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AN AMERICAN LAWYER IN THE QUEEN'S COURTS: IMPRESSIONS OF ENGLISH CIVIL PROCEDURE

*Benjamin Kaplan**

I shall try to interest you in something simple and straightforward—an exposition of the course of an action in an English court of first instance, with some remarks along the way in a mildly comparative sense. If I qualify as your guide—which English lawyers might think doubtful—it is because, during a sojourn in London some time ago, I spent many days in and about that hideous yet affecting Victorian courthouse on the Strand, trying in a regrettably random way to sniff out how the English procedure conducted itself.

When I got back to Cambridge, Massachusetts, an elderly lawyer—a solemnly quizzical man who has somewhat the manner and vaguely sacerdotal authority of the Confidential Clerk in T.S. Eliot's play of that name—asked me at a law school party whether it was not true, as he had heard, that English courts were better at trying cases than American courts. I must say that I found the old gentleman's flat question curiously disconcerting. I had been thinking of technical details, not the whole picture. I began to riffle quickly through my accumulated English learning. As a man falling down an elevator shaft is said to see his whole past life in flashbacks, so to my inner eye the English procedure unrolled. But my interlocutor had already wandered off, no doubt to tweak the consciences of other guests. In the end I shall victimize you with the poor answer I might have given him; but now to my exposition.

I. A TOUR OF THE SYSTEM

While the words "English Civil Procedure" in the title of this lecture might suggest that there is a single English system, there are in fact a number of them. In the High Court itself, the court of general jurisdiction, a suit in Chancery Division proceeds differently from an action in Queen's Bench Division: the English have made less of a fetish of the "one form of action" than we have. Procedure in the County Courts, the courts for small-debt collection and miscellaneous claims, contrasts with those of the High Court. But Queen's Bench procedure for the staple cases of some consequence is the model of civil procedure in English minds. Similarly, our Federal

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Rules system, although it is but one of several systems alive in our country, has emerged as the prototype for us. I shall be dealing with these two models.

A. *Informal Search for Evidence*

I begin with the informal gathering of the raw facts of a case for prospective litigation (or for litigation already commenced). Recall that, unlike our legal profession, the English profession is divided. Investigative work is done by the solicitors—office lawyers who are retained by the clients. According to custom enforced as law within the profession, such work may not be done by barristers—the forensic lawyers who are retained by solicitors when actual litigation looms. I formed the impression that in the mine run of cases a solicitor will collect the facts in a more gingerly, more frugal way than his American brother would do. Perhaps I should rather say that he looks to the center of the picture, and does not worry himself about the periphery. Besides consulting his client and any expert he has retained, the solicitor takes statements from witnesses, and these are usually barebones. I surmise there is not much of an effort to interview witnesses naturally committed to the other side or known to be favorable to it; indeed, the propriety of this kind of private approach has sometimes been doubted.¹ If the fact-gathering effort is thus limited, does it not result mainly from the fact that the solicitor is highly cost conscious? Training that nearly becomes instinct has made him that kind of fellow throughout his professional work. Moreover, he is moved toward a modest preparation of the case by the psychology of a system of “indemnity of costs,” in which as a rule the loser in litigation is obliged to pay the winner’s expenses. So, representing a possible loser, the solicitor is interested in holding down the expenses on his own side and in seeing to it that his opponent’s reimbursed expenses are kept well within reason; representing a potential winner, he is still concerned lest he incur expenses that will be found inessential and thus will not be reimbursed. Contingent fees, which can act as mighty energizers when the stakes of litigation are high, are prohibited by English law. Also, may it not be a depressant of the zeal factor for a solicitor to know that he does not have ultimate responsibility: he is doing preparatory work for a barrister who will take charge at the climactic phase—actual trial—if that should come.

1. See *Roe v. Robert McGregor & Sons, Ltd.*, [1968] 1 W.L.R. 925, 2 All E.R. 636 (C.A.). Cf. T. LUND, A GUIDE TO THE PROFESSIONAL CONDUCT AND ETIQUETTE OF SOLICITORS 82-83 (1960).

B. *Pleadings*

I skip to pleadings. The English sequence is longer than ours under the Federal Rules, in that a reply is required of the plaintiff if he means to respond with affirmative matter to an answer;² on the other hand, the English system, less inclined to compel the parties to bring into the action all connected disputes between them, is innocent of our so-called compulsory counterclaim.³ But the big difference is that the English still take their pleadings seriously while we, despite our occasional protestations to the contrary, have become quite cavalier about them. Symptomatically, the Federal Rules have retreated from the position of the Field Codes and no longer adjure the pleader to set forth "facts."⁴

English pleadings are supposed to be accurately informing of the case which the opponent will have to meet and factual in character, though not descending to the level of "evidence." They are supposed to be fairly particularized, and in practice a request for particulars of the claim usually accompanies the answer (in England called the "defense") and is met with the plaintiff's like request upon the defendant to give particulars of his answer.

The insistence of the English that pleadings be really revealing is understandable in a system that is—as we shall see—quite chary of compelling pretrial disclosure by other means from either the parties or third persons. (When strong discovery comes in, bills of particulars naturally go out, as they did under the Federal Rules system.) But in day-to-day practice English pleadings hardly attain to the professed standards. They regularly offend by being too abstract or general, or, the other way round, by alleging so much so compendiously that the opponent can't tell where the weight of the proof is going to fall. Thus a defendant's denial, cast in general terms, may give hardly a hint of what his actual story will be; a complaint in an automobile accident case may allege almost the whole catalogue of ways in which the defendant might conceivably have been negligent. Those skilled at the game, when confronted with a demand for particulars, have little trouble converting from uninforming generality to obfuscating particularity. The pleader indeed often must protect himself in one way or the other because he has not enough hard information to go on. The less knowing pleaders who do follow the

2. Compare RULES OF THE SUPREME COURT Order 18, rule 14(1) with FED. R. CIV. P. 7(a).

3. Compare RULES OF THE SUPREME COURT Order 15, rule 2(1) with FED. R. CIV. P. 13(a).

4. See FED. R. CIV. P. 8(a).

exhortation to be precise and accurate can find themselves boxed into false or unprovable positions at trial from which, despite the courts' reasonably tolerant attitude toward amendments, they cannot always escape, or escape unwhipped of the expenses to which their opponents are put by having to react to a permitted change of position. There is some irony of history in the recent report of the Winn Committee on Personal Injuries Litigation, which summons the English bar yet again to be virtuous and deliver pleadings that will be truly informing, and at the same time recommends that parties be held more closely to their averments and that belated amendments be simply refused.⁵ All this is familiar. It matches the unhappy American experience under the Codes when perforce there was reliance on the pleadings for the essential mutual avowals.

