chancellor. Salaries (£8,000 for Lords Justices and £9,000 for the Master of the Rolls)²⁰ are sufficient to attract leading members of the bar.

Unlike their brothers who sit on the Court of Criminal Appeal, the Lords Justices of Appeal are engaged exclusively in appellate work. They do not try cases in the first instance save when exceptionally asked to do so by the Lord Chancellor. They never sit in judgment on the work of their immediate colleagues. The judges do not have law clerks, nor are they provided with any other form of research assistance.

Counsel who appear before the Court are trained advocates. As barristers, they are specialists in litigation, and often in the particular type of case they are arguing. They have gained experience first by "devilling" for older advocates in their chambers (drafting pleadings, preparing memoranda of law and the like) and then by handling cases on their own. They are not selected by uninformed lay clients, but by solicitors who are also trained lawyers and who make it an important part of their business to know which barristers are best able to handle particular cases. The decision to prosecute or defend an appeal is an intensely pragmatic process. The spectre of heavy costs being assessed against the unsuccessful party induces caution. A solicitor is not likely to retain a barrister who is incompetent for fear of losing not only the case, but also the client; and the barrister himself is not likely to undertake a hopeless case for fear of losing his reputation and with it his livelihood. This ensures a level of competency in advocacy which would be hard, if not impossible,

likely to write no more opinions in criminal cases than his brother judges who have specialized in contracts, torts, or property. However, in courts where the chief or senior judge assigns the writing of opinions, he may take account of the specialized interest and background of his colleagues.

18. JACKSON, *op. cit. supra* note 6, at 238.

19. Supreme Court of Judicature (Consolidation) Act, 15 & 16 Geo. 5, c. 49, § 9 (1925).

20. The Judges Remuneration Act, 2 & 3 Eliz. 2, c. 27 (1954).

to duplicate in a system where the legal profession is not separated into two branches and where costs are not a serious deterrent to frivolous litigation. The Court itself is a principal beneficiary, for it is spared having to hear cases which are hardly worth consideration, and it almost always receives genuine, rather than token, assistance from counsel.²¹

Volume of Work

In recent years, about 700 appeals a year have been filed in the Court of Appeal. About 100 to 300 are usually withdrawn before argument, leaving 400 to 600²² to be dealt with on the merits. These figures show a slight tendency to increase with the recent increases in the number of High Court judges of first instance. Since the Court now sits in four divisions, the case-load per division can be expected to average 100 to 150 cases per year. Each case takes, on the average, about a day and a quarter of the time of the division concerned. Most appeals come from the High Court—373 out of a total of 582 in 1959 and 482 out of a total of 718 in 1960. The bulk of the remainder come from the County Courts—187 in 1959 and 193 in 1960.

The volume of appeals is small in relation to the volume of trial litigation. Out of 21,577 trials in the County Courts in 1959 (1,325,798 cases were initiated), 187 appeals were taken, but 68 were withdrawn, leaving only 119 to be heard. This is about one-half of 1 per cent of the cases tried. The ratio of appeals to trials in the High Court is higher, but not as high as might be expected. The Queen's Bench Division produces far more appeals than any other division, but only about 7 per cent of the cases tried by it reach the Court of Appeal.

The relatively small number of appeals is probably explained in part by the expense involved, and particularly by the rule that the loser pays all costs incurred by the other side, including reasonable attorney's fees. In part it is probably because a high proportion of actions in the Queen's Bench Division are negligence actions for personal injuries which turn solely upon questions of fact and which, therefore, are unlikely to be successfully appealed.

21. In the United States, there is no such professional screening of litigating lawyers as takes place in England except in a few special situations, as where the house counsel of a corporation retains an outside firm of lawyers for a big case or where a general practitioner is both brave and modest enough to entrust his client to a specialist for a particular piece of litigation. These, however, are unusual situations. Ordinarily, it is a lay, uninformed client who determines which lawyer shall appear in which court.

Nor is there in the United States any equivalent screening of cases for "merit" except where legal aid or other outside financial help is needed. In either nation, it is difficult for a person who is indigent to prosecute a "test" or "hard" case because of costs and counsel fees. In either nation, it is easy for a wealthy person to prosecute such a case. As for persons of modest means, interested in such cases, they probably have a more difficult time in England than in the United States because of the specter of heavy costs.

22. The number of cases heard in 1961 (the first year of four Divisions) was 617 compared with 515 and 412 in 1960 and 1959 respectively.

