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"Civilizing" Nonjury Trials

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With jury trial on the wane in American civil litigation, Professor Lacy contends that two systems of procedure might be feasible—one for jury trials and one for nonjury trials. The author here examines the sophisticated civil law nonjury procedure of Austria and the common law nonjury procedure of Israel in light of the underlying contention that Americans should consider devising distinct rules of procedure for nonjury cases.

This article is intended to make people think about American procedure, yet it is devoted largely to a description of Austrian and Israeli civil procedure and perhaps that calls for some disclaiming and confessing and avoiding. I have spent only a few months in the two countries and have no doubt that I am open to the charge, made against far more seasoned American comparatists,[1] that I tend to look at foreign systems through American conceptual spectacles. By way of avoidance let me offer, first, the usual defense of the popularizer. There never will be many serious students of comparative law in the United States. If foreign ideas are to play any part in thinking about American law, it is essential to get some general information out to the grass roots. Secondly, as indicated above, this article is intended as a consideration, largely by implication it is true, of American procedure and it is aimed at the reader who, whatever the level of his information and interest in foreign systems, knows a good deal about American procedure. I believe that such a person's thinking about his own system is likely to be enriched by even somewhat oversimplified ideas about a foreign system.

I.

Jury trial is on the wane in the United States. A strong case can

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1. NAKAMURA, A COMPARATIVE STUDY OF JUDICIAL PROCESSES 1 (Waseda Univ. Inst. Comp. Law 1 1959). Commenting on Von Mehren's comparative analysis of judicial process in *The Civil Law System, Cases and Materials for the Comparative Study of Law*, Nakamura writes: "Frankly speaking he simply analyzes the French and German legal systems (or the Japanese legal system, while he was in Japan) from the standpoint of an Anglo-American jurist . . . this cannot be called comparative legal study." *Id.* at 13.

be made for its retention in criminal cases and personal injury cases. Here the essence of the trial is not so much, or at least not solely, to find isolated historical facts, but rather to evaluate facts and pass community judgment on a complex human situation.[2] Also, in personal injury cases, many contend that the jury supplies a devious but on the whole desirable, corrective to certain draconian rules of substantive law.[3] Outside these fields little can be said in favor of jury trial. There is no need to elaborate its expense, cumbersomeness, and unfitness to deal with complex issues. Waiver of jury, frequent today in commercial and other "inhuman" cases, will probably become more frequent and spread to other kinds of cases.[4] And of course, there is the equity side.

There is nothing new about this and the purpose of this article is not to argue for or against jury trial, but to suggest the possibility of reforming the procedure followed in such nonjury trials as may occur. The rules of procedure relating to the definition and determination of issues of fact, in particular, the rules of evidence, in force in American jurisdictions were designed for jury trial.[5] They emphasize formality and breathe a considerable distrust of the fact finder. Varying with jurisdiction, judge, and counsel, there may be more or less common-consensual relaxation of these rules in nonjury

2. *Cf.* Curtis, *The Trial Judge and the Jury*, 5 VAND. L. REV. 150 (1952) (jury's proper function is to react emotionally and irrationally).

3. 2 HARPER & JAMES, TORTS 889-95, 1128-29 (1956); Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831, 832-35 (1961). For a recent protest against such left-handed law reform, see Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 503-06 (1962).

4. This has been the course of development in England. It has been aided some by statute, and of course there is no constitutional impediment, but presumably the change reflects what the people want. See DEVLIN, TRIAL BY JURY 129-35 (1956). Recent appraisals of the jury system in the United States appear in JOINER, CIVIL JUSTICE AND THE JURY (1962), reviewed by Herbert Galton, 42 ORE. L. REV. 91 (1962); Green, *Juries and Justice—the Jury's Role in Personal Injury Cases*, 1962 U. ILL. L.F. 152. See also Foster, *Jury Trial on Trial—A Symposium*, 28 N.Y.S.B. BULL. 322 (1956).

5. The traditional view that the jury system is the mother of the rules of evidence is questioned, with specific reference to the hearsay rule, in MCGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 15 (1947) and Chadbourn, *Bentham and the Hearsay Rule*, 75 HARV. L. REV. 932, 938 (1962). Mannheim, "Trial By Jury" in *Modern Continental Criminal Law*, 53 L.Q. REV. 99, 388-94 (1937), explains how adoption of jury systems on the continent following the French Revolution was associated with a liberalizing of the law of evidence. However "evidence," to a civilian, means rules for the evaluation of proof rather than rules of admissibility. The liberalizing of which Mannheim speaks took the form of rejection of formal rules of proof which operated positively as well as negatively (an accused *had* to be convicted upon certain kinds of evidence) in favor of requirements of moral proof or *intime conviction* because it was believed that such an undirected, essentially subjective, decision was more safely left to a lay group than to an official.

cases, but there is no institutionalizing of such relaxation.[6] Thus, counsel can, and undoubtedly where the interest of his client so dictates, should limit the evidence that may be considered by an experienced judge—limit it by excluding matter that would be properly and reasonably taken into account by a non-professional trial examiner, or a cautious businessman, in deciding a comparable issue. In less dramatic ways and probably with less serious effect on the outcome of the case, he may insist on formality at the expense of convenience and dispatch in such matters as where and when witnesses will be heard and the proof of not seriously contested allegations. Again nothing new. What is new to me, and perhaps even new to some readers, is the idea of separate rules of procedure for jury and nonjury trials. More likely to be new, and, initially at least, likely to be somewhat unpalatable, is the idea that these nonjury rules might be influenced by foreign practice. This article is an effort to present the relative simplicity and straightforwardness of trial in some other parts of the world and so to raise the question of the possibility of adopting certain foreign devices without abandoning the basic principles and virtues of our system of procedure.

II

It is natural to begin a search for foreign models in the continental, civil law countries, as everyone knows they do not use juries.[7] As will shortly appear, I think wholesale borrowing from a civil law country would be unwise, but a brief description[8] of a representative system is given here with the idea that it will give added insight into

6. Davis, *Hearsay in Administrative Hearings,* 32 GEO. WASH. L. REV. 689, 693 (1964).

7. Actually most of them do, after a fashion, but not in civil cases and the various codes of civil procedure are free from any influence by the problems created by jury trial. FORSYTH, TRIAL BY JURY 295-30 (1875), contains a 19th century account of jury trial in criminal cases in France and Germany. Mannheim, *supra* note 5, gives a very thorough account of the situation on the eve of World War II.

The modern French situation is described in Pugh, *Administration of Criminal Justice in France: An Introductory Analysis,* 23 LA. L. REV. 1, 4 (1962). A panel of three professional judges and nine laymen, sitting and deliberating together, is used in the Cour d'Assises for trial of serious offenses. Lesser crimes, punishable by up to 5 years imprisonment, are tried by a judge or panel of judges.

At present in Austria, criminal cases are ordinarily tried by *Schoffengerichte* made up of 2 judges and 2 laymen. "Simple" cases may be tried by a single judge. STRAFPROZESSORDNUNG § 13 (1960). Serious cases in which a penalty of 10 years imprisonment or more is asked for are tried by a *Geschwornengericht* made up of 3 judges and 8 jurors. STRAFPROZESSORDNUNG §§ 14, 300. The judges have more control over the verdict than American judges although they do not deliberate with the jurors. STRAFPROZESSORDNUNG §§ 332-37. A more complete explanation appears in BLASCHE, A GENERAL EXAMINATION OF THE LAWS OF AUSTRIA with REFERENCE TO UNITED STATES CONSTITUTIONAL SAFEGUARDS 11-12, 46-48 (1961).

8. More elaborate recent descriptions of European systems of civil procedure may be found in: Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure,* 71 HARV. L. REV. 1193, 1443 (1958) (Germany); Lenhoff, *The Law of Evidence,* 3 AM.

certain features of Israeli common law nonjury procedure, a consideration of which is going to be the main concern of this article. I have chosen Austria's as one of the most recently drafted and advanced systems and one held in high regard by European proceduralists.[9]

An American trial may be likened to a play produced by counsel for the judge (or jury). A comparable short characterization of Austrian civil procedure would depict the judge compiling a file on the case with the aid of counsel.

Note that the above paragraph contrasts American "trial" and Austrian "civil procedure." This is because the Austrians do not separate the pleading and motion stage from the trial proper. As in America, an action commences with the filing of a written complaint (*Klage*) to which the defendant, after certain formalities, responds with his *Klagebeantwortung*. These papers differ from common law pleadings in several respects. They are not at all binding upon the parties, but are intended to indicate the general course of judicial inquiry. Technically, they have no legal effect until acknowledged at a court session and incorporated by reference into the record (the

J. COMP. L. 313 (1954) (Austria); Murray, *A Survey of Civil Procedure in Spain and Some Comparisons With Civil Procedure in the United States*, 37 TUL. L. REV. 399 (1963) (Spain).

A good short description of German procedure appears in Kaplan, *Civil Procedure—Reflections on the Comparisons of Systems*, 9 BUFFALO L. REV. 409 (1960). Professor Kaplan is well aware of the danger of indiscriminate borrowing out of context and interestingly relates an over-all difference between German and American procedure (*i.e.*, efficient, but not over precise, mass production v. exceedingly fine, and exceedingly slow and expensive, grinding of the particular case) to a basic difference in substantive concepts, *i.e.*, application of the generalized norms of a code versus common law case matching. *Id.* at 421, 426. He makes the point, however, that some procedural reforms currently under consideration in the United States, perhaps unknown to their supporters, closely parallel the German system: "unmistakably we are moving along certain lines already familiar to foreign procedures, and I make the simple suggestion that we could perhaps profit by consulting the analogous foreign models and experiences directly and explicitly." *Id.* at 422.

9. The essential outlines of modern Austrian civil procedure were laid down in the Zivilprozessordnung of 1895 drafted by the great Franz Klein. Naturally there have been numerous amendments since then as to detail. The basic German procedural law dates from 1877 and is quite similar to the Austrian. The parallel development of the two systems in the 18th and 19th Centuries, the advantages of the later-drafted Austrian law, and its influence on German procedure may be studied in ENGELMANN, A HISTORY OF CONTINENTAL CIVIL PROCEDURE 507, 508, 635-37 (Millar 1927). See also Kaplan, 9 BUFFALO L. REV. at 416-18; Lenhoff, *supra* note 8, at 316. In France the present Code of Civil Procedure "is a barely revised edition of the Ordonnance of 1667," DAVID & DE VRIES, THE FRENCH LEGAL SYSTEM 13 (1958); ENGELMANN, *op. cit. supra* at 748-51.

Modern English procedure is founded on the Hilary Rules promulgated in 1834, the Common Law Procedure Acts of 1852, 1854, and 1860 and the Law of Judicature Act of 1873. Probably most American systems can be referred, mediately or immediately, to the English reforms, the Field Code of 1848, or the Federal Rules of Civil Procedure of 1938.

Protokoll). Even then they are freely amendable at any stage of the trial. All this reflects the cardinal principles of "orality," material truth, and judicial control which dictate that the procedure be a live conference (usually in practice a series of conferences) between the parties, counsel, and witnesses, supervised by the judge.[10] At these sessions, the judge must be free to develop the truth unfettered by technicalities and unlimited by any version of the facts that the parties, through ineptness or ulterior motives, may have presented in their pleadings.[11]

An Austrian lawyer who was kind enough to read over a draft of this article writes respecting the preceding paragraph: "We think that our civil procedure has expedited the handling of cases a good deal compared to older procedures. We also think that in the interest of fast proceeding in average cases our ZPO (*Zivilprozessordung*) creates definite obstacles to bringing in new evidence or changing the legal basis of the complaint as the case is going on. Therefore, I wouldn't agree that the *Klage* and *Klagebeantwortung* are *not at all* binding on their authors and that they are freely amendable at any stage of the case." And further "The judge does decide who will be called as a witness but he cannot call any person who was not on one of the parties' lists. Here ends material truth and judicial inquiry which we don't think we have." The applicable code provisions are ZPO § 235, which provide that the complaint may be amended at any time with the consent of the opponent and over the opponent's

10. While these principles and the conference system are the hallmark of modern Austrian and German procedure, it must not be assumed that they were radical innovations of the Austrians in 1895, any more than our Federal Rules superseded by battle overnight in 1938.