C. *Discovery*

As I have already intimated, English methods other than pleadings for forcing pretrial disclosure fall far short of the "depositions and discovery" procedures under our Federal Rules of Civil Procedure.⁶ Our rules provide six-fold devices for eliciting evidence from anyone, party or nonparty; of these, the most powerful mechanism is deposition on oral examination⁷—full-scale interrogation by live question-and-answer of anyone who may have information bearing even remotely on the case. Under the contrasting English pattern there is first a procedure for automatic exchange of documents "relating to any matter in question" in the action except such—here is the countervailing cautionary principle—as are "not necessary either for disposing fairly of the action or for saving costs."⁸ This documentary discovery, which incidentally is greatly dependent on the bona fides of the lawyers, applies to papers held by or for the parties, not third persons. And I gather that privilege shields the statements that solicitors customarily take from witnesses. Next, interrogatories can be put to a party to be answered in writing, their permitted range being nominally like that for documentary discovery. The scope is in fact conservative: I believe you can dig somewhat deeper by interrogatories than by demands for particulars, but you must direct your questions to the heart of the case, not the surrounding territory; you may not force disclosure of "evidence"; you may

5. COMMITTEE ON PERSONAL INJURIES LITIGATION (Winn Committee), REPORT, CMND. No. 3691, § X, at ¶ 245 (1968) [hereinafter Winn Committee Report].

6. See FED. R. CIV. P. 26-37.

7. FED. R. CIV. P. 30.

8. RULES OF THE SUPREME COURT Order 24, rules 2(1), (5).

not "fish." Privilege is again at work, so that a party cannot be required to give up the names of witnesses known to him. In fact, interrogatories are not used very much. Finally, the English have procedures for inspecting property in possession of a party and for demanding admissions of a party.

Discovery, wide-ranging and powerfully sanctioned on the American style, has been considered more than once by the English as a possible reform. But I believe that any movement in that direction will stop short of the drastic unless it becomes part of some big transformation of the entire system. Some enlargement of pretrial disclosure has indeed occurred in the past couple of years in the personal-injury field. A way has been opened for a party in such an action to get relevant documentary discovery and inspection of things against a person not a party; and even in advance of suit prospective parties will be subject to documentary discovery between themselves.⁹ I could go on to a few further recent reforms.¹⁰ But strong medicine like our oral deposition was brusquely rejected by the Winn Committee on the ground that it would "complicate, delay and increase the cost of litigation."¹¹ I shall not get into the full argument on both sides about the more hefty discovery devices. I do not doubt that there are many lawyers in England who, though deprecating "trial by ambush," would still not subscribe to "cards on the table" if that meant such thoroughgoing mutual disclosure that the shock of surprise would be gone from English courtrooms. They would defend surprise as a truth inducer, and in this they would be joined by some of their American colleagues. American discovery can be oppressive, can give undue advantage to the wealthier party if it is not held in check. Empirical research in our federal courts has put in question the confident claim that discovery itself increases the chances of settlement or shortens trials.¹² These negative observations could be met by many positive ones. But I am intent to say that beyond this table of arguments there are distinctive English objections to discovery by oral deposition and the like. The point is that on English reasoning the barristers would have to be drawn into the discovery process; it would not be thought a task suitable for solicitors. Not only, then, would discovery visibly increase costs; it is

9. Administration of Justice Act 1970, c. 31, §§ 31-32.

10. See, e.g., concerning disclosure of police reports of accidents, the Winn Committee Report, *supra* note 5, § VI; and with regard to physical examination of a party suing for personal injuries, *id.*, § XI, at ¶¶ 311-12, and *Edmeades v. Thames Bd. Mills, Ltd.*, [1969] 2 Q.B. 67 (C.A.).

11. Winn Committee Report, *supra* note 5, § XII, at ¶ 355.

12. See W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 91-103 (1968).

so diffuse an operation that it would threaten to change materially the quotidian life of barristers. One wonders whether it could be carried out by barristers without changing their present essential character as single practitioners. Any proposal to adopt American-style discovery ends by stirring the passion-freighted question of "fusion" of the two branches of the English profession.

There has been talk in England of reaching out for the benefits of American pretrial depositions by the simpler device of having the parties exchange the statements which the solicitors customarily take from witnesses. Such discovery on the cheap, interpolated in the midst of the current English procedure, probably would not do. It would, I daresay, have some curious effects on the character of the statements taken by solicitors and on the entire process of preparation for trial. In fact, the question of compelling disclosure of statements informally taken from witnesses has given serious trouble in the complex of American discovery—the problem goes by the name of the great case of *Hickman v. Taylor*¹³—and it had to be specifically dealt with in the reordering of our Federal Rules on discovery that became effective on July 1, 1970.¹⁴

D. *Interlocutory Procedures*

In the United States, any questions that arise for decision between the parties before trial must be put to the judge, generally upon motion, and on this sort of work the judges spend a not inconsiderable part of their energies. In England, most of these questions are put to masters—permanent subjudicial officers who have had previous experience in law practice.¹⁵ There is a right of appeal to a judge, but usually the master's decision is accepted by the parties, with the result that the judges are saved time that can be devoted to actual trial.

The masters deal with a variety of matters, but one of their better known performances occurs at "summons for directions." The plaintiff must bring on this summons within a month after the close of the pleadings. It is a theater for applications by both sides and also for settling the arrangements for trial. The master will handle the parties' demands concerning the pleadings—largely applications for particu-

13. 329 U.S. 495 (1947).

14. FED. R. CIV. P. 26(b)(3) (trial preparation: materials). For the special case of reports of experts, see FED. R. CIV. P. 26(b)(4).

15. In District Registries outside the central court establishment in London, "registrars" perform masters' functions.

lars and amendments—and questions of interrogatories and perhaps documentary discovery. So, also, with the cooperation of the parties, the master runs over the possibilities of expediting and shortening the proof at trial; he fixes the mode and place of trial. With exceptions here and there, the masters' work is routinized. A summons for directions will usually be disposed of in one to three minutes. Barristers are not often in attendance; in fact, the parties are commonly represented not by the solicitors proper but by their unadmitted clerks. Masters' calendars are heavy and their decisions are made on the spot. On the view that in the vast majority of personal-injury actions the summons-for-directions procedure has become "a useless and wasteful step" in the sense of being standardized or perfunctory, it has been officially recommended that a "stock form draft order for main directions"¹⁶ be adopted that would go into effect automatically unless a party had meanwhile applied for further or special directions. The main directions would include commonplace items such as agreement on the expert evidence or limitation of the number of expert witnesses in default of agreement, arrangements for the use of plans and photographs, discovery, and date for setting the action down for trial.