Scope of Review

Nevertheless, the Court of Appeal reviews determinations of fact as well as determinations of law.²³ It is often said that the appeal is a "rehearing." This does not mean that evidence is taken anew, but merely that the scope of review is virtually as broad as the scope of the original trial. In reviewing cases tried without juries (as almost all civil cases in England are), the Court refuses to interfere with a trial determination which is based upon credibility. It accords full recognition to the superior position of the trial judge to decide such questions because of his opportunity to see and hear the witnesses. Where his decision turns not upon credibility but upon inference, however, the judges of the Court of Appeal feel less inhibited. Since the drawing of inferences depends upon general information, experience, and logic, it is felt proper that their collective judgment may be substituted for the judgment of the trial judge, although the Court will not revise trial court inferences of fact unless it feels that they are clearly erroneous.

Precedent

In dealing with questions of law, the Court follows a doctrine of precedent which seems rigid to American eyes. It considers itself bound not only by decisions of the House of Lords, but also by its own, refusing to overrule them even if convinced that they are outmoded or mistaken. On the other hand, it frequently distinguishes them, sometimes to the point of virtually confining them to their particular facts; and it has available to it various avenues of escape from unwanted precedents. One is the conception that a decision rendered "per incuriam," meaning in circumstances where the Court was unaware of a controlling line of authority, is not binding.²⁴ Another is the idea that the Court is free to choose not only between conflicting precedents, but also between divergent opinions in the same case. English decisions seldom take the form of opinions by the Court, with agreed (or at least majority approved) texts. Since each judge customarily delivers his own opinion, there may be three or five statements from which the Court at a later date may choose a *ratio decedendi* for the case at hand.

Even more significant than judicial techniques in handling precedent is the fact that the Court is dealing with a body of case law that is remarkably flexible and manageable. That is because there is so little of it. Not all decisions are published—far from it. Only about 25 per cent of those rendered by the Court of Appeal appear in the officially sanctioned (though not officially published) *Weekly Law Reports*. About 70 per cent of those rendered by the House of Lords and the Privy Council appear; and about 10 per cent of those rendered by the Court of Criminal Appeal. The main body of case law from all the courts of England, including not only those mentioned but other

23. JACKSON, *op. cit. supra* note 6, at 80.

24. For an explanation of this curious doctrine, see CROSS, *PRECEDENT IN ENGLISH LAW* (1961).

appellate and trial courts as well, grows at the rate of only three volumes a year. This is the standard output of both the *Weekly Law Reports* and the competitive *All England Reports* (which contain in general the same cases).

Even so, about a third of the decisions so published are widely considered to be of only temporary interest, for the *Law Reports* proper, which are more carefully edited and supplemented by rather full resumes of the arguments of counsel, do not reproduce them. Some law offices throw away their advance sheets of the *Weekly Law Reports* as soon as the advance sheets of the regular monthly *Law Reports* appear.

The volume of English case law presents a striking contrast to that found in the United States, where the Supreme Court alone produces annually three volumes of roughly equivalent size to those yielded by all the English courts combined. The state courts of New York, serving a population approximately one third of England and Wales, produce about a dozen such volumes each year. These do not include the several additional volumes yielded annually by the lower federal courts sitting in the state.

The cases published in England are chosen not by the judges but by barristers who "report" them. The basis upon which they exercise their discretion is precedent value. If a decision announces a principle of law, they deem it worthy of publication; but if it merely applies a well settled principle to a particular state of facts, they do not. The distinction is easy to state, but hard to apply in view of the recurring but divergent fact patterns which constantly arise. Nevertheless it is applied—by trained barrister-reporters, acting under experienced editorial leadership, and in the light of long established traditions. It is heartily supported by most lawyers and judges, not a few of whom would like to see the number of published decisions reduced even further. They like to see the law remain simple and compact, consisting of a relatively small number of broadly stated principles rather than a wilderness of single instances. They also like the saving of cost, not only in terms of the money spent on law books, but also and more importantly in terms of the time of lawyers and judges in preparing and deciding cases.

Nevertheless, there are counter forces working in the direction of fuller reporting. Rules of law almost inevitably evolve from recurring fact patterns. If facts A, B, and C yield a certain legal consequence as to Mr. Smith—if, for example, they are held to constitute "negligence" in a personal injury case or "extreme cruelty" in a divorce case, or if they are held to justify a certain quantum of damages or a certain type and degree of criminal punishment—it is not unreasonable to expect that they will bring about the same result with respect to Mr. Jones. Otherwise, equality before the law would tend to disappear.