"'Orality' was the slogan and battle cry" in 1848 and earlier, Kaplan, von Mehren and Schaefer, *supra* note 8, at 1213. Its doctrinaire overemphasis was one of the faults of the German Code of 1877, avoided by the Austrians and alleviated by subsequent amendments in Germany. ENGELMAN, *op. cit. supra* note 9, at 620-22, 636-37. Material truth and judicial control reached their zenith in the Prussian General Ordinance of 1793, and then were greatly de-emphasized in favor of party presentation as part of the wider 19th Century liberal revolt against paternalistic government. *Id.* at 590-94. As with "orality," the Austrian code makers concluded that the German reformers also had gone too far here, and the Austrian code gives the court considerable power to ascertain facts independently. *Id.* at 636. See Murray, *supra* note 8, at 400, 429, 441, regarding the modern situation in Spain.

"Immediacy"—the principle that the entire trial must be conducted by the judge or judges who will make the decision—is instanced by Lenhoff as the most important new feature of the 1895 code. Lenhoff, *supra* note 8, at 316-18. One of the main points of my article is that Austrian trials involve considerably more writing than American trials. See note 15 *infra* and accompanying text. When a continental proceduralist emphasizes the "orality" and "immediacy" of Austrian or German procedure he is contrasting it with the system formerly followed there, and still in many European countries, whereby civil litigation is carried on almost entirely on paper. A Belgian lawyer once told me he had taken part in hundreds of trials but could not remember ever seeing a wituess in court.

11. ENGELMANN, *op. cit. supra* note 9, at 636.

objection if the judge considers that this will produce no serious complication or delay of the proceeding; and ZPO § 183, which provides that the judge may summon any witness "from whom according to the complaint or the course of proceedings clarification of material facts might be expected" unless both parties object thereto. Perhaps my friend's letter suggests that these powers are rather seldom used in practice. I suspect that our difference is attributable, in the main, to the fact that he is comparing his system with the older Austrian system, or with civil law systems which put greater emphasis on judicial control, whereas my comparison is with an American system. Also undoubtedly an observer of a foreign system is prone to oversimplify and exaggerate differences in an effort to organize his thinking about the foreign system vis-á-vis his own. Some of this is excusable, perhaps even desirable for orientation purposes, but the reader is cautioned that modern Austrian procedure has moved considerably from the polar informal-inquisitorial position suggested in the preceeding paragraph just as ours has come a long way from the formal-adversary pole.

Austrian pleadings contain more detailed factual statements and are more argumentative than those in America. They must indicate the means by which the pleader proposes to prove each fact alleged, for example, they typically contain a list of witnesses and documents.[12] While they should not include propositions of law or citations to legal authorities, they frequently do. However, there is no reason to strike such material, since the pleadings are not considered to be part of the record. As the case proceeds, often in preparation for, or as a sequel to, a conference, counsel will generally file further papers called *Schriftsätze*. These may be tenders of proof, or amended pleadings, or stipulations, or memorandums of law, or factual argument, or, frequently, a combination of these.

The heart of the procedure is a series of oral conferences or hearings (*mündliche Verhandlungen*). The first of these is ordinarily attended by the parties and their counsel, without witnesses, and is devoted to a discussion aimed at defining the dispute and, so far as possible, eliminating issues of fact. When a factual issue is arrived at, the parties suggest methods of investigation and the judge makes a decision (*Beweisbeschluss*) indicating what proofs will be taken. This is generally followed by a conference devoted primarily to proof taking and then conferences for further discussion, restatement of positions, tenders of further proof, *et cetera*. Usually several weeks elapse between conferences. This is partly due to docket difficulties, but it is also desirable to enable counsel to find witnesses, procure experts' reports, and otherwise to prepare the case. There is no idea of

12. See Appendix A.

preparing the entire case for presentation at one continuous session. This would be considered most inefficient as there is always the chance that certain anterior issues may be resolved in such a way as to dispose of the whole case. Thus in negligence cases, the liability issue ordinarily will be carried through to final judgment, and even appealed, before damages are considered.

A major function of the judge at each conference is the building of the *Protokoll.* He does this by dictating audibly[13] in open court to a *Schriftführer* (usually an apprentice judge or lawyer), the gist of what each speaker has said—whether testimony, argument by counsel, tender of proof, or his own rulings. There is no verbatim record. Although this dictation is in the first person, as though the witness were speaking, the *Protokoll* reflects the judge's interpretation of what was said. Since counsel and witnesses have a chance to correct any misunderstandings on the spot, the *Protokoll* is often more accurate than a stenographic transcript. It is certainly more meaningful. The extraneous and immaterial are omitted; if a witness is vague, confused, or self-contradictory, he is ultimately pinned down and only his final version recorded.

The mode of examination of a witness also contrasts quite sharply with American practice. All the witnesses are the court's and not the parties'. The judge decides who will be called and the order in which they will be examined and he conducts the examination-in-chief. Cross-examination is permitted, but is usually quite brief and restrained. Counsel, and even the parties, may occasionally interrupt a witness to contradict him or point out the factual or legal implications of his testimony. This is not strictly proper but is tolerated within reasonable bounds.[14] Also, there are provisions for taking testimony outside of the courthouse, for example at the home of a sick or elderly witness, and in other parts of the country. This will generally be done by a sort of "deputy judge,"[15] who is instructed by the court charged with deciding the case (the *erkennendes Gericht*)

13. The judge must dictate "loudly." YUGOSLAV LAW ON CIV. P., art. 115 (largely based on the Austrian law).

14. See Appendix B.

15. If the auxiliary prooftaking is outside the territorial jurisdiction (*Sprengel*) of the *erkennendes Gericht* an *ersuchter Richter* (requested judge) is used. This will be a judge, often of an inferior court, having competence in the place where the examination is to be conducted. Proof taking outside the courtroom but within the *Sprengel* of the *erkennendes Gericht* is usually conducted by the judge in charge of the case. If a case is heard by a multi-judge *Senat* such tasks may be assigned to a single member of the panel—a *beauftragter Richter* (delegated judge). In theory any case involving more than 100,000 schillings ($4000) will be heard by a *Senat* but in practice *Senate* are rare, the parties usually consenting to trial before a single judge to avoid delay. A criminal trial usually involves at least one session at the scene of the crime (*Lokalaugenschein*) in which the prosecution's version of the crime is reenacted, often with the defendant in the starring role.

to examine certain witnesses, inquire into certain matters, and prepare a portion of the *Protokoll.* In practice, counsel try to bring witnesses of any importance before the *erkennendes Gericht,* sometimes after a preliminary appearance before a "deputized judge." There is very little law of evidence as we think of it—a few privileges and rules about authentication of documents but nothing remotely approaching our complex of exclusionary rules. Experts (*Sachverständige*) are much used, not only in respect to medical and scientific questions, but also on such matters as the cause of traffic accidents and economic consequences of injuries to person and property. An expert will usually file a written report (*Gutachten*) containing a certain amount of fact-finding as well as his conclusions, but he often makes no supplementary "live" appearance in court, unless so requested by one of the parties. Counsel are more likely to propose the appointment of another expert than try to shake an unfavorable report by cross-examination.

When the court considers that the case, or a severed issue such as liability, has been sufficiently ventilated, it declares the oral hearings closed and retires to review the *Protokoll* which by now may include pleadings, *Schriftsätze,* testimony, experts' report, perhaps the record of a criminal prosecution or police investivation connected with the main action, and even such items as newspaper clippings reporting the death of a witness. On the basis of the *Protokoll,* the court decides the case and writes a "reasoned" judgment (*Urteil*) which sets out its view of the facts and law, explaining why it disbelieves certain witnesses, and so on. Appendix D is an example of such a judgment.

The judgment of the court of first instance is added to the *Protokoll,* and an appeal (*Berufung*), if there is one, involves a more or less de novo consideration of the whole record. The second instance court may re-examine witnesses heard below or hear new evidence, but there is a strong inclination to accept the trial judge's finding of simple, historical facts though not necessarily his evaluation and inferences. A third instance procedure (*Revision*), reviews only questions of law and there is usually no personal appearance by counsel.[16]

If an issue such as liability has been separately decided, the interlocutory judgment (*Zwischenurteil*) may be carried through *Berufung* and *Revision* before going on with the rest of the case. There is also a procedure for interlocutory review of procedural rulings

16. This is fairly typical. Presently in Yugoslavia, counsel are not usually allowed to appear even in the court of second instance, although a change in this rule is under consideration. In Germany audience before the Federal Supreme Court is restricted to members of a very select bar.

(*Beschlüsse* as opposed to *Urteilen*). This is called a *Rekurs* and is decided without appearance and ex parte. In theory, counsel may not even know that his opponent is seeking a *Rekurs*. Many rulings are not reviewable[17] and more are not specially reviewable[18] (that is, they will be considered only if and when there is a review of more important matter). However, the more important ones usually are reviewable.[19] This also bespeaks a procedural philosophy that favors settling each issue definitively as it arises.

All this seems rather chaotic to an American observer, on first acquaintance. He soon observes, however, that the system works tolerably well. The Austrian legal profession is, of course, thoroughly familiar with it, and there is no need to unify the presentation of a case, or keep it simple, for a lay jury. The American observer may in time conclude that the system has considerable virtues of flexibility and naturalness. It indeed closely resembles the way most of us would conduct a serious investigation unhampered by formal rules. Nor is delay excessive. The trial starts much sooner and, in all probability, the case is finally disposed of faster than in America. Delays for interlocutory appeals are not much more than the ordinary time lapses between first instance hearings.[20] While episodic, stop and go procedure is, of course, impossible with a jury, and with a judge, if an impressionistic reaction to the whole case is desired, it is by no means unsuitable if the objective is careful collection and recording of data followed by a decision on the basis of a completed "file."

In fact, the major objection to borrowing from a civil law system of procedure is not its disorderliness, but its inquisitorial nature. Of course, I do not mean black hoods and thumb screws. Modern western European procedure is as civilized as our own and in fact many continental lawysrs regard our method of cross-examination as somewhat barbarous. Rather, the weakness of the inquisitorial method is that by charging the judge with active direction of the case and muting the function of counsel it makes it harder to find the truth. In order to direct the case efficiently—decide what witnesses to hear, and in what order, map out the line of questioning to be

17. *E.g.*, ZIVILPROZESSORDNUNG § 82 (fixing time for discovery and inspection of documents) (hereinafter cited ZPO); ZPO § 349(2) (whether to continue hearing when witness refuses to testify or to take oath).

18. *E.g.*, ZPO § 130(2) (setting time and place of hearing); ZPO § 173(2) (excluding public from hearing); ZPO § 277 (*Beweisbeschlusse*); ZPO § 349(1) (deciding legality of witness's refusal to testify or take oath).

19. *E.g.*, ZPO § 193 (declaring proceedings closed, *i.e.*, finally terminating proof-taking and argument); ZPO § 194 (reopening for further conferences). Compare ZPO § 153 which precludes any review of an order relieving party of consequences of default.

20. See Appendix C.

pursued with each, *et cetera*—a judge must almost inevitably make some tentative hypothesis about the facts. This introduces a considerable psychological danger that the judge will unwittingly persuade himself by his own questioning.[21] Judicial direction of the inquiry is more pronounced in criminal cases, and the danger just noted accordingly more serious, but it is a not inconsiderable factor on the civil side. Further, in view of the concepts that the witnesses are the court's and not the parties', and that their examination is a search for truth by the judge with the cooperative assistance of counsel, there can never be such an effective cross-examination as in a system that conceives of counsel's first duty as being to doubt and to shake. And while it is doubtless a hackneyed observation, no one who has ever seen it done well can have any doubts that cross-examination is indeed a marvelous engine for the discovery of truth—or at least for the detection of falsehood.

If the foregoing is the sole objection, and the flexibility and informality of Austrian procedure are desirable, why not adopt it with such modifications as would permit adversary direction of the case and effective cross-examination? The answer might be that this would involve tampering with basic concepts and thus the danger of dislocating the whole system. Instead, I suggest consideration of a common law adversary system which because it has no jury seems to have developed—or to be on the way to developing—many of the desirable features of the Austrian system. This brings us to Israel.

III.