One begins by thinking of the summons for directions as being analogous to the American "pretrial conference," allowing always for the fact that with us it is the judges who do the work. Indeed, the summons for directions was referred to for comparison in the original Advisory Committee's note to Federal Rule 16, which established the pretrial conference.¹⁷ Our conference, however, has turned out to be so variable as to complicate assessment, comparative or otherwise. It appears in the Federal Rules as a device to be used in the court's discretion. In some courts it is used hardly at all; in others it is regularly used but in a perfunctory way; in still others it is cultivated intensively. The pretrial conference figures importantly in the conduct of large, complex cases where it has been used under strong judicial initiative and impulsion to organize the conduct of discovery by the parties, to concentrate the parties' interlocutory motions, to frame issues of fact and law superseding the pleadings *pro tanto*, and to make other arrangements anticipating ultimate trial. Discussion of settlement comes in quite naturally, and is encouraged and even initiated by some judges. But it should be added that the once-current idea that the American pretrial conference in fact hastened

16. Winn Committee Report, *supra* note 5, § XII, at ¶¶ 351-52.

17. RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, S. DOC. NO. 101, 76th Cong., 1st Sess. 235 (1939).

and multiplied settlements was left in doubt by field investigation of an ordinary run of cases in the state courts of New Jersey.¹⁸

There has been some sentiment in the United States for employing practice masters, and we hear of two federal district courts that have utilized so-called pretrial examiners or pretrial masters to help with pretrial conferences.¹⁹ The English masters are indeed attractive figures, working hard and efficiently to mop up the interlocutory applications with little levy upon the time of the judges. One connects the masters' work with the fact that procedure in England has been put in the adjective or subordinate place where it seems to belong; one connects it with a boast that the English can make with more claim to truth than ourselves, that cases are not decided on points of practice which are, in Pound's words, "the mere etiquette of justice." However, the qualities of the milieu in which English masters operate must be appreciated. There can be relatively few important, potentially dispositive questions that arise upon the face of an English action. For England is a legal unit without the complications of competency, jurisdiction, and venue that can bedevil an action in a federal system—Walt Whitman might have been thinking of legal federalism when he wrote: "Here is not merely a nation but a teeming Nation of nations."²⁰ Again, the English substantive law, against which the surface validity of claims or defenses is to be measured, is relatively stable, without the turbulence that can be expected from an agglomeration of fifty-one related sovereignties each generating its own law. So also the masters are spared the kinds of questions that can arise from the ramifications of the American discovery process. It is indicative of the greater complexity of the American scene that the exact procedures for dealing with interlocutory questions seem more finely honed in the United States than in England; the intermeshings of our Federal Rule 12 on "defenses and objections" furnish an example. Now none of these differences makes a case against our installing a device of practice masters. It merely warns that the voltage of our system is different; therefore the device might have to be modified accordingly.

In their turn, enthusiasts of the American pretrial conference have been pressing it on the English, to become there an adjunct,

18. See M. ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE* 45-50 (1964).

19. See Rosenberg, *Court Congestion: Status, Causes, and Proposed Remedies*, in *THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION* 29, 42 (H. Jones ed. 1965).

20. From the poem *By Blue Ontario's Shore* in *THE POETRY AND PROSE OF WALT WHITMAN* 328, 330 (L. Untermeyer ed. 1949). I owe the reference to Griswold, *Two Branches of the Same Stream*, 14 *HARV. L.S. BULL.* No. 4, at 4 (1963) (comparing various features of English and American law).

perhaps, to the summons for directions. The conference, however, is most plausible as a means of ordering and arranging massive cases with the usual imprecise pleadings and sprawling discovery. The wisdom of using it in the bulk of English actions—that is, relatively small actions—is thus dubious, as, indeed, is also the wisdom of applying it routinely to American cases. Adoption of the conference in personal-injury cases would seem at odds with the recommendation to routinize further the summons for directions.²¹ Again, there are peculiarly English objections to adopting our conference. Barristers would have to be briefed to attend a conference, which of course would mean a fee. Moreover, it might be thought awkward—destructive of the image of the office—to have masters edging up to settlements. Of course the idea of using the judges themselves to manage such conferences would go down even harder. In all events, the Winn Committee rejected the idea of a pretrial conference in the same breath with its disapproval of American discovery.²²

We are approaching the event of trial in our Cook's tour of the conduct of an action. But it goes without saying that in both countries few filed actions survive to the trial stage, and still fewer are actually fully tried. Many cases exit from the calendars by reason of settlement or defendant's default. Some cases linger without forward movement as a kind of legal detritus. Some are disposed of on interlocutory applications because of supervening points of law. For cases in which a party can demand immediate disposition on the ground that the opponent is overwhelmed on the facts, there is the device of summary judgment, but here the systems diverge. In England only a plaintiff is entitled to apply, and almost always he makes his application before the defendant serves his answer. The plaintiff verifies his claim by an affidavit in general terms. If the defendant comes back with an affidavit that tells a plausible story in reasonable detail, summary judgment will be denied even though the master is very skeptical of the defendant's response. In the fact that summary judgment cannot be sought by a defendant as it can be in the United States (and does not really contemplate voluminous material being offered on the motion, as is possible in our practice), we find perhaps an adhesion to the historical origins of the device in England as a simple means for enabling creditors to collect quickly on com-

21. See text accompanying note 16 *supra*.

22. Winn Committee Report, *supra* note 5, § XII, at ¶ 355. Fifteen years earlier, the Evershed Committee had rejected both the pretrial conference and expanded pretrial disclosure but reserved the possibility of using a conference in special cases. See COMMITTEE ON SUPREME COURT PRACTICE AND PROCEDURE (Evershed Committee), FINAL REPORT, CMD. No. 8878, at ¶¶ 214-24 (1953).

mercial paper. Conceivably, the English might explain the limitations on their use of summary judgment by reference to their confined pretrial disclosure. Or perhaps they think a broadening of opportunities for using the device would lose more in aimless applications than it would gain in disposed cases. We have to search hard for connections and explanations.

E. *Trial*

Suppose a case seems likely to run the course. The master will have fixed the mode of trial, which, with few exceptions, in numbers almost negligible, will be by a judge without a jury. A jury can be demanded of right only in a few cases, such as fraud or defamation. In many cases the master theoretically has discretion to grant a jury trial, but he will hardly ever do so, and he will be particularly reluctant in personal-injury cases, which make up the bulk of matters actually tried. This particular disfavor of the jury is explained by the desire for uniformity in awards of damages, which cannot be secured at the hands of sporadic juries but can at least be aspired to if trial is committed to judges who will stick to "conventional" amounts. Against the obsolescence of the English civil jury, which has come about quite casually, with a minimum of soul-searching, is to be set the robust survival of the American jury. Indeed, in the federal courts, we have seen an extension of the jury system to new cases beyond the historical paradigms. The jury is enshrined in our constitutions, trails clouds of sentimental rhetoric, is seen as a safeguard against undue conservatism or even corruption of judges, flourishes symbiotically with wheel-of-chance contingent-fee litigation. One reason for the fervid attachment of many American lawyers to the civil jury can be readily inferred, as it were by ricochet, from a suggestion made a few years ago in England—that, as a departure from the general English rule, occasional jury verdicts should be taken in personal-injury cases in order to acquaint the judges with the ideas of the man in the Clapham omnibus, and thereby presumably to induce the judges to raise their sights when they set those conventional awards.²³

Coming to English trial proper, I need not dilate on its panoply: the judge wigged and robed, the barristers wigged and gowned, the solicitors at hand with their files and whispered confidences. Proceedings still appear more thoroughly oral than in our courts; even docu-