This is probably why specialised reports, supplementing the regular reports already discussed, flourish in England. One series deals with patent cases, another with local government cases, another with traffic cases, several with tax cases, and so on. Each series carries not only the cases in the regular reports within its field of interest but also some (though still by no means all)

additional cases within that field. Such reports are partly the result of and partly the cause of specialisation within the legal profession. As already indicated, a barrister is typically not only a specialist in litigation, but also a specialist in a certain type of litigation. If he handles commercial cases, he ordinarily has nothing to do with matrimonial cases or will contests. Hence his office (for he is usually in chambers with several other barristers specialising in the same field) subscribes only to the specialised reports which deal with his specialty. He is thus able to keep abreast of decisions on diverse but recurring fact patterns which fall within the broad sweep of the general principles appearing in the cases published in the standard law reports. And since he argues to judges who are also specialists, there is little likelihood that the Court will be unaware of how earlier cases based upon fact patterns similar to the one at hand were decided. Such cases may never be cited by counsel in argument, or by the judges in their opinions, but the memory of them is important and influences decision. In this sense, the common law of England is far more truly "unwritten" than is the common law of the United States.

The consequence is that English judges enjoy a broad discretion in molding the law to fit changing circumstances—broader perhaps than that of judges in the United States with their power to overrule earlier decisions. In England, with less voluminous reports, there are fewer precedents to cause trouble or to restrict judicial freedom of action.²⁵

Another factor affecting the English doctrine of precedent is the machinery for securing legislative corrections of the law. In 1934, the Lord Chancellor established a standing committee composed of judges, barristers, solicitors, and professors, to study and report on needed changes in the law. Known as the Law Revision Committee, it functioned until the outbreak of World War II in 1939. In 1952, it was reconstituted as the Law Reform Committee and it has been supplemented from time to time by *ad hoc* committees specially appointed by the Government to deal with particular problems. Considering suggestions emanating from any source within the legal profession (though formally referred to it by the Lord Chancellor), operating through specially appointed subcommittees of experts, and having access to the well springs of legislative power through a secretariat in the Lord Chancellor's Office,²⁶ this Committee has been responsible for fundamental changes in the law. Representative of its accomplishments is the abolition of the doctrine of contributory negligence in favor of comparative negligence and the substantial elimination of the statute of frauds²⁷—accomplishments which American courts, despite their

25. In the United States, the problems caused by the great bulk of case law are far more difficult than in England. They are well described in Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961). Even in England, however, the problem is recognized as a serious one. Some thoughtful judges and lawyers would like to see a substantial reduction in the already small number of opinions published.

26. The old Law Revision Committee did not have this advantage.

27. For this development in England see 70 L. Q. REV. 441 (1954); 68 HARV. L. REV. 383 (1954) and 40 CORNELL L. Q. 581 (1955).

relaxed attitude toward precedent, could hardly have been expected to undertake. Certainly on major problems, the Law Reform Committee has functioned well.²⁸ But it has not concerned itself with minor problems—possibly because they are not the special responsibility of any individual group or agency. On such problems, corrective action seems to be taken more easily by the American practice of judges' overruling decisions than by the English practice of waiting for legislation.

Statutory Interpretation

The existence of the Law Reform Committee also helps to explain the English approach to statutory interpretation. It tends to be more literal than the American approach, stressing the language of a statute more than its purpose. In particular, the Court of Appeal, in common with other English courts, refuses to consult committee reports or parliamentary debates as aids to ascertaining legislative intention.

The judges are likely already to know something about the background of any statute they are called upon to construe. Perhaps their knowledge comes from random conversations in the Inns of Court where they lunch almost daily with practising barristers, some of them members of Parliament. Perhaps one of the judges may have participated, as a member of the Law Reform Committee or otherwise, in the deliberations which led to its enactment. In any event, few, if any, of the judges seem to feel a need for extrinsic aids of the type used in the United States.

Furthermore, the judges assume that if they make a mistake in ascertaining legislative intent, means are at hand to correct it. Just as the Law Reform Committee and similar governmental bodies outside of the courts can propose legislation to deal with defects in judge-made law, so also they can propose amendments to existing statutes. The unitary nature of the British Government, wherein the Lord Chancellor serves not only as the highest judge of the nation, but also as a powerful legislator and a key member of the Cabinet, lends a weight to recommendations of committees appointed by him which would not be accorded to similar recommendations of bodies similarly constituted in the United States. Nevertheless, it is an open question whether legislative changes, especially on seemingly minor points which are of interest only to a few individuals affected by them, come quickly or easily enough. Responsible opinion in England seems to think that the answer lies in a less literal approach to statutory language, in allowing the judges freedom to reason by analogy from statutory principles, and in less detailed legislative

28. Judge Cardozo, in *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921), suggested the need of similar machinery for the United States to channel the recommendations of judges to legislative bodies. His idea has been realized, to a considerable extent, in New York's Law Revision Commission. N. Y. Legislative Law, art. 4-A, also REPORT OF THE LAW REVISION COMMISSION, LEG. DOC. (1935). In the limited field of procedure, his idea is also being carried out by the judicial councils found in many states. See ABA HANDBOOK, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 21 (4th ed. 1961).

draftsmanship.²⁹ It does not, however, envisage the use of committee reports or legislative debates.