During the British mandate in Palestine (1923-1948), the Ottoman procedure, imposed by the former Turkish rulers and based on the French system, was displaced by rules of civil procedure[22] and a

21. *Cf.* Fuller, *The Adversary System* in TALKS ON AMERICAN LAW 30, 41 (Berman ed. 1961): "[I]t proceeds from a very understandable desire to bring the hearing into some order and coherence, for without some tentative theory of the case there is no standard of reference by which testimony may be measured. But what starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a final conclusion, as all that confirms the diagnosis makes a strong imprint in the mind, while all that runs counter to it is received with divided attention." My Austrian friend writes in this connection: "There is indeed a psychological danger in the judge directing the case. If the case is complicated and the judge a poor jurist, he is likely to be inclined to direct fact finding according to his wishes so that he will be enabled to come to a suitable legal conclusion. But counsel will hear this in each question and protest against it or even, as a last resort, ask that the judge be disqualified. If the judge is a good judge then our system of questioning witnesses at first by the judge is very efficient and there is not so much chance for counsel to embarrass and confuse witnesses. If the judge is not as good as he is expected to be by the ZPO (jura novit curia!) then everything you mention here is true. But what can you do against poor judges anyway?"

22. CIV. P. ORD., 1938, repealed the Ottoman Code of Civil Procedure. The basic enactment is the CIV. P. RULES, 1938, published in Supplement No. 2 to the Palestine

number of ordinances regulating criminal procedure.[23] The former was promulgated by the Chief Justice of Palestine and the latter was enacted by the High Commissioner (both Englishmen). They followed closely contemporary English models, with one significant exception: no provision was made for jury trial in either civil or criminal cases. On the civil side, the jury was, of course, virtually extinct in England by this time (1938). On the criminal side, perhaps the decision was attributable to England's status as an alien ruler increasingly at odds with the Arab and Jewish population. Undoubtedly, the jury system works best where government is "of the people" and where the criminal law is regarded as a means of protecting person and property rather than as an instrument of foreign domination.[24] Whatever the reason, jury trial was not adopted in Palestine and so not only were the rules of civil procedure drafted without any thought of application in jury cases, but also they were used, administered, amended, *et cetera*, by lawyers with no carry over of "jury-thinking" from criminal practice.

Since obtaining independence, there has been no basic change in Israeli civil procedure. The first legislative enactment of the Provisional Council of State included the following reception clause:

The law which existed in, Palestine on the 5th Iyar, 5708 (14th May, 1948)

Gazette Extraordinary No. 755 of 31st January 1938. Important also are the EVIDENCE ORDINANCE 1 LAWS OF PALESTINE 670; Ordinance No. 38 of 1940, and the COURT'S ORDINANCE, Palestine Gazette No. 1032 of 25 July 1940. The latter two items are reprinted in SALANT, CRIMINAL PROCEDURE AND PRACTICE IN PALESTINE 250, 275 (1947).

23. Most importantly, the Trial Upon Information Ordinance, 1 LAWS OF PALESTINE 475; the Magistrates' Courts Jurisdiction Ordinance, 1939, Palestine Gazette No. 964 of 23rd November 1939; the Magistrates' Court Procedure Rules, 1940, Palestine Gazette No. 979 of 15th January 1940; and the District Court (Summary Trials) Rules, 1938, Palestine Gazette No. 757 of 10th February 1938, all reprinted in SALANT *op. cit. supra* note 22.

24. *Cf.* United States v. Seagraves, 100 F. Supp. 424 (D. Guam 1951), holding omission of right to jury trial in Guam's organic act was deliberate, and observing that "the jury system needs citizens trained to the exercise of the responsibilities of jurors, a responsibility which it is hard for people not brought up in fundamentally popular governments at once to acquire." *Id.* at 425. The same idea is expressed in Balzac v. Puerto Rico, 258 U.S. 298, 309-10 (1921). Juries are used in Australia and Canada and were, to some extent, in British India in cases involving Englishmen. See INDIA CODE OF CRIM. P. §§ 29-32, 266-88 (1898).

The fascinating collection of privy council cases in HOLLANDER, COLONIAL JUSTICE (1961), suggests considerable variation but no consistent pattern. See *id.* at 39 (Basutoland—ritual murder—jury), 40 (Bechuanaland—attempted murder—no jury), 48 (British Guiana—armed robbery—jury), 66 (Japan, Consular Court (1897)—murder—argument that natural born British subject entitled to jury trial), & 86 (Swaziland—murder—no jury). Apart from any question of the popularity of the government, it may be decided not to import the jury when a common law system is adopted in an area used to civil law methods. *Cf.* United States v. Seagraves, *supra* (noting tradition of Spanish law on Guam); Gahan v. Lafitte, 3 Moore 382 (P.C. 1842) (St. Lucia, West Indies, governed by ancient law of France save as superseded by British Orders in Council, criminal trials by 3 judges and 3 assessors).

> shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities.[25]

While there have been amendments, some of considerable importance, no fundamental change has taken place since 1948.[26] Recently, the Civil Procedure Rules, 1963, were drafted and promulgated by the Minister of Justice, but they generally adhere to the basic philosophy and approach of the 1938 rules.[27]

In spite of anti-British feeling in the early years of the State and the large number of lawyers with a continental background, the law and the legal profession has a strong Anglo-American, common law cast.[28] Thus, English is a required course in the Hebrew University Law School for students not proficient in the language. The library

25. Law and Administration Ordinance § 11 (5708-1948). English translation in 1 LAWS OF THE STATE OF ISRAEL 7 (5708-1948); *cf.* the Mandatory Reception Statute, Palestine Order in Council, § 46, 3 LAWS OF PALESTINE, 2579 (1922), reprinted in SALANT, *op. cit. supra* note 22, at 206.

26. Israel's short legal history is recounted in BAKER, THE LEGAL SYSTEM OF ISRAEL (1961); Akzin, *Codification in a New State*, 5 AM. J. COMP. L. 44 (1956); Yadin, *Reception and Rejection of English Law in Israel*, 11 INT'L & COMP. L.Q. 59 (1962).

27. A bill for a new Code of Criminal Procedure was introduced in the Knessett by the Minister of Justice in May 1963. This proposal derives in considerable part from a draft prepared in 1959 by *Harvard-Brandeis Co-Operative Research for Israel's Legal Development* (1959). For accounts of this unusual foreign-aid program, see Akzin, *supra* note 26, at 73; and Laufer, *Co-operation between Harvard and Israel in the Field of Legal Drafting*, 41 A.B.A.J. 969 (1955). The 1963 bill retains the basic adversary-accusatory, non-jury system but makes some far-reaching changes in detail, notably an increased opportunity for discovery by the defendant and provisions encouraging him to plead factually. Generally speaking, criminal procedure lies within the exclusive competence of the Knessett whereas the Minister of Justice may make rules of civil procedure.

28. It was seriously contended as recently as 1956 that the Israeli Supreme Court was bound by post-1948 decisions of the English House of Lords on the theory that this is the ultimate authority on the content of "the common law," Yadin, *supra* note 26, at 70-71; *cf.* Akzin, *supra* note 26 at 54-55. Referring to the preference of Israeli judges and lawyers for common law methods and their resistance to codification, despite the fact that many of them are "civilians" by training, Professor Akzin speaks of the "enthusiasm of the neophyte" and suggests that ex-continental jurists find common law methods "more work but also more fun." He says that at present English influence is waning and American gaining. *Id.* at 67.

As further evidence of the pervasiveness of common law ideas see the Israeli opinions summarized in Appendix G. See also Sussman, *The Role of the Judge in Directing Civil Proceedings*, 1962 INSTITUTE FOR LEGISLATIVE RESEARCH AND COMPARATIVE LAW, ISRAELI REPORTS TO THE SIXTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 35 (The Hebrew University Student's Press ed.) (judge of the Israeli Supreme Court deplores "sporadic attempts to supersede the English [*i.e.*, adversary] system" in the name of anti-colonialism); Attorney-General v. Berkowitz [1959], C. A. 360 (English summary in Appendix G). "[T]he fact that the courts of Israel are not obliged to adopt the principles of English common law *holus bolus* should not be interpreted as meaning that some of the finest principles . . . should not be emulated." The particular principle emulated in this case was the trespasser-licensee-invitee distinction in landowners' liability cases.

contains many more English and American than Hebrew books, including most of the national reporter system, many of our law reviews, Wigmore, Williston, Prosser, *et cetera.* There are fewer French, German and Spanish titles, principally in the fields of Roman law, comparative law, international law, and jurisprudence. Several opinions of the Israeli Supreme Court are printed in Appendix G from which the reader may judge for himself the persistence of English substantive rules and habits of legal thought.

However, like all young nations, Israel has a strong desire to assert her independence.[29] Unlike many young nations, she enjoys a level of culture and intelligence, both among the general population and, more importantly in the present connection, among the legal profession, that is very high indeed; and this, coupled with the eclectic bent of the Jewish people, has produced a number of innovations and variations on the basic English model that are worthy of serious study by anyone interested in legal procedure. The remainder of this article is concerned with a number of these that seem to bear some relation to the absence of a jury. Since the article is not intended as a general survey of Israeli procedure but rather to suggest possible changes in American systems, references are made to repealed and proposed Israeli rules as well as to existing law.

Emphasis on Writing

Although several references have been made to the principle of orality in Austrian civil procedure, it, in fact, relies far more heavily upon pencil and paper than do the common law systems. First and foremost, there is the *Protokoll* expressing the judge's interpretation of the testimony and argument. Also, there are the expert's *Gutachten* and counsel's pleadings and *Schriftsätze.* Although, technically, these do not become a part of the record until incorporated by reference during an oral hearing, once this is done there is little doubt that the documents have more lasting importance than anything said about them. The point was made that the judicial process in Austria is essentially a matter of reviewing and deciding on the basis of a file meticulously and disjointedly compiled—a process obviously impossible so long as jury trial is the matrix of the system. It is submitted that some features of Israeli procedure tend to move it in the direction of the Austrian.

Judge's Notes

The 1938 Rules of Civil Procedure contain the following provisions:

29. *Cf.* Akzin, supra note 26, at 66: "a certain intellectual pride which does not take kindly to the idea that the ancient Jewish people, so steeped in a rich juristic tradition of its own, should simply copy the legal institutions of another nation."

193. The presiding judge shall record the evidence of each witness in narrative form, and shall sign the record at the end of each sitting.

194. The court, may, of its own motion or on the application of any party or his advocate, take down any particular question and answer, if there appears to be any special reason for so doing.

195. Where objection is taken to any question put to a witness, the objector shall state his reason for the objection, the party desiring to put the question shall answer such objection and the court shall then decide on the admissibility of the question. The court shall, if requested by either party, and may of its own motion, record the question and its decision together with a note of the arguments.

. . .

197. Where any judge is prevented by any cause from concluding a trial of an action, another judge may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down or heard by him, and may proceed with the action from the stage at which his predecessor left it.

. . .

200. The presiding judge shall record any application or submission made by any party at the hearing of the action or any proceeding therein.

These sections are interpreted literally to require the judge to keep the record in his own handwriting as the hearing proceeds, including therein the gist of each important question and answer, submissions of counsel and court rulings with the reasons therefor. Though it is not required, some judges read more or less audibly as they write and ask counsel and witnesses if the writing is correct.

This method of record-keeping originated because of the unavailability and expense of shorthand reporters, and currently there are proposals to abandon it.[30] The defects are obvious: it is often painfully slow and much "demeanor" evidence is lost. Worse, the constant interruptions so the judge may "catch-up" break the flow of the examination and give a dishonest witness too much time to think. Apparently none of the judges follow the continental practice of waiting until the witness has finished, or reached a natural breaking point, before summarizing the testimony.

But are there not some offsetting good points? The judge is encouraged, even forced, to play an active, vocal part in the trial. Arguably this contributes to his understanding and to greater precision. Here is an excerpt from a trial I watched:

Counsel: "How far were you from the plaintiff, in meters"?
Witness: "In meters? (helplessly) I don't know . . . ."
The Court: "Would you say to that table? Or to the window"?

30. The ISRAELI CIV. P. RULES, 1963, authorizes the use of shorthand reporters, and also electronic recording devices, but their actual use is still very rare. I have been told that there are only about two dozen Hebrew shorthand reporters in the entire country, and that the services of most of these are required by the Knessett.

Witness: "Yes, about that, the window."

The Court: "Will counsel agree that that is about four meters"?

Counsel: "Yes."

The Court: (muttering and writing) "I was about four meters away."