23. BRITISH SECTION OF INTL. COMM. OF JURISTS ("Justice"), REPORT: TRIAL OF MOTOR ACCIDENT CASES 28-29 (1966).

mentary evidence is read out, and so are copious extracts from precedents and statutes used in argument. (True, in prescribed situations proof may now be made in England by affidavits; but then the affidavits are read from as they are put in evidence.) It is, of course, in the exposure of witnesses, one by one, to direct and cross-examination by the barristers that the main truth-sifting and highest drama of trial so often consist. So one needs to consider the nature of the barristers' preparations for handling witnesses and other exigencies of trial. In a case of consequence, the solicitor will have retained a barrister to settle the pleadings. When the case has been set down for trial, or perhaps earlier, the advice of a barrister is sought "on the evidence": he is handed a bundle consisting of witnesses' statements and other material assembled by the solicitor, with perhaps some commentary subjoined. The barrister is to advise how the case can be strengthened for trial; he may suggest that further questions be put to witnesses or that the theory of claim or defense be shifted, which may call for investigation on a new line with possible amendment of the pleadings. Finally, the barrister receives the brief for trial. The bundle of papers now reappears, perhaps enlarged and improved. Besides poring over this material, the barrister will probably interview the lay client and any experts appearing on his side; according to protocol he will not see them alone but in the solicitor's presence. But the understood professional canon prohibits him ordinarily from seeing the other witnesses whom he will be calling to give evidence. And he will usually have no pretrial recourse, even secondhand through his instructing solicitor, to the witnesses who will be called on the other side; he may indeed be ignorant of their identity. The insulation of the barrister from his own witnesses is a little mysterious. Consider that solicitors may try cases in the County Courts, though not in the High Court, and at trial in County Court they are allowed to examine witnesses whom they have interviewed earlier in private. Is it thought that "rehearsal" by barristers would have a more dire effect on witnesses than vetting by solicitors? Or are barristers, as aloof court tacticians, to be saved from any possible charge of influencing witnesses? Or does the larger part of the explanation lie simply in a notion of the proper division of work between the two branches of the profession?

I surmise that very intensive collaboration between barrister and solicitor in preparing for trial is not common, so that there is some danger that useful tasks of preparation will fall between the two. Lengthy consultations would have to be paid for accordingly. Moreover, effective teamwork springs from association over a period of

time, whereas the characteristic relationship between solicitor and barrister—like the barrister's fee—is per case, or rather per job per case. This is the general picture, although a solicitor (or firm of solicitors, as solicitors may practice in partnership) may come over a period of years to prefer certain barristers and retain them repeatedly. And the fact that partnerships among barristers are prohibited means that there is little teamwork on that side of the profession beyond such as results from “devilings” by the younger members of the bar, or from the requirement, which often seems quite arbitrary, that where a senior (Queen's) counsel is retained, junior counsel also be briefed to understudy and assist him.

It would follow from the nature of the pretrial preparation that the barristers are often working in the courtroom with less than a full script; they must improvise, adjust to new material and unknown personalities, and adapt to fresh surprises. Not the least of a barrister's risks is calling and thereby being “bound” by his own witnesses, whom he sees for the first time as they take the oath. To be sure, barristers are specialists in trial work and appear by and large to be highly competent; yet it cannot be expected of all that they should have the mental reflexes of Sir Patrick Hastings.

The fact that barristers are well separated from their lay clients (and of course never have a financial stake in the result) means that there is in their manner a considerable detachment. And this detachment relates itself to their exemplary candor toward the court and other counsel, which is further fostered by the intimacy of the entire small fraternity of barristers—including those turned judges—congregated at their Inns of Court and circuit messes.

The English barrister's disinterest, like any virtue, has its dangers or complementary defects; yet one might wish for more of it at the American trial bar. Recall that the American trial lawyer is at no distinct remove from his client and may have more than an academic interest in the size of the recovery; he is not inhibited in his recourse to the prospective witnesses, least of all his own, and his closeness to the facts is or can be intensified by discovery and the pretrial conference. Our specialist triers—and there are many of them, especially in the personal-injury field—may have their cases prepared for them by their associates and then try them, in a sense, from a brief; but this distancing from the facts or division of labor is still very different from the effects of the barrister-solicitor cleavage.

Turning our gaze to the English judges, we find that they are constantly working at a job—presiding at trial—at which they have

previously become vicariously expert through many years of trying cases on the other side of the bar. American judges will generally have less trial work in their backgrounds but probably a more variegated legal and human experience. Popular election of judges, which is still the mode in many of our states, would be thought colossally inappropriate in England. The Lord Chancellor is entrusted with picking the judges; he has his own not-quite-explainable methods of deciding when a barrister is ripe for the bench. The Lord Chancellor looks, no doubt, to reputation for solid ability as the chief criterion. Politics in the narrow sense probably plays today little if any part; but I imagine that a lack of calm moderation in political or social views will disqualify a candidate, while a good family and a good school will still help him. These figures, then, of eminent prestige and respectability superintend trial with a firm and knowing hand that seeks fairness between the parties and decent dispatch, but without a pressing hurry. Their benevolence is sometimes edged with testiness, but I heard of very few counterparts of the famous curmudgeons of old.

As to rulings on evidence, the task of an English judge is lightened, in the first place, by the fact that the triers are appearing in court day after day and know the ropes. A more notable fact is that restrictions on admission of evidence are few and becoming fewer—a development encouraged, I suppose, by the near disappearance of the jury. The hearsay rules have been diminished by legislation of 1938 and 1968.²⁴ One even learns of heady words by Lord Gardiner, the former Lord Chancellor, about the eventual disappearance of all rules of evidence, whatever that would mean.²⁵ On the whole, I sense that the English are somewhat further advanced in permissiveness about evidence than we are in the United States—even taking account of the looseness lately encouraged in many of our jurisdictions, at least when trial is without a jury.

English trial proceeds, then, with few “objections” by counsel. The judge follows the proof with close attention; typically, he takes his own handwritten notes even though an official verbatim record is also being kept. He is engaged in continual conversation with counsel about the significance or value of the evidence as it is introduced. (A colleague of mine describes this process as informality

24. The subject is now treated in the Civil Evidence Act 1968, c. 64, §§ 1-10.

25. Lord Gardiner's remarks were made during the report stage of the bill that became the Civil Evidence Act 1968, c. 64. See 289 *PARL. DEB., H.L.* (5th ser.) 1461 (1968).

within a formal setting.) Further, the judge freely puts questions to witnesses to clear up or complete the picture.

When the evidence is concluded, counsel address the court on the facts and the law. The written trial memorandum is unknown, as is also written argument in the appellate courts. As counsel finish, the judge, usually without any pause, begins to deliver an oral opinion, called the judgment, showing—perhaps the word is “proving”—his grasp and command of the whole case.²⁶ This extemporaneous effort is generally good and sometimes masterful (and the same, I gather, can be said for instructions to juries when they are sitting). In contrast, American judges rarely deliver immediate oral opinions.²⁷ Under current Federal Rules practice, a judge in any nonjury case tried to the end is required to render findings of fact and conclusions of law.²⁸ In addition, he is likely in a case of consequence or difficulty to write a reasoned opinion. These papers will usually be filed some time after the trial proper is concluded. I revert to the English oral judgment to say that it is the finishing touch to a total performance which, taken in itself, will appear to an American onlooker to be better conducted and more satisfying than the usual American product. It is often a considerable aesthetic experience. Even so, one can't suppress the feeling that the instant oral bouts on the part of counsel and the court, with all their merits of freshness and spontaneity, must tend to skimp on the finer points just as they forfeit to some extent the benefits of afterthought. (I have heard an English lawyer exaggerate the point by saying in self-deprecation, “We English would rather listen and talk than read and think.”) As to the legal ingredient of the judgment, I am led by some personal observation, but more by the commentary of others, to say that an English judge of first instance conceives of himself as a pretty literal follower of the doctrine laid down above, without much of a license to innovate; herein is a difference from the attitude of the more lively among American trial judges. But very large factors are at work here, including on our side the force of federalism and the fifty-one law-making factories.