Mechanics of Appeal Before the Hearing

An appeal is initiated by serving on the respondent a notice of appeal within six weeks after entry of the formal judgment in the trial court. This document specifies the grounds of appeal and the precise relief sought.³⁰ Since "briefs" (in the American sense) are not used in England, a delimitation of the area of argument can be accomplished only by some writing filed at an early stage of the appeal. The notice of appeal permits the record to be abbreviated in such a way as to eliminate matter which is irrelevant to the questions to be considered. The document is an important one, binding upon counsel unless the court allows the assignment of errors to be amended.³¹ For this reason, it is usually prepared with the advice of the barrister who handled the trial if he is going to argue the appeal. If not, it is normally prepared by the solicitor for the appellant. Because of its limiting effect, it tends to be couched in broad terms which fail to concentrate attention in advance upon the precise points to be argued.

Within seven days of the service of the document on the respondent, it must be filed in duplicate along with a copy of the judgment, and the respondent must be notified of the filing within two days.³² If the respondent desires to support the judgment upon some ground other than was relied upon by the judge below, or if he desires to have the judgment varied on appeal, he must serve and file a notice to that effect within 21 days.³³

The next step is for the appellant to file what in the United States would be called a "record on appeal," consisting of the formal papers in the case (notice of appeal, judgment, pleadings, and list of exhibits), plus excerpts from the stenographic transcript of the proceedings below.³⁴ These include the opinion of the trial judge and whatever testimony and exhibits are relevant to the questions raised on appeal.³⁵ If unnecessary material is reproduced, the appellant receives no reimbursement for the cost thereof even if he succeeds upon the appeal. This is regarded as a serious sanction in England, and is enforced by taxing masters.³⁶

Seldom is there any dispute between English lawyers as to what ought to be included in the record on appeal. If the respondent (appellee) desires to add to the record and cannot obtain the agreement of the appellant, he is en-

29. Evershed, *The Judicial Process in Twentieth Century England*, 61 *COLUM. L. REV.* 761 (1961).

30. *Sup. Ct. (App.) R. 3, § 2.*

31. *Sup. Ct. (App.) R.3, § 3.*

32. *Sup. Ct. (App.) R. 5.*

33. *Sup. Ct. (App.) R. 6.*

34. *Sup. Ct. (App.) R.5.*

35. *Sup. Ct. (App.) R.11.*

36. *Sup. Ct. (App.) R. 7.*

titled to do so at the risk of paying the costs thereof even if he is successful on the appeal, if the court considers the additional matter unnecessary.

The record on appeal is mimeographed, not printed.³⁷ Only three copies are required, one for each of the judges who will be sitting. No rigid time is fixed for filing the record on appeal. It is supposed to be done at least one week before the case appears on the Daily Cause List. This time can be ascertained by inquiring in the Clerk's office and by following the published Daily Cause List. When filed, the papers go to the clerk of the Lord Justice who will preside in the division to which the case has been assigned—a matter which also can be ascertained in advance. The time lapse between the filing of the notice of appeal and the argument averages about six months. This represents a sharp improvement over the situation which prevailed until the recent increase in the size of the Court. When there were only three divisions, the average time lapse was about a year. No other papers are filed beyond those mentioned. In particular, there are no briefs.

Oral Argument

Judges of the Court of Appeal hear cases one at a time and ordinarily without advance preparation. They sit in open court day after day throughout an entire term hearing arguments and deciding cases. Except between terms and except when the court occasionally rises early, there are no periods of recess in which they may study the appeal papers or prepare the decisions.

Because the English method of arriving at judicial conclusions is based upon the use of oral argument there are no briefs for them to read, and the judges ordinarily learn all they are to know about a case from the oral arguments of counsel. They have the record on appeal before them shortly before the oral hearing and those who so desire can read it. They may also read the reasoned opinion of the court below which summarises the facts and discusses the questions of law, citing all the authorities which the trial judge regarded as relevant. If they do not take this course (and many prefer not to do so), and see the record for the first time at the actual hearing, they must, in order to use it for any purpose other than note-taking, master the art of reading and listening at the same time.

Counsel do not content themselves with telling the judges briefly and in narrative form what the case is about and what questions are raised upon appeal. They read extensively from the testimony, the documents, and the judgment below, interpolating comments as they go. This occurs whether or not there is any dispute as to what happened in the court below. The reading takes approximately half of the entire time devoted to an appeal.