Very likely, the same expedient would have occurred to counsel and perhaps the incident illustrates more than anything else the readiness of an Israeli judge to participate in the examination. But more difficult situations can be easily imagined and an American judge, even though his greater experience may suggest a possible solution that counsel overlooked, would probably remain silent.[31] The Israeli judge, on the other hand, is impelled by the necessity that he write something down to intervene in order to get it straight and get it definite. It is only human to prefer to record "4 M" instead of "I don't know," but shorthand reporters and tape recorders are not allowed such preferences.

I would not seriously suggest that we fire our court reporters and make judges keep the record. But it might be interesting to try something like the Austrian *Protokoll* system. Let the examination proceed as at present with no recording other than the judge's abbreviated personal notes. At suitable intervals let him dictate a narrative account of the testimony in the presence of counsel and witnesses, and any misunderstandings or disputes about what was said could be cleared up by on-the-spot re-examination. Possibly a verbatim shorthand or electronic record of testimony could be kept in addition to the dictated *Protokoll,* but only as an nltimate source and with the understanding that the *Protokoll* is the primary record. This would not differ much from the present practice in judge-tried cases where the judge makes his decision on the basis of his notes, and a transcript of the shorthand record is called for only if there is an appeal. The added requirement of keeping a *Protokoll* would give counsel a chance to correct errors and omissions in the judge's notes and, above all, encourage more active participation by the judge.

I should now mention that at least one member of the Supreme Court of Israel, Justice Sussmann, vigorously deplores the propensity of Israeli trial judges to actively participate in the conduct of the case and the examination of witnesses, regarding such activisni as incompatible with the adversary system.[32] It is a mistake, however,

31. *E.g.,* State v. Duggan, 215 Ore. 151, 333 P.2d 907 (1958), although the omission of proof there was seemingly attributable to deliberate tactics rather than inexperience. See Linde, *Criminal Law—1959 Oregon Survey,* 39 ORE. L. REV. 161, 173-74 (1960), urging that trial judges recognize a responsibility to aid in full development of the facts.

32. Sussmann, *supra* note 28; see Moshe Green v. The Attorney General in Appendix G.

to think that the adversary system requires utter passivity on the part of the judge—that he "speak only when spoken to."[33] The hallmark of the inquisitorial system is *judicial direction,* not judicial participation; and this, together with something of an idea that a lawyer's ultimate loyalty is to "the law," or "the truth," or "the court," rather than to his client, is its weakness.[34] So long as counsel direct the trial—select witnesses, decide on the order, in which they will be called, decide on the framework of the examination of each—the essential adversary character is retained. Occasional, even frequent, judicial requests for clarification or further ventilation of a subject opened up by counsel are not inconsistent with counsel direction and, if anything, are likely to help him present his case.[35] The greatest argument for an adversary system is that it tends to insure full, vigorous presentation, and not that the more skillful counsel deserves to win. Accordingly, it is difficult to understand Justice Sussmann's objection to a case in which, after the parties had rested, the judge, at plaintiff's request, recalled a witness and elicited inadvertently omitted but crucial testimony. Certainly this was on more than an exercise of the court's discretion to grant a motion to reopen,[36] and not a matter of the judge turning into an advocate for one of the parties.

A final point. It may be argued that while active participation in questioning is not likely to affect the judge's impartiality, it might be misunderstood by lay jurors. This is an additional argument for devising different rules of procedure for jury and nonjury cases.

Introduction of Evidence in Writing

Certain provisions of the Israeli law along with a draft code of evidence prepared by the Harvard-Israeli Research Project[37] suggest

33. Fuller, supra note 21, at 41.

34. See note 21 *supra* and accompanying text. "[T]he [German] procedural system we have outlined does not make for notably vigorous performance by counsel. Moreover, the education of lawyers tends against their full identification with clients as combatants . . . ." Kaplan, 9 BUFFALO L. REV. at 413.

35. Fuller, *supra* note 21, at 41. "A more active participation by the judge—assuming it stops short of a pre-judgment of the case—can therefore enhance the meaning and effectiveness of an adversary presentation."

36. American cases suggest that *denial* of the motion to reopen might well have been an abuse of discretion. See 88 C.J.S. *Trial* §§ 104-05 (1955) and cases cited therein. See also Sanders v. Ryan, 112 Ind. App. 470, 41 N.E.2d 833 (1942) (error to deny plaintiff motion to reopen to introduce proof that negligent driver was acting within scope of his employment by defendant, the motion being made *after* a verdict had been directed for defendant because of lack of evidence on this point). Lenhoff notes a reluctance in English and American courts to recognize that the judge has power to call a witness on his own motion. Lenhoff, *supra* note 8, at 326. Kaplan suggests in passing that the authorities are "one way and the other." Kaplan, 9 BUFFALO L. REV. at 423.

37. See note 27 *supra.*

a movement away from the "play" concept of a trial and toward the idea of compiling a file upon which to base judgment.

For example, Part VII of the Evidence Ordinance—Evidence of Experts—added in 1954, requires that each expert submit a written report of his opinion as to matters of science, research, *et cetera.*[38] This often, though certainly not always, discourages a demand for his "live" examination in court. Second, the Evidence Ordinance also has an official documents provision,[39] which going little beyond present American rules,[40] offers the advantage of eliminating a necessity for formal appearances by an authentication witness. Third, there is the Protection of Children Law, requiring the police *and the courts* to obtain permission from a "youth interrogator," (a social worker) before questioning, or hearing as a witness, a child under fourteen years of age charged with offenses against morality.[41] The act presumably contemplates that such permission ordinarily will be withheld and the child will be examined in private by a youth interrogator. Finally, the draft code proposals of the Harvard-Israel Research Project envisioned a single judge investigatory process, whereby a court composed of three judges or more would be permitted to impose upon one of them the duty of hearing testimony, or of inspection, such individual duties to be considered as if they had been performed by the full bench. The above items are set forth at length in Appendix E.

Psychologists will probably have a higher opinion than lawyers of the youth interrogator law. The wisdom of admitting the record of an examination carried out by a non-lawyer, primarily motivated to protect and diagnose or treat the child seems very doubtful.[42] If the welfare of the child precludes his appearance in court maybe it would be better to dispense with his testimony altogether, though of course in cases of the kind contemplated by the law the child victim's testimony will usually be very important. All the more reason to worry about its accuracy. Actually the merits of the law are not my concern. The point is that the admission of such evidence would be unthinkable in a jury case. If the law is a good one, it is because the youth interrogator's report will be weighed by a professional

38. 8 LAWS OF THE STATE OF ISRAEL 89, 90-91 (5714-1953).

39. 10 LAWS OF THE STATE OF ISRAEL 10 (5716-1954/55).

40. *Cf.* ORE. REV. STAT. §§ 43.330, 43.370 (1963); UNIFORM RULES OF EVIDENCE §§ 63(15),(16),(17) & 68; Swearingen, *How The Adoption of The Uniform Rules of Evidence Would Affect The Law of Evidence in Oregon: Rules 62-66,* 42 ORE. L. REV. 200, 229-33 (1963).

41. 9 LAWS OF THE STATE OF ISRAEL 102 (5715-1954/55).

42. Yehudai v. The Attorney-General, in Appendix G, suggests some misgivings about the law on the part of the Israeli court. Moshe Green v. the Attorney General, *supra* note 32, while not involving the Youth Interrogator law, touches on the suggestibility of child witnesses.

judge keenly aware of the dangers involved. Again an argument for different standards for jury and non-jury trials.

The Harvard proposals came in for some critieism by a reviewing conference[43] and their enactment was never seriously considered. Justice Sussmann asked, "How can a court of three judges discharge the task of weighing evidence . . . if it has not seen the witness nor perused the document?" Mr. Joseph Laufer pointed out that three judge courts are authorized only in very important cases and all the conferees agreed that section 26, at least, should be used only in very exceptional circumstances. I mention these abortive proposals because they so closely resembled the Austrian device of proof taking by deputized judges and so suggest the possibility of domesticating civil law methods. Note that the objection to the proposal has nothing to do with the adversary-inquisitorical dichotomy but is simply that the whole court ought to see the witness. The Austrians recognize the force of this and employ the device relatively infrequently. It is principally used for routine witnesses and always with the possibility of re-examination before the adjudicating court if the testimony turns out to be crucial or counsel disputes its validity. So limited and safeguarded, the practice could be a simplifier and expeditor of common law trials. It suggests the possibility of collecting much routine evidence by deposition in advance of trial, before a judge of an inferior court, or even a court reporter, and limiting the trial to an intensive examination of the crucial witnesses. The only change in existing American deposition rules would be an elimination of the requirement that the witness be unavailable before the deposition may be introduced at the trial.[44] That, plus the will-inguess of counsel to submit part of the case in documentary form; doubtful tactics before a jury but by no means out of the question in a judge-tried case.

Written Closing Arguments

An amendment to the Israeli Rules of Civil Procedure in 1952 authorized the court to order the parties to submit closing arguments in writing, and, reportedly, this is now a regular practice. The writing may be in lieu of oral argument or in addition to it.

An eminent barrister recently deplored comparable departures from

43. This conference met on July 22-23 and August 20-21, 1963, and was attended by Professors A. Leo Levin, John M. Maguire and E. M. Morgan, Mr. Justice Joel Sussmann and Judge Zvi Alon, Dr. Julius Sichel, and Mr. Joseph Laufer. A mimeographed copy of the record of the conference, containing the text of the draft bill, was made available to me by the Israeli Ministry of Justice.

44. *Compare* FED. R. CIV. P. 26(d) and ORE. REV. STAT. § 45.250 (1963) (generally requiring unavailability), *with* UNIFORM RULES OF EVIDENCE 63(3)(a) (no such requirement).

the tradition of complete orality in English courts. He argues that (1) the parties cannot see and hear that their cases are being fully presented and so justice is not "manifestly seen to be done," and (2) that there is a good deal of waste motion in that counsel must cover each point of the case in their written arguments even though the court generally will base its decision on only one or two issues. In short, counsel do not know when they are "pushing at an open door."[45] Many Israeli judges, with English backgrounds, echo these sentiments, especially the latter one. But how about it? Even where argument is wholly oral, counsel must work up and be prepared to argue the whole case even though the court decides to concentrate on only one or two facets. Is the extra effort of writing out the arguments perhaps worthwhile as a check on a court that may be prone to over-simplification? Or, if the testimony has left parts of the case too clear for argument, there is nothing to prevent the court saying so and requesting written argument on specified issues. And does exclusive reliance on oral argument put too great a premium on mere glibness?

Seemingly, neither the English nor the Israelis make any significant use of our appellate practice of a comprehensive written brief supplemented by selective oral argument. Perhaps most American lawyers would resist frequent use of such an elaborate procedure in the trial court, but it is at least a possibility for important cases if they are not tried to a jury.

Reasoned Judgments

Rule of Civil Procedure 205 provides: "Judgments in defended actions shall contain a concise statement of the case, the courts' findings on material facts, the points for determination, the decision thereon, and the reasons for such decision."

A typical Israeli trial court judgment, prepared in compliance with this rule, is printed in Appendix F. It may be interesting to compare this with the Austrian judgment (Appendix D) and with representative judgments of American trial courts.

The following Israeli Rules of Civil Procedure indicate the considerable effect that the use of "reasoned judgments" has upon the work of the appellate courts.

> 341. Where the evidence upon the record is sufficient to enable the appellate court to pronounce judgment, the appellate court may, after resettling the issues, if necessary, finally determine the action, notwithstanding that the judgment of the court from whose decree the

45. MEGARRY, LAWYER AND LITIGANT IN ENGLAND 167-73 (1962), (praising "comprehensive orality" of English procedure).

appeal is preferred has proceeded wholly upon some ground other than that on which the appellate court proceeds.

342. Where the court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the appellate court essential to the right decision of the suit upon the merits, the appellate court may, if necessary, frame issues, and refer the same for trial to the court from whose decree the appeal is preferred, and in such case shall direct such court to take additional evidence required; and such court shall proceed to try such issues, and shall return the evidence to the appellate court together with the findings thereon and the reasons therefor.

. . .

344. (1) The party to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. But if:

(a) the court from whose decree or order the appeal is preferred has refused to admit such evidence which ought to have been admitted, or

(b) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the appellate court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an appellate court, the court shall record the reason for its admission.

Section 10 of the Evidence Ordinance is also in point:

> When evidence which is not admissible in proof of a criminal charge has been admitted by error or inadvertence, such evidence shall not be used in proof of the charge nor shall any judgment be based thereon: nevertheless, the fact that such evidence has been heard by the court shall not be held to invalidate the judgment unless, in the opinion of the court, the accused would not have been convicted if such evidence had not been given or there was no other sufficient evidence to support the conviction apart from the evidence.