Now I should say, with regard to the interna of the trial, that a defendant is entitled to put to the judge when the plaintiff first rests that there is “no case to answer”; and in jury cases a like challenge

26. Exceptionally in long and complex cases the judge will reserve his judgment.

27. When I was in practice in New York, it was rumored that one brilliant trial judge who had begun to imitate the English style was warned off it by the appellate court for fear that his less gifted colleagues would try it too.

28. FED. R. CIV. P. 52(a).

can, in addition, be put by either side at the close of all the evidence. Our nearest American analogues are the motion for involuntary dismissal²⁹ and for a directed verdict.³⁰ The English worry about whether it should be made a condition of the defendant's suggesting "no case" at the close of the plaintiff's evidence that the defendant relinquish his right to call evidence on his own behalf. This is a many-faceted problem, but I suspect that the English do not take kindly to a defendant's application for the peremptory dismissal of a claim at a point when he has never exposed himself or his defense to real scrutiny by the other side. So the matter may be related in part to the scope of pretrial disclosure.³¹ The English, on the other hand, seem to be less preoccupied than we recently have been with the exact standard to be applied by the judge when he decides whether to "control" the jury by withdrawing a case from it. The problem is relatively unimportant in England, not only because there are few civil juries to control, but because a judge can steer a jury away from the shoals of sentimental foolishness (as he may think) by another means—by "commenting" on the evidence; that is, by expressing his opinion on where the weight of the evidence lies. Many American jurisdictions deny the judge this power; a federal judge has the power but rarely uses it.³² Although an English judge may strongly influence a jury's verdict, he cannot mastermind a trial, jury or non-jury, by calling witnesses on his own part.³³ American judges are said to have this power, but it is again virtually unused.³⁴ Experts, however, stand on a different ground. In both countries a judge has power to call experts as witnesses "for the court," though in neither system has this become a particularly noticeable practice.

F. *Expenses of Litigation*

A spectator at an English trial becomes aware of the matter of "costs" when he hears a short exchange about it just as the judge

29. See FED. R. CIV. P. 41(b).

30. See FED. R. CIV. P. 50(a).

31. The English do not themselves make this point; rather, they stress problems of appellate review. See R. CROSS, EVIDENCE 60-62 (3d ed. 1967). Concerning FED. R. CIV. P. 41(b) on defendant's motion for involuntary dismissal at the close of the plaintiff's case, see *Emerson Elec. Co. v. Farmer*, 427 F.2d 1082 (5th Cir. 1970); *White v. Rimrock Tideland, Inc.*, 414 F.2d 1336 (5th Cir. 1970).

32. See F. JAMES, JR., CIVIL PROCEDURE 287-89 (1965); MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 229 (A. Vanderbilt ed. 1949).

33. For an exceptional situation, see *Fallon v. Calvert*, [1960] 1 All E.R. 281 (C.A.).

34. See Note, *The Trial Judge's Use of His Power To Call Witnesses—An Aid to Adversary Presentation*, 51 Nw. L. REV. 761 (1957). Cf. *Johnson v. United States*, 333 U.S. 46, 53-55 (1948) (Justice Frankfurter, dissenting in part).

concludes his oral judgment. It is, of course, a vital matter. The general rule, as already mentioned, is one of indemnity of costs, costs meaning not just court charges, such as filing fees, but other expenses of litigation, including lawyers' bills. But there are some refinements. Elaborate rules fix specific reimbursable amounts for various steps taken by the solicitor, but there are also "discretionary" items—for example, barristers' and experts' fees agreed upon with the solicitor, and some of the solicitor's main charges for his own work. The usual formula is that only "necessary and proper"³⁵ expenses of the winner are reimbursed to him; the necessity and propriety of various items, especially the amounts of the discretionary ones, may thus be questioned. The winner's bill will then be reviewed by a "taxing master"; under his parsimonious eye items charged by the solicitor to his client, which between them are quite reasonable, may still be and frequently are pared down for purposes of the indemnity. For this and other reasons, the indemnity may actually be incomplete, and the winner may emerge less than "whole." A "payment-in" procedure injects an aleatory element. A defendant may pay into court an amount representing in effect his best offer; if the plaintiff refuses it and in the end wins but recovers no more than was tendered, he not only forfeits his own indemnity but is obliged to make good the defendant's costs from the time of payment-in.

Putting details to one side, the English pattern is a rather rigid one of compensation to the lawyers on a piecework basis, with double bleeding of the party who guessed wrong in the litigation. In the United States, lawyer-client arrangements are free-form—contingent fees; global charges stipulated in advance, or set after services are rendered, in which success may or may not affect the final figures; annual or general retainers; and numerous other styles of compensation with their combinations. In the litigation proper, the rule still is—although variations and exceptions are accumulating—that the loser reimburses court charges and a few other items to the winner but the major expenses lie where they fall.

Let us leave off here and ask, what of the people who can't stand the gaff of legal expenses? The current American answer is again free-form. The institution of the contingent fee can take care of anyone with a barely plausible (and tolerably sizable) claim. Then we have a variety of legal-service programs that absorb expenses for individuals and groups in civil matters. Potentially very important

35. RULES OF THE SUPREME COURT Order 62, rule 28(2).

are the new "neighborhood law offices," with a network of ancillary organizations all largely financed by the government. These aim to bring lawyers into the homes of the poor to provide a full assortment of legal services. Assistance in ordinary litigation is but a minor phase. The lawyers are to "represent the neighborhood," to seek actively to better the condition of the poor, whether by class actions, sponsorship of legislation, or other means suggested by professional knowledge and skills. As yet this is aspiration, not accomplishment. The program is small when compared to the magnitude of the hope; even so it must repel repeated boarding attacks by interests that consider themselves threatened. Now the efforts to assist the poor are but part of the multifarious *pro bono* activities of a growing number of lawyers who may be styled "public-interest lawyers." The law is accommodating itself to these new advocacies, on one side by relaxing old canons defining the desired relationships between lawyer and client, and on the other side by loosening pre-conditions of suit such as "standing." The American scene is disordered, but it is lively.