Besides reading the judgment and the evidence below, counsel also read aloud from the legal authorities, statutory or otherwise, to which they wish to

37. In the United States, there is a growing trend away from the requirement of printing records on appeal and briefs in favor of cheaper methods of reproduction, including mimeographing. See Willcox, Karlen & Roemer, *Justice Lost—By What Appellate Papers Cost*, 33 N.Y.U.L. REV. 934 (1958).

call the Court's attention. When this is done, the judges are furnished with copies of the books involved so that they may follow with their eyes what they are hearing from the lips of counsel. An advantage of dealing with legal authorities in this way is that counsel cite relatively few of them. Sometimes counsel do not cite even a single case. When the governing legal principles are well settled, it may be safely assumed that the judges know and will apply them.

Reading often tends to be either too fast or too slow. It is likely to be too fast when the complicated language of a statute or lease is involved. It is likely to be too slow when testimony is involved. There is, moreover, a danger of distortion in reading testimony aloud, because, through emphasis and pace, the words of a witness uttered conversationally may be analysed and dissected as though they were the product of deliberate draftsmanship.

Questioning by the judges tends to be fairly extensive. They feel no inhibition in discussing with counsel who is addressing them the case before them and the authorities claimed to govern its decision; or in revealing the trend of their thoughts as the case progresses. They rely upon this kind of Socratic process in open court to clarify the issues of fact and law. Questions or comments addressed to counsel may well be directed to persuading their fellow judges, thus fulfilling to a degree the purpose of post-hearing conferences between the judges in American practice. They thus become involved immediately, consciously, and deliberately in attempting to reach a decision while the oral argument is in process. In truth, an appeal sometimes has the appearance of a committee meeting with five members present, only three of whom have a vote.

Sometimes after argument has been in progress for a while the presiding judge tells counsel for the appellant that the court "need not trouble" him further. This is an indication that the judges have reached a tentative conclusion in his favor either on the whole case or on specified points. They are ready, in other words, to hear the other side. The burden of going forward with the argument is thus shifted to counsel for the respondent. It is up to him to persuade the judges that their tentative conclusion is wrong.

In much the same way, the argument of counsel for the respondent may be curtailed. The Court may announce that it wishes to hear argument only on a certain point, thus indicating that the judges have decided against the appellant on all other points. Or it may dispense with argument from the respondent entirely. If, after hearing counsel for the appellant, the judges have reached the conclusion that the decision should be affirmed, they see no point in spending time hearing the respondent. The presiding judge merely announces that the court wishes to hear no further argument and then proceeds to deliver his opinion.

Except for such informal, *ad hoc* controls as have just been described, the time for argument is unlimited. The average case takes about a day and a quarter to hear, but some cases run into weeks; others take only an hour or so.

An Experiment to Curtail Reading

Shortly after the Anglo-American interchange described at the beginning of this article, the Court of Appeal conducted an experiment aimed at cutting down the amount of time consumed in open court reading. Lord Evershed, then Master of the Rolls, announced it in open court on March 22, 1962. His remarks were reported in *The Times* of the next day as follows:

The Master of the Rolls, presiding in the Court of Appeal, announced that, in view of comments by United States jurists on our appellate system, immediate steps would be taken by way only of experiment with the aim of reducing the time taken in the hearing of appeals by the Court. In particular documents would be read by members of the Court before the hearing of an appeal.

Referring to the visit last July of a distinguished party of American lawyers led by Mr. Justice Brennan, his Lordship said that its object was to examine and compare the work in our two countries of appellate courts, civil and criminal. A return visit was paid to the United States in January of this year by a similar English team (of which Lord Evershed had been the leader).

Time of Reading

"Following these visits," continued his Lordship, "the members of each team have recorded their comments upon the appellate system in the country of the other team. The comments of the American team about our own system have been both generous and gratifying; but all the American visitors, without exception, have drawn attention to the length of time so frequently taken in this Court by the reading of documents, including the judgment under appeal and the cases therein cited; and it has been pointed out (with truth) that the result must often be substantially to increase the costs which, under our system, one or other of the parties or (in appropriate cases) in whole or part the Legal Aid Fund will have to pay.

"The point is indeed the same point that was taken in the Final Report of the Committee on Supreme Court Practice and Procedure which therefore recommended (a) that an appellant should in his notice of appeal be bound to state the grounds of his appeal and (b) that the appeal judges should, before hearing a case, have read the notice of appeal and the judgment appealed from—or the relevant part of it.