Examination of the opinions of the Israeli Supreme Court in Appendix G suggests a realistic effort to discover and evaluate what actually happened below. Not infrequently, an American appellate court directs its attention to a case that never was.[46] This is unavoidable so long as the opaqueness of our trial court judgments forces our appellate courts to proceed upon questionable assumptions: for example, that errors in procedure and in admitting and excluding evidence have affected the decision below; that if there is evidence

46. *E.g., compare* Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928), *with* the expanded account of the accident in Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953); see generally LLEWELLYN, THE COMMON LAW TRADITION-DECIDING APPEALS 28 (1960) ("A Frozen Record from Relow"); Lusk, *Forty-five Years of Article VII, Section 3 Constitution of Oregon*, 35 ORE. L. REV. 1 (1955).

in the record that would support a finding of certain facts, which facts would justify the judgment below if a certain rule of law were correctly applied to them, then such facts were found on that evidence and the rule of law was applied to them.[47] These assumptions may conceal errors in factfinding—the jury may in fact have drawn untenable inferences from evidence other than that regarded by the appellate court as supporting the findings—and may require reversals and remands of cases correctly decided below. The "harmless error" concept[48] and the use of findings of fact and conclusions of law in judge-tried cases are fairly efficacious remedies for these evils although there is a difference between knowing what the trial judge decided and why he decided it.[49] Remands for retrial are rare in Israel.

Four ways in which Israel's trial procedure emphasizes writing to a greater extent than the United States trial procedure have been presented—the judge-kept record, introduction of testimony in written

47. To make the point clearer, suppose that if fact situation A exists, the court may, in its discretion, give judgment X. Consider: (1) the trial court rejected the evidence pointing to A and found fact situation B existed and gave judgment X only because it erroneously thought the law ran, "if B then X;" (2) the trial court found A but gave judgment X because it erroneously thought this was required (i.e., not realizing that the correct rule of law required an exercise of discretion). For an example of an affirmance on the ground that the trial court "may have based its judgment upon certain evidence in the record," see Toledo & Ohio Cent. Ry. v. S. J. Kibler & Bros. Co., 97 Ohio St. 262, 119 N.E. 733 (1918). For an example of a seemingly unnecessarily complex retrial, see Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 154-56 (1963). *Cf.* Townsend v. Sain, 372 U.S. 293 (1963), in which the Supreme Court attempts to define the situations in which the federal courts must grant an evidentiary hearing in connection with habeas corpus review of state court rulings admitting confessions.

48. See LLEWELLYN, *op. cit. supra* note 46; Lusk, *supra* note 46.

49. Consider these sections of the HARVARD-ISRAEL DRAFT CODE OF EVIDENCE:

Section 13. Admission of Inadmissible Evidence. A court of appeals shall not reverse a judgment on the ground that evidence inadmissible under this law was admitted by the court below unless it is satisfied that the other evidence remaining before that court was insufficient to support its decision. HARVARD-ISRAEL PROJECT DRAFT CODE OF EVIDENCE § 13 (1959).

Section 14. Refusal to Admit Admissible Evidence. A Court of appeal shall not reverse a judgment on the ground that the court below refused to admit evidence admissible under this law, unless it is persuaded that the admission of that evidence would have resulted in a different judgment. HARVARD-ISRAEL PROJECT CODE OF EVIDENCE § 14 (1959).

At the conference, *supra* note 43, Professor Morgan commented: "The statement in the comment that [these sections] are in accord with the common law is questionable to say the least. Certainly the A.L.I. lawyers and judges believed that the common law goes no further than exercising a judgment whether the questioned evidence had or would have had a substantial effect upon the finding. Is it any easier to guess the effect on the mind of a judge than of a juror?" And Justice Sussmann: "The two sections cannot be identical because in § 14 the appellate court can only guess what effect the excluded evidence would have had, while in § 13 the effect must be gauged from the judgment under appeal."

Query: did Professor Morgan understand what Justice Sussmann meant by a judgment?

form, written closing argument, and reasoned judgments. None of these are compatible with jury trials, but each is an everyday feature of Israel's common law based procedure. There has been some consideration of the pros and cons of each item. Generalizing, it comes to this: if the goal is an impressionistic, unintellectualized reaction to the whole case, then a system of nailing down each point in writing, with the inevitable delays involved in so doing is contraindicated; if precise fact finding and detailed logical analysis is desired, then all the writing is to the good. It is not suggested that either of these basic attitudes is obviously the correct one. Perhaps impressionism is desirable in one kind of case, articulate analysis in another.[50] The latter seems likely to be preferable in the kind of case that is likely to be tried to the court as things now stand in the United States.

INFORMALITY—EPISODIC TRIAL

Our concept of the trial, necessary when there is a jury, is of a single, continuous, "live" presentation of all the evidence. Provisions respecting expert testimony, official records, and the like, discussed under the preceding head, suggest the possibility of a system of trial to the court where the spadework is done on paper and the judge hears only the key witnesses. Further, once the jury is gone, and if adequate notes are kept, there is no need to hear all of the case at one time. Some Israeli practices and provisions should be considered in this light.

Adjourned Sessions

A typical Israeli personal injury trial may occupy five or six days in court spread over a period of three or four months. Despite an initial surface resemblance, however, the system is not like the Austrian. We saw that there the usual practice is to resolve one issue, liability, and then hold a conference to assess the thus arrived at posture of the case and to decide where to go from here. In Israel

50. See Curtis, *supra* note 2; BLOM-COOPER, THE *A-6* MURDER 14-15 (1963), commenting on denial of jury's request for a transcript of the testimony in a lengthy murder trial: "Why is it that a jury is supposed to reach its verdict on the evidence heard in court without having the chance to check the possible introduction of bias and rumor through reference to the only reliable guide—the transcript of the words actually spoken? The English system leans heavily on the arrival of a verdict by way of general impressions rather than scrupulous examination of the testimony. When Mr. Justice Stable, in the case of Victor Terry, who was convicted in 1961 of the capital murder of a bank clerk in Worthing, gave the jury in that case a transcript of complicated medical evidence, marking certain passages touching on the plea of diminished responsibility, the Court of Criminal Appeal deprecated the practice. Now Mr. Justice Corman was conforming to that directive by telling the jurors, 'No, you do not' get a copy of the transcript."

all the issues are made up in advance of any proof-taking by a system of pleadings and motions essentially like our own. Amendments during trial are no more frequent or readily allowed than in our system. The dispersion of hearings is primarily a consequence of docket setting practices. In the Jerusalem district court, for example, the trial docket is rigidly set for three months at a time, each case being assigned to commence on a date certain. Supposedly, sufficient time is alloted to hear a case on successive days once it starts, but perhaps because of the obsessive fear of wasting judicial time[51] the estimate is usually too short, and instead of an idle judge waiting for his next scheduled case, the time allotted for the first case generally runs out with only half or two-thirds of the proof in. Then, because of the tightness of the docket, the next available date is usually two or three months ahead.[52]

The practice respecting continuances also plays a part in spreading out the case. There is no provision for severance of issues for separate trial save by consent of the parties. This is rare, at least in the Jerusalem district, and when it occurs, severance is only with respect to proof taking. Thus, there is no *Zwischenurteil.*[53] However, counsel regularly parcel their presentation for the convenience of the witnesses—proof of negligence today, medical witnesses tomorrow, *et cetera.* If things move faster than anticipated and he comes to the end of his negligence evidence at eleven in the morning (the court sits from nine to one-thirty), the court will usually be quite lenient about granting a continuance until the following day.[54] Likewise, if after hearing two or three witnesses counsel suggest an adjournment to talk settlement, the court will probably accede.

Israeli judges are unhappy about the situation described above, largely because of the long delays in disposing of cases, but, in the case of at least one judge, also on the ground of lack of continuity. The delay point seems purely mechanical in origin and not beyond

51. *Cf.* MEGARRY, *op. cit. supra* note 45, at 77-89 (1962).

52. See chronologies in Appendix C.

53. Apparently severance of issues is fairly common in the Tel Aviv District Court and I have been told of at least one case there in which judgment was given on the liability issue, and an appeal taken therefrom, before the damages issue was taken up.

54. The attitude of the Israeli bench is illustrated by the following vignette. Magistrate's Court Procedure Rule 266 (regulating procedure in minor criminal cases) originally provided that the court might adjourn a hearing at any time "in its discretion." In 1952 the Minister of Justice promulgated an amendment limiting adjournments to certain enumerated situations—non-appearance of counsel, unavailability of witnesses, *etc.*—and then only if necessary to prevent a miscarriage of justice. The seemingly manifest purpose of the amendment was to tighten up on continuances but it has been construed to mean just the opposite, *i.e.*, that counsel is entitled to a continuance as of right on a showing that a material witness is not present at the trial without any reference to why counsel did not insure his presence.

the power of human ingenuity to solve.[55] The continuity point, however, raises once again our basic question about the judicial process. If a judge is supposed to approximate a jury and react to the whole case, then certainly continuity is essential. If he is supposed to compile and then examine a file it is not. The quality of the file may even be improved if there are intervals to stop and think as the case proceeds.

Hearing Witnesses Outside the Courtroom.

The following provisions were included in the 1938 Rules of Civil Procedure:

> 190. The evidence of the witnesses in attendance shall be taken orally in open court in the presence of and under the direction and superintendence of the court.
>
> 202. When a witness whose evidence is necessary to be taken for trial of an action in a civil case in any court is the Rais of Ulema or one of the Bishops of the Latin, Orthodox or other Eastern or African churches or one of the two Chief Rabbis, his evidence shall be taken at his place of residence or at some other place that shall appear to be more convenient, or in private in the chambers of the court before a judge or such other suitable person as may be appointed for the purpose by the court in the same manner as the evidence of a witness about to leave Palestine may be taken, and the evidence when so taken may then be read at any hearing of the action and treated for all purposes as if it had been taken in open court.

The Harvard-Israel Project draft evidence code made this proposal:

> *Section 24: Testimony Outside Court.* The court may hear testimony at the residence of a witness or at a place other than the courtroom and even outside its jurisdiction, whether because of respect for the witness, or of his illness, or for any other reason deemed appropriate by the court.

Apart from stylistic objections the only reaction of the conference was to suggest that it be made clear that such proof taking be on notice to the parties and with opportunity to cross-examine.

55. Simplest would be more realistic initial time allowances and acceptance of an occasionally idle judge as the lesser evil. If this seems unwise, surely experience must permit fairly accurate forecasts of the number of cases that will be completed within the time initially allotted and of the number of cases that are set for trial but never tried. Why not leave a reasonable number of unassigned judge days in each week to be used for uncompleted, carry-over cases? And why not set an uncompleted case for a date only a week or so ahead on the assumption that some case set for that time will be settled and make room for it? Even if two or three such attempts were necessary to find an open day, the possibility of completing the case in three weeks seems better than waiting three months. Costs are very substantial in Israel—I am told that the courts, at least in Jerusalem, operate at a profit—and one would think that they might be so manipulated as to reduce the number of last minute settlements and so permit docket setting with considerable certainty at least a day or two in advance.

Pre-Trial

The situation with respect to pre-trial conferences has until recently resembled that existing in many American states. The judge assigned to the case usually called counsel in for informal exploration of settlement possibilities and attempted to narrow the case to a few bona fide issues by encouraging stipulations and admissions. But beyond exerting moral force, and perhaps some rattling of the costs sabre, he had little power to compel cooperation. The Civil Procedure Rules, 1963, contain the following new provisions designed to strengthen the hand of the judge:

> Rule 143. The judge at a pre-trial is authorized—
> (1) To verify if the pleadings have been drawn up according to law, to strike out anything which is unnecessary and to ascertain what are the questions which are really the questions in controversy between the parties;
> (2) To determine, after verification with the parties, the means by which the allegations are to be proved, (and) the admissibility of the evidence, and also to order the hearing of evidence outside the area of jurisdiction of the court in which the proceedings are to take place or outside the boundaries of the state;
>
> . . .
>
> Rule 146. Where an application has been made for the delivery of interrogatories, the judge may, either on the application of one of the parties or of his own motion, order that the party to whom the application is made be examined before him on oath or by affirmation on the questions submitted to him, whether in addition to or instead of the interrogatories, and testimony so heard may be submitted in the trial as evidence against him; where such an application is submitted by the two contending parties, the party who is entitled to open in the action shall be examined first.
>
> Rule 147. (a) The judge may order a particular party to appear in person, or, in the case of a corporation, its director, manager or any other person who holds an office in the corporation howsoever the judge may see fit; he may also order that a particular party whose presence is not required for the hearing should be exempt from appearance.
>
> (b) The consequences of non-appearance in a pre-trial shall be as the consequences of non-appearance in a trial.