One sees less exuberance on the English scene. I suspect there is an occasional oblique approach to a contingent fee through simple omission to collect earned fees from a client when litigation has failed, but the practice, if it does exist, cannot bulk large. Some trade unions take care of their members' work-connected damage actions. But the chief factor in England is government-provided "legal aid and advice." The "advice" part has lagged and is now being strengthened; one begins to see a trend toward government support for free legal-advice centers, supplementing the work done by private organizations. The aid in litigation conforms to the fundamentals of the costs system, with the state making provision for litigants whose means fall below a prescribed level. The aided party chooses a solicitor (the choice may in fact be a bit constrained) who, if it comes to that, retains a barrister; the bill, somewhat reduced from the usual rates where litigation occurs in the High Court, and allowed when necessary by a taxing master, is an ultimate responsibility of the state fund. But at the outset the party must have convinced a committee of unsentimental lawyers that he had reasonable grounds for prosecuting or defending. Often the party is not completely aided; he must make a contribution appropriate to his own financial position.³⁶ Aid is nominally available in any civil action,

36. If the aided party wins, the fund has a prior claim for reimbursement of its expenditures against any costs or damages awarded in the action. If the opponent wins, he can get costs against the aided party. These costs, however, will be at reduced

except a few disfavored types such as actions for defamation. It is, of course, very visible in matrimonial matters. It appears on the plaintiffs' side of a substantial number of personal-injury actions in Queen's Bench Division. It is not conspicuous in the County Courts.³⁷

G. Caseloads and Delay

Writers have often assumed that the English indemnity principle is more potent than the contrasting American principle in discouraging resort to the courts and in encouraging settlements. But it is not clear to me that on rational grounds a potential plaintiff would invariably see the prospect of indemnity as more of a deterrent. There are a number of variable impinging factors: the strength of the plaintiff's belief in his own case, the depth of his purse, the amount in question in the action, the probable size of the lawyers' fees.³⁸ (I suppose, incidentally, that if an average hour of lawyer's time could have a price tag put on it, the American figure would far exceed the English.) Plaintiffs' motivations are not easily tracked. Nor are defendants', and these are important also, for it takes two to make a lawsuit.

There is a natural appeal in the indemnity idea that the loser, the party who has been proved wrong, should make full, not partial recompense. But suppose he acted "reasonably" in bringing or resisting the action? That is thought too complicated a question to get into: a nice consideration of who was at fault here might lead a court—as Scrutton once said—to cast the costs against the parliamentary draftsman whose ineptitude caused a lawsuit, rather than against either of the parties. But if the loser is to pay the expenses of suit on both sides, should not the reimbursable items and their amounts be fixed definitely in advance to add predictability? Such

amounts and may be uncollectable; in certain exigent situations there can now be a recovery of such costs from the state fund. See *Hanning v. Maitland* (No. 2), [1970] 2 W.L.R. 151 (C.A.). Cf. *Nowotnik v. Nowotnik*, [1967] P. 83.

37. Compared to 166,481 proceedings commenced in Queen's Bench Division in 1968, there were 11,834 legally aided parties in the proceedings there, a ratio of 14 to 1. The corresponding ratio for proceedings in County Courts was 287 to 1 (1,515,884 proceedings; 5,266 aided persons). See CIVIL JUDICIAL STATISTICS FOR 1968, CMND. No. 4112, at 21, 74 (1969). These figures are not very revealing because (among other reasons) there is so much straight-out debt collection in both systems of courts. More interesting would be the fraction of cases *tried* in which one or more of the parties are legally aided. Some approach to the facts can be made by comparing the data in CIVIL JUDICIAL STATISTICS FOR 1969, CMND. No. 4416, at 13, 82 (1970) with LAW SOCIETY, REPORT No. 19, LEGAL AID AND ADVICE 1968-69, at 14 (1970).

38. An interesting beginning on these problems is Mause, *Winner Takes All: A Re-examination of the Indemnity System*, 55 IOWA L. REV. 26 (1969).

an arrangement seems too mechanical, and might unduly chill competition among lawyers.

Apologists for the American view would say that the loser's "fault" is palliated by the inherent uncertainties of litigation; that the administrative burdens of a costs system on the English style are themselves considerable; and finally—begging the question what exactly are the practical effects of that system—that it is supremely important not to bar people of small means from the temple of justice. This abounding idea of open access to the courts goes part of the way to explain our tolerance of the contingent fee. And it is a piquant fact that, despite all the uneasiness about contingent fees, some of it justified, some not, American courts find themselves in the position of supporting much of the massive protracted litigation—class actions, shareholders' derivative actions, and some other giant species—by themselves administering in respect to these cases a kind of contingent-fee system. I mean that in practice the plaintiffs' lawyers would usually have no source from which to recover compensation if they should lose; when they win, the courts themselves fix the compensation to be paid out of the fund secured, and generally the size of the fund is a factor in determining the amount of the compensation. I observe that when Professor L.C.B. Gower notes the virtual absence of shareholders' derivative actions in England, he does not attribute it to the exceptional probity of English businessmen but to a lack of the American inducement to bring suit.³⁹

To return to the point, whatever may be predicated in the abstract about the effect of an indemnity principle or the contrary on the parties' propensities to bring or defend suit, when I put the actual entire English costs system, as modulated by legal aid, alongside the working American arrangements, including the contingent fee, I incline to think that the former is comparatively a discourager of litigation. Thus I am in qualified agreement with the conventional assumption.

But it is not costs alone that influence the volume of business in the courts of the respective countries. Tracing the forces at work would send us hunting through all the national resources for handling disputes and much more besides. The variousness of such an inquiry is suggested if we look to the American side and consider personal-injury cases. We would have to start with the number of vehicles on the road and wind up with an appreciation of the meaning of "claim consciousness."

Anyway, I put down as hard if sibylline figures with respect to

39. L. GOWER, *COMPANY LAW* 591 n.63 (3d ed. 1969).

the English High Court, the focus of our interest, that from a population of around 50 million persons (Wales included), 295,706 civil actions found their way into that court in 1969 (a peak year); of these, 208,716 were lodged in Queen's Bench Division; 24,954 began in Chancery Division.⁴⁰ I suppose that for the United States we would show many more actions per capita in similar court competences. Moreover, we would show many more individual actions of large size or complexity, and among them cases in categories of administrative and constitutional law which do not appear at all in the English courts. I use the egregiously inexact expression "many more" not entirely through laziness: I hesitate to affect any greater precision on the basis of the available statistics.

Now what is *prima facie* impressive is that the English High Court had only sixty-eight judges, with forty assigned to Queen's Bench and ten to Chancery;⁴¹ and we must note further that the judges of the High Court other than Chancery judges do considerable criminal work in addition to the civil. You can throw in the fifteen Queen's Bench and Chancery masters and still wonder how the caseload is moved along to such effect that the average waiting time from "setting down" to trial in 1967, as reported by the Beeching Commission, was nine months in London and 5½ months at Assizes in the provinces.⁴² With a rearrangement and decentralization of the court structure and with management changes, the Beeching Commission hopes to bring the waiting time down to three months.⁴³ In this country we have 5,000 or more judges working, usually also part time, on roughly comparable kinds of civil business—an overwhelmingly larger number of judges per capita—yet the condition of the calendars in our metropolitan centers is a cause of bitter lamentation. I grieve to say that the average interval from answer to trial in personal-injury jury cases in the superior court of my own county was thirty-five months in 1968, thirty-eight in 1969,

40. CIVIL JUDICIAL STATISTICS FOR 1969, CMND. No. 4416, at 23 (1970).

41. The numbers are not quite up to date but they make their point. The maximum authorized number of puisne judges of the High Court was raised in 1970 from seventy to seventy-five. At the same time the maximum of ordinary judges of the Court of Appeal was raised from thirteen to fourteen; and County Court judges from 105 to 125. See STAT. INSTR. 1970, No. 1115.