Homework for Judges

"It has not been suggested by any member of the English team that we should in this country adopt the American system of 'written briefs' and the limitation of time spent on oral arguments. On the other hand, the unanimity of the American comments, which added to the recommendations of the Committee on Supreme Court Practice, have persuaded my colleagues and myself in this Court that it would be worth while making an experiment aimed at a real reduction in the time taken, through mere recitation, in this Court and therefore at a real reduction in costs; but without at all fettering the right of counsel to full oral argument of their cases. For the purposes of such experiment each member of the Court will have read (1) the pleadings or the originating summons (or their equiva-

lent) (2) the order under appeal (3) the notice of appeal and respondent's notice (if any) and (4) the judgment of the learned judge, together with any cases cited by him in his judgment. It is proposed to introduce the experiment in this Court with the Appeals Tribunal List next week and so in each such appeal we shall all have read beforehand the case stated, the order made by the Tribunal, the notice of appeal and the decision, together with any cases cited in the decision.

"In order that the judges shall have time and opportunity to read what is mentioned above, the Court may on occasion sit at a somewhat later hour; but due notice will be given of this."

What was suggested, his Lordship emphasized, was by way of experiment; the results would depend on the event. It was only by trying that you could learn. He was sure that all would agree that the experiment should be tried, and hoped that counsel and solicitors concerned would cooperate with the Court in the attempt. The proposal was made with the full support of the Lord Chancellor, and representatives of the Bar and the Law Society had been consulted.

At the beginning of the Easter Term (about May 1st), the experiment was extended to all four divisions of the Court of Appeal. Then, at the end of the Term, all of its judges met to appraise the results. They concluded that advance reading of the papers on appeal and precedents worked well in some cases, not well in others; and that the practice should henceforth be reserved for "long, heavy" appeals.

Such is the practice today, and it is no longer regarded as experimental. The Presiding Judge of each division of the Court, assisted by his clerk, scans the papers in each case a few days before it is due to be reached for argument. If he finds that the appeal is likely to be short and simple (the great majority of appeals are of this type), he lets the case take its normal course described earlier. If, on the other hand, he concludes that the appeal is likely to be long and complex, so as to warrant reading the papers beforehand, he notifies his brother judges to that effect. Then they have three or four days before the hearing in which to do their "homework." At the same time, counsel who are to appear in the case are notified, so that they may prepare their presentations in light of the fact that the judges will have already read the papers.

Sometimes in the middle of an appeal, the judges decide that it would be well to read some of the papers overnight and they proceed to do so. Thus, in a recent appeal involving about a hundred pages of correspondence, the Presiding Judge announced to counsel on both sides that the judges would read the correspondence by the time the court convened the next morning at 10:30 a.m. That procedure was followed, and a considerable amount of time saved. This happens fairly often.

The Decision

Customarily, though not invariably, the Court renders its decision immediately upon the close of argument. Each judge speaks, no one of them with any greater authority than either of his colleagues. The senior judge (who is

presiding) delivers his opinion first, extemporaneously. It is sometimes described as the "leading" opinion. Then the other two judges state, also extemporaneously but somewhat more briefly, their opinions. Often the second and third judges, especially the latter, will say little more than that they concur with the views already expressed. Sometimes one of them develops an alternative ground of decision or registers a dissent. Dissents are relatively rare, occurring in a small percentage of cases; but so also are single opinions for the Court as a whole. All opinions are recorded in shorthand and later transcribed.

In the ordinary case, there has been little opportunity for collective deliberation between the judges. They always have a whispered conversation, seldom lasting more than a minute or two, on the bench, or a brief talk in the corridor while walking to or from the courtrooms, but they are not likely to attempt anything further in the way of a conference. And since opinions are not written, but delivered extemporaneously, there is only limited opportunity for an advance interchange of suggestions and comments.

Nor are the judges individually able to carry on any profound independent study of a case or to spend much time in meditating, deliberating, and reflecting after hearing the oral argument. That is because ordinarily no interval elapses between the conclusion of argument and the rendition of the decision.

What has just been described above is the ordinary case where the judgment is delivered immediately upon the close of oral argument. It is becoming increasingly common, however, for judges to postpone decision overnight or over a weekend. When this happens, the situation is somewhat altered. There is still little time for study, reflection or discussion, or for writing out opinions at length; but there is some. The major part of any opinion still probably has to be delivered extemporaneously when the Court convenes, but the interval is generally taken and used for reducing to writing the crucial part of the opinion.