A proponent of the new rules explains 143(1), 146 and 147 as follows: Israeli lawyers overwork the general denial; we think that under sworn, personal examination by a judge, a defendant will admit many allegations as to which his counsel has put the plaintiff on his proof for tactical reasons or out of too mueh caution; then as word gets around about such examinations, embarrassing both to the party making the admissions and counsel who exposed his client to the ordeal, pleadings will become more precise with the resultant shortening and simplification of trials.

There is some question as to the precise meaning of Rule 143(2). Does it merely contemplate advance rulings on objections to save time at the trial? If so, it does not go beyond what has always been possible at pre-trial. Or does it mean that counsel are to disclose how they intend to go about proving their allegations and the judge is to decide what witnesses, documents, *et cetera,* are to be presented, that is, make a ruling like the Austrian *Beweisbeschluss*? If so, that trenches dangerously on counsel's power to decide how best to present his case—a power at the heart of the adversary system.

Has the regulation of the pre-trial conference anything to do with mode of trial—jury or nonjury? If trial is to the jury, seeking an impressionistic response, a complete picture ought to be presented *in court,* including undisputed facts necessary to full understanding of the case and perhaps even some marginally relevant background material. Arguably counsel should be allowed to present all his case through the dramatic medium of live testimony and not be limited to a dry statement by the judge that "this, this, and this stand admitted."[56] Where trial is to the court, however, especially in the kind of case I have spoken of as calling for analysis of a file, proof of undisputed facts is a waste of time. Hence pre-trial devices aimed at isolation and sharp definition of issues are more suitable to such cases.

Therefore, if Rule 143(2) does mean something like a *Beweisbeschluss,* this is much less objectionable where trial is to the court because the method of presenting the case (such matters as the selection of witnesses for human appeal and the use of dramatic means of proof) is far less important. Counsel should have the right to decide for themselves what evidence will best persuade a jury, but in nonjury cases, the judge is the one to be persuaded and it is a convenience to counsel more than anything else if he indicates in advance what is most likely to succeed.

Interspersed Argument

According to Justice Sussmann:

> In a Continental court you can, of course, frequently hear an advocate addressing the court in the middle of the case on any question of law or fact, and so it was in this country even after 1937, where the bench often acquiesced in such piecemeal conduct of trial. According to the rules made in 1938, the plaintiff opens and calls his witnesses, and then the defendant calls his witnesses and sums up his case, and the plaintiff replies. This is, of course, the English system, but in the early forties, one could still find

56. *Cf.* Lacy, *Admissibility of Evidence of Crimes Not Charged in the Indictment,* 31 ORE. L. REV. 267, 275-78 (1952).

both bar and bench ignoring the rule—whether from ignorance or otherwise—and conducting cases in the Continental manner.[57]

The European practice is more a matter of tolerated extra-legal tradition than codified procedure;[58] court and counsel "just know" how far to go, and what is "judicious" interweaving." But how do you legislate the nuances of a tradition?[59] It is more probable that the practice may develop naturally and gradually as American judges and lawyers come to think about trial increasingly less in terms of jury-oriented rules, than it will be the product of deliberate legislative innovation.

Broader Admissibility of Evidence

Allusion was made at the start of this article to the generally accepted belief that the jury is the mother of the exclusionary rules of evidence. Under this head will be discussed a number of respects in which the rules have been, or seem to be in the process of being, relaxed in Israel's nonjury system.

Practice

There is no question that the common law rules of evidence

57. Sussmann, *The Role of the Judge in Directing Civil Proceedings* in 1962 Institute for Legislative Research and Comparative Law, Israeli Reports to the Sixth International Congress of Comparative Law 35, 36.

58. See Appendix B.

59. A comparable problem exists in connection with the approach of Israeli judges to novel tort claims. The Palestine negligence law inherited from the Turks was very inadequate, *e.g.*, it recognized no remedy for personal injuries. Nor was this a *lacuna* permitting reference to English common law (in accordance with the Mandatory Reception Statute, *supra* note 25) as the Ottoman law was negative rather than silent. The British sought to remedy this by the enactment of the Civil Wrongs Ordinance in 1944. Civ. Wrongs Ord. No. 36 (1944). This is a sort of legislative restatement of torts, admirable in most respects, but marred in the eyes of many in that it purports to be a complete enumeration of all wrongs actionable in Palestine, and now, by reception, in Israel, *i.e.*, it is a closed system without a growth principle. In consequence the Israeli court has found itself unable to allow recovery for invasion of rights of privacy, Rabinowitz v. Polyfot Ltd., [1956] C.A. 68 (English summary in Jerusalem Post, Oct. 27, 1957), or for injuries without impact, see Nader v. Kahanowitz, [1957] C.A. 4 (English summary in Jerusalem Post, Dec. 26, 1957). Consider how to draft an amendment to the Civil Wrongs Ordinance that would convey the seldom articulated but generally understood (by Americans) judicial power of creativity-but-not-free-decision.

Again, consider § 33 of the Courts Law of 1957: "(a) A court shall be guided by a precedent established by a higher court; (b) A precedent established by the Supreme Court binds every Court, except the Supreme Court." 11 Laws of the State of Israel 163 (5717-1956). To my American eyes this suggests an intent to substitute our more relaxed concept for the rigid English idea of stare decisis. But I have talked to continentally trained Israeli jurists who understand it as an adoption of the civilian idea that precedents have only persuasive force. If the Knesset meant what I think it meant, should it have incorporated Cardozo's *Nature of the Judicial Process* by reference in § 33?

(modified by statutes in numerous matters of detail of course) are part of the law of Israel. Objections on the ground of hearsay, opinion, not the best evidence, *et cetera,* are regularly made by counsel. The judge, regardless of his personal opinion as to the wisdom of the matter, has no choice but to rule in accordance with the law. However, two factors tend to considerably modify the law in practice. First is the principle that rules of evidence are not substantive directions about the value of different kinds of proof but merely create a power in counsel to exclude certain kinds, a power which may be conclusively waived if not promptly asserted. In addition, many Israeli lawyers, because of civil law backgrounds, have never developed a facility with the exclusionary rules, and the result is that much technically excludable evidence is admitted in many trials. As Justice Holmes said, ignorance is a great law reformer. Secondly, as noted, Israeli trials usually run over a considerable period of time and judges readily allow continuances to obtain witnesses. Consequently an objection to hearsay evidence, for example, about a fact that counsel knows to exist and to be provable by competent evidence is much more likely to lead to prolongation of the trial than to a failure of proof. Judges know this, and some of them frankly bully counsel out of what they consider to be over-technical or purely obstructive objections.

Introduction of Evidence in Writing

Passing from questions of practice, some actual modifications in the rules of evidence will now be considered. The previously discussed statutory innovations regarding experts' reports, official records and the Youth Interrogator law are all relaxations of the hearsay rule and might have been postponed for consideration here. They were not because it seemed that the most interesting point was what they suggested about the "file" concept of trial—the non-necessity of complete, oral presentation once the jury is gone—but it should be observed here that the wisdom of using such time-saving devices is much clearer when the written reports are to be subjected to critical, professional evaluation.

No "Dead Man" Rule

Section 3 of the Evidence Ordinance provides that "all persons are competent to give evidence in all cases, and no person shall be considered incompetent to give evidence in any case by reason of his being a party to a civil action . . . ." There is no qualification, in the familiar American style, respecting transactions with persons now deceased in actions against decedent's estates. A case decided during the Mandate period recognized that a party to an action against an

administrator was competent to testify about a contract allegedly made with the deceased,[60] noting only that such evidence should be accepted with caution and that this was in accord with what has been the rule in England since at least 1885, and probably ever since the lifting of the disqualification of parties.[61]

Section 6 of the Evidence Ordinance provides:

> No judgment shall be given in any civil case on the evidence of a single witness unless such evidence is uncontradicted or is corroborated by some other material evidence which in the opinion of the court is sufficient to establish its truth.

This general section is not limited to cases involving claims against estates, but it does supply a safeguard especially desirable in such cases. By providing a mechanical rule for the disposition of certain cases, and so rejecting the principle of free evaluation of evidence, this section contradicts the central thesis of this article, for there is no general requirement of corroboration in most American jurisdictions even in jury cases.[62]

Preliminary Showing of Admissibility

Because of the division of functions in a jury trial, there are situations in which the judge must first be persuaded that the factual conditions for the admissibility of certain kinds of evidence are satisfied before the material evidence may be presented (confessions, dying declarations, witnesses of tender years or doubtful mental capacity, to mention the most common). In *Bashari v. Attorney General,*[63] a principal witness for the prosecution was a certified schizophrenic who had escaped from a mental hospital and for the attempted murder of whom the defendant was on trial. After the witness had testified, a medical expert gave testimony that if there were corroboration on the main substance of her evidence, she should be believed to have told the complete truth. There was such corroboration and the defendant was found guilty. He appealed on the ground that it was error to permit this witness to testify before the court had heard medical evidence as to her testimonial capacity. The conviction was affirmed, the court saying that while the procedure contended for by defendant is required in America and England, this is

60. Atallah Mantoura v. Nur Michail of Khoury, [1940] C.A. 233, 8 Palestine L. Rep. 20 (1940). The same rule has been applied since the creation of this state. Rubashitz v. Heller, [1958] C.A. 392, 13 Piskei Din 1925 (1958).

61. *Cf.* 7 WIGMORE, EVIDENCE § 2065 (3d ed. 1940).

62. *Id.* § 2046 (no general rule declaring insufficiency of a single witness has found footing in the common law). *Cf.* ORE. REV. STAT. § 41.260 (1963) (direct evidence of one witness sufficient).

63. [1962] Cr. A. 507 (English summary in Jerusalem Post, Mar. 24, 1963).

> because of the jury system in operation in those countries and the fear of allowing laymen to hear evidence which may afterwards be declared inadmissible. Where there are only professional judges, however, as in Israel, no such fear exists and the procedure may be regulated according to the greatest convenience and efficiency.[64]

Although this case deals with a question of the order of proof rather than an extension of admissibility, it is noteworthy for its explicit recognition of the influence of the jury on the rules of evidence.

Declarations of Unavailable Witnesses

This and the next subhead consider two proposed, but so far unaccepted, relaxations in the exclusionary rules.

Very far-reaching exceptions to the hearsay rule were created by statute in Massachusetts in 1898[65] and in England in 1938.[66] These admit evidence of declarations made of his personal knowledge by a person now deceased (Massachusetts) or unavailable as a witness (England). The English rule is limited to written statements and excludes "a statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish." The Massachusetts rule extends to all declarations made in good faith. The Model Code of Evidence and the Uniform Rules of Evidence contain comparable provisions.[67]

The rationale is that people generally tell the truth, even outside of a court, and that it is less likely to do harm to admit some evidence of questionable value than to compel decision of cases on incomplete data or by mechanical application of rules about the burden of proof.[68] A better case can be made for recognizing the exception in judge-tried cases, as the fact cannot be escaped that it does admit uncross-examined statements that call for special caution and skill in their

64. Another good example is Dissentchik v. the Attorney-General, [1962] Cr. A. 126, 17 Piskei Din 169 (1962) (English summary in Jerusalem Post, Feb. 27, 1963) (in prosecution of newspaper for publication about pending murder case, court points out danger of influencing outcome much less in Israel than where trial is by jury).

65. MASS. GEN LAWS ANN. ch. 233, § 65 (1932).

66. Evidence Act, 1938, 1 & 2 Geo. 6, c. 28, § 1. Both this and the Massachusetts law are discussed in MCCORMICK, EVIDENCE 630-31 (1954).

67. MODEL CODE OF EVIDENCE 503 (1942); UNIFORM RULE OF EVIDENCE 63(4)(c). Chadbourn, *Bentham and the Hearsay Rule,* 75 HARV. L. REV. 932 (1962), contrasts the Model Code and Uniform Rules provisions somewhat to the advantage of the former. In a concurring opinion, Chief Justice Vanderbilt has made a powerful argument for judicial adoption of the exception. Robertson v. Hackensack Trust Co., 1 N.J. 304, 63 A.2d 515 (1949).