42. ROYAL COMMISSION ON ASSIZES AND QUARTER SESSIONS (Beeching Commission), REPORT, CMND. No. 4153, app. 8, at 165 (1969).

43. *Id.* ¶ 414, at 131 (the three-month hope is with respect to "waiting time for fixed list cases"). See note 51 *infra*.

In hopes of speeding disposal of individual claims, the Administration of Justice Act 1969, c. 31, §§ 20, 22, gave the courts power to add interest upon damage awards for personal injuries, and in proper cases to require interim payments to plaintiffs before conclusion of the action.

and forty-two in 1970.⁴⁴ I parenthesize here that England has perhaps 26,500 lawyers in all, of whom some 2,500 are barristers; again in relation to population, that is a third as many lawyers as we have.

On this simple showing it seems that we would do well to take a scientific look at how the English get over their court business. But gross observations would hardly be enough. Thus, the mere fact that in this country the federal system, with an intake of some 77,000 civil cases a year,⁴⁵ needs more than 350 district judges to cope sweatily with the resulting court work, whereas a few-score English judges do the like work accruing from nearly 300,000 cases a year, does not necessarily convict our judges of being relatively slothful or inefficient. One would have to ask, what sorts of cases enter the pipelines? That a great many Queen's Bench cases seem to involve simple debt collection may already diminish the apparent English achievement. A vital point of comparison is, how many cases remain to be tried? What accounts for the attrition? What are the size and nature of the cases that survive? I need not multiply questions. A comparative study, aided by computers, flow charts, and other paraphernalia would no doubt be worthwhile.

II. A FEW REFLECTIONS

My exposition is finished. I pass to short turns and encores. I have naturally been emphasizing differences between the English and American procedures. This has obscured an important point: that at the core the two systems are alike, they have not drawn so far apart as to be alien to each other or to mask their common origins. They are still instances or substyles of a common-law style, distinct from a civil-law style. What then is the grand discriminant, the watershed feature, so to speak, which shows the English and American systems to be consanguine and sets them apart from the German, the Italian, and others in the civil-law family? I think it is the single-episode trial as contrasted with discontinuous or staggered proof-taking. This characteristic must greatly affect the anterior proceedings that culminate in trial. It enhances the combative nature of the process. It determines in considerable part the attitudes and characters of lawyers and judges.⁴⁶

44. Figures for Superior Court, Middlesex County, Mass., from yearly *Calendar Status Studies* of the Institute of Judicial Administration. The English and American intervals mentioned are only loosely comparable, but the comparison is adequate for our general purpose.

45. See 1969 DIR. ADMINISTRATIVE OFFICE OF UNITED STATES COURTS, ANN. REP. table c-1 (civil cases commenced in the district courts during 1968-1969).

46. Kaplan, *Civil Procedure: Reflections on the Comparison of Systems*, 9 BUFFALO L. REV. 409, 418-19 (1960).

If in a deep-down, very fundamental sense the English and American systems are sympathetic, it remains true, as our narrative shows, that the palpable differences between them are many and significant. Moreover, we see that these features tend in each system to intermesh, to interconnect, to be mutually supportive. We begin to discern which of them are the most important—or, what may be just as crucial for any program of change, which are thought to be crucial and thus likely to enlist strong psychological allegiance. I venture to say that two features qualify well in both senses when we read the English system against the American: the costs cycle and the division of the legal profession on the barrister-solicitor line. Around these, it seems to me, a large number of the other differences tend to group themselves.

I make profert of the recent remarks of an able English lawyer on the temerarious possibility of passing from the English to the American order of things with respect to costs (or indeed from the American to the English): "The changes," he said, "that would be needed in the organization of the legal profession, court machinery, the assessment of damages and the legal aid systems alone would be too great to contemplate."⁴⁷ For candor's sake, I must tell you that the speaker was a taxing master who might be thought to have some personal interest in the question. But that is mere accident; I don't doubt that the systemic importance, if I may call it that, of costs is as he implied. The position regarding the division of the profession is nearly as clear.

Nevertheless, slight fissures can be seen even in these granitic shibboleths. The Council of the Law Society, the chief professional organization of solicitors, has recommended a departure from the usual rules to permit contingent fees for debt collection.⁴⁸ And on our own shore I hear a good deal of speculation about changing deliberately the usual rules governing liability for expenses of suit for the purpose of encouraging or discouraging specific kinds of litigation. Indeed, our Supreme Court itself has shown some receptivity to variations of the usual pattern.⁴⁹ As to the barrister-solicitor question, I doubt that the ancient punctilios of professional form can be exactly maintained in running a free legal-advice center. Nor is it without significance that a change of a person's career from

47. From a contribution to the Workshop on Civil Procedure and Evidence held in July 1970 at the Institute of Advanced Legal Studies, University of London.

48. See 67 L. Soc. Gaz. 237 (1970).

49. See *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 389-97 (1970); *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

solicitor to barrister has recently been made less difficult,⁵⁰ or that projects for the reform of English legal education generally stress a common course of study with later election of specialized subjects leading into one or the other professional branch. In the end, changes in the structure of the legal profession may be compelled simply by the rising costs of legal services. There is conceivably some halfway house between strict division of the profession and complete "fusion."⁵¹

III. WAVES OF THE FUTURE

A word more *pro futuro*. I think the more than mild interest in law reform which the English have shown during the past several years is not likely to disappear. I have mentioned the reports of the Winn Committee on Personal Injuries Litigation⁵² and the Beeching Commission on Assizes and Quarter Sessions,⁵³ to which I ought to add the findings of the Payne Committee on the Enforcement of Judgment Debts,⁵⁴ which tries to bring some decency and order into the seamier side of the credit system, but appears, strangely enough, to have ignored the lessons of the unfortunate American experience with garnishment of wages.⁵⁵ All have resulted or will eventuate in new legislation or court rules. In addition, one would have to mention the 1970 redistribution of business among the divisions of the High Court,⁵⁶ recent and projected changes in the legal aid and advice scheme,⁵⁷ reforms of the law of evidence,⁵⁸ and a recompilation and partial rewriting of the Rules of the Supreme Court which

50. See 113 SOL. J. 613 (1969).

51. As this lecture is being submitted for publication (December 1970) a Courts Bill responsive to the recommendations of the Beeching Commission (see notes 42-43 *supra* and accompanying text) is making its way through the House of Lords. Regarding the renovation of court structure, the bill ranks as perhaps the most important since the Judiciary Acts of the 1870's. The questions that are being most hotly debated, however, are on the status of solicitors vis-à-vis barristers—questions of extending in some measure solicitors' rights to try criminal cases and of making solicitors eligible to hold judicial office in certain lower courts. The issue is not "fusion" of the two branches as such.

52. See text accompanying note 5 *supra*.

53. See notes 42-43 *supra* and accompanying text.

54. COMMITTEE ON THE ENFORCEMENT OF JUDGMENT DEBTS (Payne Committee), REPORT, CMND. NO. 3909 (1969).

55. See generally *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969); *Hearings on H.R. 11,601 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 90th Cong., 1st Sess. (1967).