Less frequently, decision may be reserved for as long as a week or a month. This provides an opportunity for study, reflection, and discussion if the judges can find time during evenings and weekends. They cannot find it during the regular working days, for those must be devoted to hearing and deciding other appeals save in the rare cases where they take a day or half a day's recess for this purpose. For this and other reasons, the judges are reluctant to reserve decision. They prefer to deal with one case at a time and to dispose of it finally before turning to another.³⁸

Once the decision is announced, nothing remains to be done except to pass upon a possible motion by the disappointed litigant for leave to appeal to the

38. The English practice of deciding many appeals from the bench was a feature of special interest to members of the American team on the Anglo-American interchange described at the beginning of this article. The technique seemed to be well suited to disposing quickly of routine cases presenting no serious problems. Such cases are common in appellate courts to which appeals lie as a matter of right.

After the interchange, the number of summary dispositions in the United States Court of Appeals for the Second Circuit rose sharply. Chief Judge Lumbard of that court had been a member of the American team. In previous years only about 5 cases per year in that Court have been decided from the bench. In 1961-2 the number was eighteen.

House of Lords. Such a motion is made orally and immediately, and is decided summarily. If denied, the moving party can apply for leave to the House of Lords itself. Rearguments in the Court of Appeal are unknown.

Law Reporting and Publishing

The opinions are taken down verbatim by shorthand writers. When transcribed, they are submitted to the judges who rendered them for possible revision. Some judges take advantage of the opportunity to do a careful editing job, particularly if they think that the case is one which is likely to be published in the *Law Reports*. Others do not, preferring to rely on the law reporters for whatever editing is needed.

One copy of each set of opinions is then filed in the Bar Library in the Royal Courts of Justice, a library open, except upon special permission, only to judges, barristers, and their clerks. They are indexed according to name, date, the court from which the appeal came, the judges who participated, and subject matter.

Whether ultimately published or not, these opinions can be and, to a limited extent, are cited as precedents, particularly if they deal with such questions as the quantum of damages in personal injury cases or if they are so recent as not to have had a chance to find their way into the published reports. Several factors, however, militate against any very extensive use of them. First, they are not readily accessible. Only one copy is available in the whole of England. Ordinarily, the only cases the librarians are asked for are those whose existence is already known to the researcher—perhaps not by name or exact date but by some type of lead. Except by writers of text books (some of whom cite these opinions extensively) they are not systematically studied. Second and more important, the judges tend to discourage the citation of unpublished opinions. Imbued with the philosophy of law reporting described above, they regard relatively few decisions as having precedent value, and are inclined to pay little attention to factual comparisons between the case at bar and earlier cases. They are disposed to accept the judgment of those who edit the *Law Reports* that the only cases worth citing are those which appear in the published volumes.

Nevertheless, the unpublished decisions are lying around like unexploded land mines, ready to do damage. For the lawyer industrious enough to search them out or to keep track of those he encounters, they may prove to be highly useful. Their existence may also help to explain the doctrine mentioned earlier whereby the Court of Appeal may avoid following a precedent on the ground that it was rendered "per incuriam"—that is, in ignorance of some controlling prior decision.

About one fourth of the decisions of the Court are published in the *Weekly Law Reports*. This series, which has been described above in general terms, is the basic repository for modern English cases, forming the basis for the so called "permanent" *Law Reports* proper. While it is supplemented by various specialised reports as well as by a competitive series of general reports (the

All England series), the way in which it is prepared will give a fair indication of how law reports generally come into existence.

The *Weekly Law Reports* are published by the Incorporated Council of Law Reporting for England and Wales, a quasi-official, non-profit organisation composed of a judge as chairman, the Attorney General, the Solicitor General, and representatives of the four Inns of Court, the Law Society (the central organisation for solicitors) and the General Council of the Bar (the central organisation for barristers). Members of the Council meet three or four times a year and concern themselves primarily with the business aspects of the enterprise—how much staff members should be paid, where funds of the Council should be invested and the like. They undoubtedly possess power to determine editorial policy as to what cases or kinds of cases should be published and in what manner, but in practice they leave the choice of individual cases to the staff.

The staff consists of an editor, an assistant editor, about twenty-five full time reporters and about ten part-time reports. All are barristers, some women and some men. They occupy a vital role in determining the shape of English Law. Their job is to cover all the courts of record of England and to report whatever decisions are worthy of preservation. The criteria they use have already been described.

The principal appellate courts of the nation, namely the House of Lords, the Privy Council, the Court of Appeal, and the Court of Criminal Appeal are covered systematically, with a reporter in virtually full time attendance at every sitting. Other courts, trial or appellate, are covered only to the extent that the editors and reporters anticipate interesting or important happenings. Since the reporters contribute to *The Times* (newspaper reporting of legal subjects in England is remarkably full and accurate) and to specialist journals of the type already described as well as to the *Weekly Law Reports*, and since they are constantly on the alert to learn about significant cases from their acquaintances among the judges, barristers, and solicitors, they are not likely to miss many cases of real importance. Nevertheless, because of the impossibility of covering all courts at all times with a staff so limited, the only trial court decisions likely to be reported are those rare ones in which the judge recognises the matter to be of such importance that he takes the trouble to write out his opinion in full instead of delivering it orally, as is the usual custom.