68. MORGAN, THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM 40-49 (1927), reports a survey of professional opinion which showed a very large majority of Massachusetts lawyers in favor of their rule, especially those who had had considerable experience with it.

evaluation, though neither England nor Massachusetts limit the rule to civil cases.

While the Palestine Evidence Ordinance antedated the 1938 English enactment, and has never been amended to conform thereto, the following proposal was made by the Harvard-Israel Research Project draft code:

> 78. Evidence of a hearsay statement (offered to prove the truth of the matter stated) is admissible if:
>
> (1) the statement was made by a party or in his presence and the evidence is offered against him; or
>
> (2) if the statement was made:
>
> (a) by a person who is present in court and subject to cross-examination, whether or not he is a party or a witness; or
>
> (b) by a person who was (duly summoned as a witness) if the court is persuaded that he cannot be found; or
>
> (c) by a person who is no longer alive.[69]

At the conference held to review the draft code, Professor Maguire observed that this section made no requirement that the declarant speak from personal knowledge and so opened the door to "multiple-layer hearsay" and perhaps had some reservations about admitting hearsay solely because the declarant was unavailable, for example, without any circumstantial indicia or reliability.[70] The other conferees accepted the basic idea of the section and in fact recommended an even broader formulation of paragraph 2(c), which was proposed by Judge Zvi Alon: "by someone who is unavailable as a witness because of death, mental or physical condition, claim of privilege or for any reason other than the culpable conduct of the proponent."[71] Here the matter stands today.

Proof of Criminal Judgment in Related Civil Case

The Ottoman Code of Civil Procedure, in keeping with the usual civil law practice,[72] authorized joinder of a claim for damages by a

69. This is actually Professor Morgan's redraft of the originally proposed section which confusingly suggested that the making of the statement might itself be proved by hearsay evidence and also would have admitted self-serving declarations of a party not present for cross-examination.

70. Conference record p. 81; see note 43 *supra.*

71. *Id.* at 82.

72. *E.g.,* Austria: STRAFPROZESSORDNUNG §§ 365-79 (1960); France: see Pugh, *Administration of Criminal Justice in France: An Introductory Analysis,* 23 LA. L. REV. 1, 12 (1962); Yugoslavia: CODE OF CRIM. P. §§ 96-107 (English transl. 1954).

A brief account of the Austrian practice appears in ZIESEL, KALVEN & BUCHOLZ, DELAY IN THE COURT 290 (1959) (Appendix D). See also Kaplan, von Mehren & Schaeffer, *Phases of German Civil Procedure,* 71 HARV. L. REV. 1193, 1200 n.22 (1958), stating that the limited possibility of litigating the civil claim within a criminal case is seldom used by German plaintiffs.

private person injured by a crime with the criminal prosecution. This provision has been carried forward through the British and Israeli reception statutes, but it was rarely used even during the Mandate. Provision was made for its repeal by the Code of Criminal Procedure introduced in the Knessett in 1963.

When it is considered that (under the usual continental practice) the defendant must be found guilty of the criminal offense as a necessary condition for allowance of civil relief, the danger of such combined proceedings in a jury-tried case—throwing the full weight of sympathy for the victim of the crime against the defendant—is self-evident. Perhaps this danger is lessened only in degree in a judge-tried case. Nevertheless, the ideals of efficiency and consistency of adjudication suggest that there ought to be some connection between civil and criminal cases arising out of the same incident. Evidently sharing these views the advisory committee to the Minister of Justice has proposed the following:

A Bill to Supplement the Law of Criminal Procedure

1. Where a person has been convicted in a criminal trial, the conviction shall be admissible in any other legal proceedings, civil or criminal, as prima facie evidence against the person so convicted of the findings of fact which constituted the elements of the offense for which he was convicted.

The American Uniform Rules of Evidence make essentially the same proposal applicable to both jury and non-jury cases.[73] Certainly the most common use would be in automobile accident cases which are generally tried to a jury. Occasionally, there will be situations where the civil and criminal cases should come out differently. Suppose the defendant was plainly violating a traffic law but the causation is obscure—the case of a child suddenly darting in front of a speeding motorist. Perhaps it can be argued that the news that the defendant has been found criminally guilty will blind the jury, where it would not blind a judge, to the subtler aspects of the case. See *Tennenholz v. Poplikitz* in Appendix G.

ASSESSORS—COURT APPOINTED EXPERTS

One of the justifications for jury trial is that it makes for judgment in the light of everyday lay experience and local custom. But having opted for jury trial, our system then tells the jurors they must not

73. UNIFORM RULE OF EVIDENCE 63(20). Section 2 of the proposed Israeli bill provides for the admission at the trial of the civil case of evidence introduced at the criminal trial either by the accused or against him if subject to cross-examination by him. Compare UNIFORM RULE OF EVIDENCE 63(3). Section 3 of the proposed bill provides for transfer of the civil case to the court in which the criminal case was tried.

use their own knowledge. And then it makes it impossible to find out if they have.[74] So much about jury trials defies logical explanation that perhaps we should not be unduly concerned about this example of deviousness. In the case of a judge-tried case, however, it ought to be possible to put the matter of supplying desirable background information to the trier on a more scientific basis.

The Palestine Courts Ordinance, 1940, provided:

> 20. (1) The president of the district court or land court may, when he considers that the nature of the dispute renders it desirable so to do, appoint assessors and such assessors shall hear the evidence and advise the court but shall take no part in the judgment of the court.
>
> (2) Where the dispute is of a commercial nature, the assessors shall be persons of commercial experience.
>
> (3) (Provisions for referee in cases dealing mainly with accounts).[75]

In practice, assessors were rarely used and the above provision was repealed by the new courts law in 1957.[76]

Somewhat comparable to an assessor is a neutral, court-appointed, expert witness. Such individuals have had an interesting history in Israel. In a personal injury case, decided in 1961,[77] the medical experts called by plaintiff and defendant at the trial differed as to whether plaintiff's condition was causally related to an injury negligently inflicted by the defendant. Unable to decide which to believe, the judge appointed a third doctor, believing that such an order was authorized by a rule providing that

> the court or judge may at any stage of the proceedings in a cause or matter, direct any necessary inquiries . . . and in making such order the court or judge may give such directions and may appoint such person or persons to make the inquiries . . . as to it or him may seem fit.[78]

The third doctor favored the plaintiff and judgment was given accordingly. The Supreme Court reversed. Justice Sussmann explains:

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74. Reference is to the rule forbidding jurors to impeach their own verdict. There is growing support for the view that the finality of verdicts is better protected by a system that permits an inquiry into the jury deliberation, but requires tolerant evaluation in the light of realistic standards, than by shutting off the most fruitful avenue of inquiry—a system that leads capriciously to the affirmance of seriously tainted verdicts and the overturning of fairly good ones. See State v. Gardner, 230 Ore. 569, 371 P.2d 558 (1962); Note, 25 U. CHI. L. REV. 363 (1958) (very good).

75. Palestine Gazette of 1940, Supp. I, No. 1032, p. 143 (English ed.). Compare the Austrian provision: JURISDIKTIONSNORM § 7, after providing that civil cases will generally be heard by a three-judge *Senat*, provides that in commercial and mining cases one of the three shall be replaced by a lay expert.

76. COURTS LAW § 48 (5717-1957), 11 LAWS OF THE STATE OF ISRAEL 157, 166 (5717-1956).

77. United Harbor Services, Ltd. v. Liebowitz, [1960] C.A. 326, 15 Piskei Din 15 (1961).

78. ISRAELI RULE OF CIV. P. 221.

> Be it remembered that this was in 1961, when the Supreme Court had already turned back the judge to his traditional role of a neutral arbiter who may take no part in the struggle between the parties. It was decided that as the trial court was not prepared, on the evidence of the plaintiff's doctor, to find for him, the defendant was entitled to a verdict dismissing the action, the plaintiff having failed to prove his case and it was held that the court acted wrongly in assuming control of the case by causing a third doctor to be called.[79]

This decision seems wrong. How does a judge become a partisan by seeking further illumination from a neutral source? The argument is that if the evidence is in equipoise the defendant wins and so, by calling for more evidence, the judge sides with the party having the burden of proof. But certainly only in the most formal way—indeed no more than he would side with the other party by deciding *not* to call for more evidence. I submit that rules on burden of proof have their proper application in dietating the result where the facts are really not discoverable, rather than in shutting out light that is available.

Presumably as a reaction to cases like this, the Civil Procedure Rules, 1963, introduced the following provisions respecting medical experts.

> Rule 163. A Medical Committee which will be established by the Minister of Justice (henceforth—"the Minister"), on consultation with the Minister of Health, will recommend to the Minister a list of candidates from among medical practitioners specializing in various fields, who are suitable for appointment as medical experts of the district courts and consent thereto, and may also recommend the addition of a candidate to the list according to need and the removal of a candidate from the list.
>
> Rule 164. The Medical Committee will work alongside and in coordination with the administration of the courts in all that concerns the number of medical experts required by every district court.
>
> . . .
>
> Rule 170. A plaintiff wishing to submit medical evidence on which to base his claim for damages shall attach to his statement of claim an opinion or a certificate from a doctor in accordance with form 16 of the first schedule (henceforth—"an opinion") and with as many copies as there are copies of the statements of claim, but he may, instead of submitting such an opinion, apply to the court for the nomination of a medical expert for this purpose.
>
> Rule 171. Where a plaintiff has attached a medical opinion to his statement of claim, the defendant may do one of the following:
>
> (1) send to the plantiff, within twenty days from the day the statement of claim was served on him, a demand that he be examined by a medical practitioner of the defendant's choice, and if the plaintiff does not accede to this demand the court will nominate a medical expert;

79. Sussmann, *supra* note 57, at 41. The allusion is to the "overactive judge" cases. *Supra* note 32 and accompanying text.

(2) submit to the court together with his statement of defense—and by leave of the court or registrar even after the statement of defense has been filed—an opinion by a medical practitioner of his choice, with as many copies as there are copies of the statement of defense;

(3) apply to the court for the nomination of a medical expert.

Rule 172. The court may of its own motion nominate a medical expert at any time, even before judgment has been given on the question of liability for the damage, and this may be done on the application of a party, even if the same party has submitted a medical opinion.

Rule 173. The medical expert will be nominated by the court from the list of experts and so far as possible according to the order in which they appear on the list; [the nomination shall not be abrogated for the sole reason that his term of appointment under rule 167 has terminated meanwhile.]

Rule 174. The medical expert nominated by the court may examine the plaintiff; he may hear the opinion of a medical practitioner who has submitted an opinion on behalf of a party; and he is obliged to do so if so requested by a party.

Rule 175. A medical expert may, at any time, apply to the court, in writing or orally, for directions concerning the fulfillment of his duty, and rule 303 shall not apply to an application in writing under this rule.

Rule 176. (a) The medical expert shall submit his report to the court within thirty days of the day of his nomination by the court, unless the court or registrar has made any other order.

(b) The opinion shall be submitted with as many copies as the court shall order and the court shall serve them on the parties.

Rule 177. The court may order a medical expert to give the plaintiff a further examination and to submit an additional opinion; it may also order the plaintiff to undergo an additional examination by another medical expert.

Rule 178. The plaintiff may, within fifteen days of the date on which the opinion of the medical expert was served upon him, rectify the sum which he claimed in his statement of claim, whether by increasing or decreasing it, without obtaining leave from the court.

Similar proposals are abroad in the United States today.[80]

As in the case of several of the other reforms discussed above, a slightly stronger case can be made for the adoption of this one in nonjury cases, although I am certainly not against it for jury trials. A judge is probably less likely than a jury to feel that he must rubber stamp the expert's conclusion, although such rubber stamping is preferable to having the jury overawed by an expert, or worst of all, making an uneducated choice between conflicting experts.

IV.

This article has briefly examined a number of Israeli variations from what an American lawyer thinks of as the ordinary course of litigious procedure in a common law country. Some of these, such as the

80. ZEISEL, KALVEN, & BUCHOLZ, *op. cit. supra* note 72, ch. 11.

proposal concerning court appointed experts, will have had a familiar ring; others, the practice of episodic trials and the use of "reasoned judgments," probably seem quite foreign.