56. Administration of Justice Act 1970, c. 31, §§ 1-3.

57. See ADVISORY COMMITTEE ON THE BETTER PROVISION OF LEGAL ADVICE AND ASSISTANCE, REPORT, CMND. NO. 4292 (1970).

58. See note 24 *supra* and accompanying text.

became effective in 1966.⁵⁹ We should recall, too, that the substantive law of England is being re-examined by the Law Commission, which has made a solid start on its monumental task. The Law Commission is not barred from the field of procedure and one hopes it will enter in. All this is to the accompaniment of a questioning of ingrained institutions by a squad of young Turks who are met by establishment pressure, as heavy as it is superficially genial. All recognize the fundamental importance of the future tone of legal education; therefore the report of the Ormrod Committee on that subject is awaited anxiously.

Recent reforms of court procedure have of course been interstitial, have left undisturbed the accustomed parameters of the system. Is it the case that these procedures are especially resistant to change? A law-trained man, Franz Kafka, wrote—it was while he was incubating his novel about procedure, *The Trial*—that “every completed organization . . . strives to close itself off,”⁶⁰ and it is easy to relate this remark to mature procedural systems. In a similar vein, Holmes, on the first page of *The Common Law*, announced as a kind of fact of nature that whereas “the substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient, . . . its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.”⁶¹

But drastic changes may come about in the future through the pressure of exigent needs for the settlement of new kinds of disputes. What mechanisms for conflict resolution will be devised to meet the surge of problems boiling up from new group awareness, from class frictions, from freshly conceived individual demands upon centers of private power? What means will finally emerge for settling problems springing from technological revolution? All this strife, as yet far less intense in England than in the United States, challenges procedural ingenuity as well as substantive wisdom.

Can scholarship anticipate solutions and even nudge them along? If I may be excused a reminiscence, when I retired in 1966 as re-

59. See I I. JACOB, P. ADAMS, R. CHAMBERLAIN & K. MCGUFFIE, *THE SUPREME COURT PRACTICE* 1970, at 1 (1970).

Other stirrings may be found in LAW REFORM COMMITTEE, SEVENTEENTH REPORT: EVIDENCE OF OPINION AND EXPERT EVIDENCE, CMND. NO. 4489 (1970); LAW COMMISSION, ADMINISTRATIVE LAW, CMND. NO. 4059 (1969); LAW COMMISSION AND SCOTTISH LAW COMMISSION, THE INTERPRETATION OF STATUTES (1969); NATIONAL BOARD FOR PRICES AND INCOMES, REPORT NO. 54: REMUNERATION OF SOLICITORS, CMND. NO. 3529 (1968); COMMITTEE ON JUDICIAL STATISTICS (Adams Committee), REPORT, CMND. NO. 3684 (1968).

60. F. KAFKA, *THE TRIAL* 280 app. IV (Schocken paperback ed. 1968).

61. O. HOLMES, JR., *THE COMMON LAW* 5 (M. Howe ed. 1963).

porter to the Advisory Committee on Federal Civil Rules, the committee, on a detour from its regular sobersided duties, asked what would be a worthwhile basic research in civil procedure. For openers, I thought three sets of questions might be cultivated.⁶² First, which quarrels belong to the civil courts, constituted more or less as they now are, and which do not? Should matrimonial or probate matters depart from the courts on the heels of accident cases, and on what terms for each class? Should commercial cases, or some of them, be lured back? Should the new and more exotic disputes be drawn into the courts or barred the door and remitted elsewhere? Second, as to the cases to be allocated to the courts, should the drive toward a unitary procedure be abated, should special procedures be set up that are better accommodated to the intrinsic qualities of the problems presented? I suggest that we need to think less about "procedure" *eo nomine* and more about the particular social matrix; we should go from the problem in its setting to the appropriate procedure; whether or how the courts or any other dispute-resolving mechanisms are to be invoked will be conditioned by the other material solutions. My third research question would ask: what have modern management methods to offer for the day-to-day workings of the courts? In all three related researches, I would lay stress on the value of experimentation with live cases insofar as this would not involve illegal or unfair discrimination among litigants.

You may think this a sorry outline for a study; it may seem only an appeal to review all of civil procedure and much substantive law from the bottom up. So be it. But imagine the research as applied to England. The Beeching Commission report is receptive to the idea of scientific management, and is itself an example of knowing analysis of the operation of courts. With regard to variations on a standard procedure, recall that the English are not as much attached to unitary procedure as we have been; a number of variant procedures are today in use in the High Court, but whether the particular variations are justified functionally may be doubted. As to the prime question of which disputes belong in the courts, would the study end by suggesting that English courts could safely take on a livelier assortment of jobs than they do now? "Discussion about reform," said Lord Radcliffe, "ought to come round in the end to the question: what place are law courts going to occupy in the society of the future?"⁶³ Much more is involved than judgments about narrow procedural devices. For in England social problems have not framed

62. Reporter's Letter to Dean Acheson, Chairman, Advisory Comm. on Fed. Rules Civ. Proc., March 2, 1967.

63. C. RADCLIFFE, *NOT IN FEATHER BEDS* 34 (1968).

themselves so readily as cases for the courts; the courts by reason of long disengagement have not been looked to as dynamic instruments of public betterment.

IV. THE CONFIDENTIAL CLERK

With this excursus my speech might close, but I have left dangling the question put by the Confidential Clerk, the refugee from T.S. Eliot's play. Is English trial a better job all around? A worthy question, surely, but a bit broad and enigmatic. This is not a business of trying to assess by methods of agreement and difference the effects of a small twist of procedure, difficult as even that can be. Here two entire procedural systems are to be compared, seen in the form of models somehow to be abstracted. For it was implicit throughout our discussion that to evaluate "trial," one necessarily has to pass a series of judgments on the preparatory phases of litigation which feed into and condition trial—indeed, one really would have to go further and consider the effect on the trial proper of the modes of appellate review, a subject we have sought to avoid. Reflecting on the anterior steps, those preceding trial, one sees that the English do not go quite so far as we Americans do in our passion for sedulous accumulation and refinement of the facts, although the English surely would not say to us what Lady Elizabeth Mulhammer says to her husband in the same Eliot play: "I don't believe in facts. You do. That is the difference between us."⁶⁴ What price refinements of facts, however, for the kinds of issues with which the English courts are customarily dealing? And what are the values and disvalues of surprise—surprise to the English degree? We are led to a series of other conundrums. Can we avoid having to assess what is lost and gained by shrinking the role of the jury? If an English judge scores better for technical proficiency at trial, shall we subtract a point or two to reflect any probability that he has a class bias? When we speak of trial in one system as better than that in another, should this be taken in relation to the respective investments in the justice enterprise? What is the pertinence of the fact—I think it is a fact—that John Bull has greater confidence in the work of his civil judges than Uncle Sam has in his?

Can it be that the Confidential Clerk was knowingly asking a question which, if not unanswerable, is unanswerable in that form? I would not put it beyond him.

64. T. S. ELIOT, *THE CONFIDENTIAL CLERK* 105 (Harcourt, Brace & Co. ed. 1954).