The decision to report a case lies in the first instance with the reporter responsible for the court in which it was decided. If he is inexperienced or if for any other reason he fails to appreciate the significance of a case, there is a possibility that it will be lost forever as a precedent. It can be cited if a transcript of the judgment can be found in the Bar Library (though only decisions of the Court of Appeal and the House of Lords are available there) or if it is reported by any barrister; but as a practical matter it has to be found first. Any oversights by the reporters, however, are likely to be corrected by the editors, who frequently have their attention called by judges,

barristers, and solicitors to cases which ought to be reported. Apart from acting upon such suggestions, the main function of the editors with respect to determining the cases to be published is to exercise veto power as to cases which they feel do not belong in the *Reports*. Despite their care and despite the strong sense of responsibility exercised by the reporters, mistakes occasionally happen and have to be rectified (as when frequent calls by the bench and bar for an unreported decision lead to its publication in the *Reports* a year or two later). Nevertheless, in general the system works well in carrying out the English ideal of reporting all cases which announce principles of law, but only those—omitting ones which simply turn upon their own particular facts. This is attested by the fact that the Council of Law Reporting, representing the entire legal profession, has never, since its establishment in 1865, found it necessary to interfere with the details of editorial policy. Whatever dangers may exist in the present system are thought by the English legal profession generally to be less than those which would inhere in a system of reporting all cases, including many which only applied well settled principles to specific fact patterns. Under such a system, with its multiplication of volumes of printed material, it is feared that vital cases might be overlooked in the masses of unimportant cases reported.

Once a decision has been made to report a given case, heavy work for the reporter lies ahead. His task is not merely to collect and transmit to the printer a document which is ready for publication but to do an editorial job of great delicacy and importance. The first thing he does is to order from the shorthand writer a transcript of the decision after it has been seen (and perhaps revised) by the judges. Then he sets to work. He verifies all names, dates, and places mentioned; he checks all citations to statutes, cases, and other authorities; he restates the facts clearly and concisely; and he rewords the judges' opinions in such a way as to preserve their meaning but improve their form eliminating redundancy and polishing grammar. His object is clarification without alteration of substance. If the case is one destined to be published in the *Law Reports* proper (as distinguished from the *Weekly Law Reports*), the reporter also prepares a summary of the arguments of counsel on both sides, with an indication of any significant comments and questions interposed by the judges. In doing all of this work, the reporter is aided not only by whatever notes he has made while listening to the case, but also by a borrowed copy of the record and by access to the notes, papers, and recollections of counsel. Most barristers are happy to cooperate, realising, as they do, that this is one of the few avenues by which their names and work may become known. Finally, the reporter prepares appropriate head notes.

After a report has been put into such form that the reporter and editors believe it is ready for publication, it is printed in galley form, and submitted for final correction to the judges and barristers involved. Sometimes there are pencilled queries and suggestions in the margin. After these have been answered and the report approved (usually without further corrections), it is published.

The net result of the editorial process just described is that published reports sometimes bear little resemblance to the judgments, delivered orally and extemporaneously, upon which they are based. What sounds in court like a long rambling discourse, with incomplete sentences and doubtful syntax, may turn out in print to be a polished composition, just as if the judge himself had taken the time and trouble to write it out in full.

With written judgments such as are customarily rendered by the House of Lords and Privy Council and occasionally by the Court of Appeal, the reporters take fewer liberties. They do not alter language except to correct obvious errors in names, places, citations, etc. They do, however, excise portions of the opinions which they consider unilluminating, indicating the omissions by brackets. The theory is that omissions are not alterations. They also tend to deal rather freely with the facts, choosing the one statement—out of perhaps three or five in the separate opinions—which seems most apt, and sometimes even redrafting that one. Then they indicate what they have done by saying “the following statement of facts is based on the judgment of Mudd, L.J.,” or words to that effect.

The law reporter in England performs many of the same functions as are performed by the law clerk in the United States. He does not participate in the process of formulating a decision in the first instance (but then neither do some American law clerks, depending on the judges for whom they work), but he renders the same kinds of service after that point has been reached. His responsibility, however, is not so clearly fixed, for he is not directly answerable to any judge or group of judges. While in one sense his influence is less than that of the typical law clerk, in another sense his power is greater. Having a considerable measure of control over what cases are to be published and in what form, he determines to a very large extent the content of the English case law for the future.