The preliminary description of the Austrian system finds many echoes in the Israeli provisions discussed, and this may lead the reader to overestimate the civilian influence in Israel. In fact, Israel is very much a common-law jurisdiction—if anything there is more respect for traditional English ideas (in legal matters) than with us. The rules and practices I have described are not a product of conscious importation of civil law ideas, but logical developments in a common law, adversary system that is not blessed, or encumbered, with a jury. If there are resemblances to Austrian procedure, it is because both are modern attempts to reach the same goal of efficient resolution of controversies. It would be mildly surprising if there had not been any parallel invention.

The underlying contention throughout has been that Americans should seriously consider devising distinct rules of procedure for nonjury cases. If ever we should decide to do this, we could do much worse than observe the Israeli scene.

APPENDIX A

A COMPLAINT IN AN AUSTRIAN CIVIL CASE*

Amenrecht beauftragt[1]
In the Circuit Court, Wels

Plaintiff: Marianne Stockhammer, a minor, Keuschen No. 99, St. Leonhard, represented by her father Matthias Stockhammer, foreman, Keuschen No. 99, St. Leonhard
who is represented by Advocate
Dr. Heinrich Thun
Salzburg, Residenzplatz 6
Telephone 2090

*This and Appendix D are translations of documents from a real case, however names of parties and places have been disguised.

1. A free translation would be "legal aid requested." Under the *Armenrecht*, or "poor litigants law," a person who is not able to bear the expense of litigation without impairing his ability to provide the necessities of life for himself and family may be exempted from all costs and fees (including his opponent's attorney's fees if the action is unsuccessful) and provided with a lawyer and an advance to cover his own disbursements. There is machinery to screen out frivolous claims and defenses and a requirement that the poor party must make full or partial payment if his fortunes improve. ZPO secs. 63-73

Defendants: (1) Franz Mayrhofer, farm laborer, Keuschen No. 37, St. Leonhard;
(2) Matthias Aigl, sawmill operator, Keuschen No. 12, St. Leonhard,
concerning: S45, 166
and determination of future liability (Stipulated value S50,000)
comprising in all S95, 166[2]

COMPLAINT

(1) The first named defendant, on 16 March 1958, while in the employ of the second defendant as driver of a horse drawn sled on the logging road[3] in Keuschen, in the village of St. Leonhard, caused an accident wherein I suffered injuries which will be more particularly described. In consequence, the first defendant has been sentenced, by a judgment of the district court in Mondsee (U 76/58) and of the circuit court in Wels (7 Bl 167/58), under Criminal Code §335, to 74 days in jail, suspended for three years, and to pay the costs of the criminal proceedings and of the execution of the sentence.

The accident happened because the first defendant, who by his own admission was completely inexperienced as a teamster, was driving without sleighbells and with too heavy a load, because he released the brakes too soon and, in particular, failed to use the requisite harness—for example, a crupper essential to braking. Because there were no sleighbells, I noticed the sled too late so that I could not escape and was run over and dragged along. The first defendant saw me at a distance of 20 meters and dragged me under the sled for 10 meters. In spite of the braking effect of my body it required a distance of 30 meters to stop. From this it is evident that the equipment of the sled was extremely deficient, especially the absence of a crupper.

Proof: The judgment (U 76/58) of the Mondsee district court.
Karoline Stockhammer, housewife, Keuschen 99, as witness.

(2) In the accident I suffered a complete shattering of the left forearm and a double fracture of the left upper arm. The artery in the elbow was torn and in spite of an attempt to sew it together the flow of blood could not be restored and an amputation three fingerbreadths below the elbow had to be performed. The upper arm was broken in two places and had to be wired. Further I suffered a head wound and brain concussion. I underwent treatment at the state hospital in Salzburg for a period of 32 days.

2. About $4000. S=schilling=about $.04.
3. *"Guterweg,"* literally "goods way" or "freight road." Probably it was a steep, narrow, snow covered and snow bank enclosed path or road used for transport of logs—a skidroad.

At this time I still suffer from an irritation of the amputation scar, headaches associated with atmospheric changes, and depression.

Proof: The medical certificates of Dr. Emanuel Jörgner, dated 23 October 1958, and of Chief Surgeon Dr. Josef Hohenwallner, dated 29 October 1958.

Dr. Emanuel Jörgner, general practitioner in Mondsee, as expert witness, Karoline Stockhammer as witness

(3) At the time of the accident the first defendant was working for the second defendant, bringing down saw logs; the second defendant had employed the first for this purpose. The incompetence of the first defendant for this work is clearly established in the judgment of the Mondsee district court (U 76/58) and also in that of the circuit court at Wels (7 Bl 167/68). During the main hearing before the Mondsee district court the first defendant, on 13 May 1958, stated: "I am not a teamster. I took the harness that was there and hitched up the horse. The sled was loaded with about 1 meter of piling. I had not driven horses before and was undertaking that kind of work for the first time."

Thus the first defendant lacked the requisite knowledge for safe management of a loaded horsedrawn sled and so was an incompetent employee. Besides this, the second defendant is responsible for the damages sustained because he let the first defendant do his job with an inadequately equipped sled. As determined in the judgment (U 76/58) of the Mondsee District Court, the harness included neither sleighbells nor the crupper, indispensable to braking.

Proof: Judgment U 76/58 of the District Court, Mondsee
Karoline Stockhammer as witness

(4) As a result of the aceident I suffered the following damages:

(a) charges for stay at state hospital in Salzburg for 32 days at S5.20, ... S166.40

Proof: Bill of 30 May 1958 and
Karoline Stockhammer as witness

(b) for the numerous injuries which finally required an amputation of my left forearm, I demand as compensation for the pain and loss of physical well being the reasonable sum of . . . S45,000.

Proof: Karoline Stockhammer, Dr. Emanuel Jörgner as expert witness

(c) by the loss of the left forearm I am 50% disabled for employment

Proof: written opinion of Chief Surgeon Dr. Josef Hohenwallner
Chief Surgeon Dr. J. Hohenwallner as expert witness

(d) in order to prevent atrophy of the left arm, I must wear a prosthetic device as soon as the healing of the amputation wound permits. This will have to be replaced twice a year.

Proof: Statement of Dr. Emanuel Jörgner, of 16 November 1958 Dr. Emanuel Jörgner, general practitioner in Mondsee as expert witness.

(e) through the loss of my left forearm my chances of marriage are much reduced if not completely destroyed. However the amount of this loss cannot yet be determined. Therefore a determination at the present time that I will be entitled to compensation in the future for damages arising out of the accident is necessary to prevent such claims from being barred by the passage of time.

Proof: Karoline and Matthias Stockhammer

(5) I have in vain demanded payment and acknowledgment of future responsibility of the second named defendant and of his liability insurer and therefore request the following

Judgment

I. The parties defendant, Franz Mayrhofer, farm laborer of Keuschen No. 37, and Matthias Aigl, sawmill operator of Keuschen No. 12, are liable, indivisibly, to pay the sum of S45,166 to the plaintiff Marianne Hinterberger, a minor, within 14 days or have execution issue.

II. It is determined that the minor child, Marianne Stockhammer is entitled to compensation from Franz Mayrhofer, farm laborer of Keuschen No. 37 and Matthias Aigl, sawmill operator of Keuschen No. 12 for her not yet ascertainable damages, resulting from her 50% disability, diminished chances of marriage, and procuring of prosthetic devices, all traceable to the accident caused by the first defendant Franz Mayrhofer on 16 March 1958 as driver of a horse drawn sled on the logging road in Keuschen.

III. The defandants are also liable, indivisibly, to pay the costs of this action within 14 days or have execution issue.

IV. I further request, in accordance with the proposal of the attached Armenrechts certificate, approval for legal aid, since I am not in position to pay for the conduct of this litigation either out of savings or income.

Salzburg, 9 January 1959

Marianne Stockhammer,
minor

APPENDIX B

These are some brief excerpts from the novel, *Die Frau des Staatsanwalts* (The District Attorney's Wife), by Frank Richard, recently serialized in REVUE, a German popular magazine or *Illustrierte*. Although fictional, they serve to illustrate the rather informal practice of interspersed questioning and argument followed in continental courts and suggest the atmosphere of a German criminal trial. An Austrian lawyer, while firmly dissociating himself from my *ausländisch* literary tastes, assures me that these scenes are quite true-to-life and could occur in any Austrian court room.

In the story, Frau Lüthe and her lover Hans Gregor, a much younger man, are on trial for the murder of Herr Lüthe. At the hearing described in the first excerpt a witness, Michael Gründig, is being questioned about a revolver that had been identified as the murder weapon....

"Herr Gründig," said the president of the court, after the usual formalities, "examine this weapon and tell us whether it was once yours."

The bailiff took the revolver from the table and handed it to the witness.

"I don't know whether it is mine or not," said the witness. "It looks sort of like it."

"It is your revolver! The police have determined that you bought it with a regular firearm permit. You stated that you needed it because you often came home late and lived in a tough neighborhood. Now, when did you sell the revolver to Herr Gregor?"

[After some prodding, Gründig testified he had sold it sometime in the spring and that he didn't know why Gregor wanted it. The president then asked the state's attorney if he had any questions. He answered simply that he was satisfied with the showing that the murder weapon had belonged to Gregor. The president then turned to Gregor's counsel. . . .]

"Herr Dr. Tohr, have you any questions?"

"Not of the witness." Hans Gregor's defender rose. "But in this connection I would like to put a few questions to my client—in the presence of the witness." And—when he had been given permission for this—"Herr Gregor—you bought the revolver then because you lived in a lonely area?"

Hans Gregor stood up. "In the immediate vicinity of my apartment a few people had been mugged lately."

"Exactly," said the lawyer. "An important circumstance, incidentally, that we will prove to the court in due course. But for now, did you carry the gun mostly in the evening?"

"Mostly."

"And when you went to see Frau Lüthe."

"Then too."

"And when did you miss the weapon?"

An expression of resigned boredom settled on the state's attorney. He knew from the preliminary investigation that Hans Gregor claimed to have lost the revolver.

"About the first of July," said Hans Gregor.

"After a visit with Frau Lüthe?"

Dr. Wanderer, Annemarie Lüthe's defender, arose. This was always a difficult feat as his enormous belly was jammed fast between the table and defense counsel's bench.

"I must interrupt my Herr colleague," he thundered. "This question has nothing to do with the witness Gründig and is just a futile attempt to suggest to the court that my client took Herr Gregor's weapon."

"I will come to Herr Gründig straightaway," replied Dr. Tohr calmly. "I don't interrupt you when you question your client." He turned to the president. "I must put a few rather painful questions to my client which are unfortunately indispensable in the interest of truth." Without waiting for the president to authorize this, he continued his questioning "On the night you noticed your revolver was gone, Herr Gregor . . . had you earlier been alone with Frau Lüthe?"

Gregor looked at his lawyer with loathing.

"Fraulein Lüthe was not at home?" the lawyer continued imperturbably. "Her mother had sent her out?"

"Ja," answered Herr Gregor. His resigned "Ja" was that of a man who would say Ja and Amen to anything in order to be left in peace.

"Were there intimacies between you and Frau Luthe that night?"

The state's attorney glanced at the president. Not for the first time he felt that Dr. Diebold was not the judge for this case. If he wanted to hear these details, why didn't he at least exclude the public? He thought of Martha and was glad she had stayed home. Also, for a moment, he felt a touch of sympathy for Frau Lüthe, whose most private affairs were being served up to the sensation-hungry public.

"Ja," answered Gregor unwillingly.

"You had"—now his lawyer hesitated too—"You had taken your clothes off?"

The state's attorney glanced at Annemarie Lüthe, who sat there, the picture of respectability, as though none of this had anything to do with her.

"Ja," said Gregor.

Now Dr. Tohr turned to the witness. "Just one question, Herr Gründig. Did Herr Gregor—in the period between the first and tenth of July—speak to you about the loss of his revolver?"

"I can't remember the exact time," he answered. "One time he said, 'I should have saved my money. The thing is gone.'"

Franz Tohr sat down satisfiedly.

The state's attorney was already on his feet.

"I call to the court's attention that the only important thing here is the exact time, which Herr Gründig can't remember. Several weeks passed between the murder and Herr Gregor's arrest." He continued sarcastically, "If Herr Gregor said, 'the "thing" is "gone",' the day after the crime then he was obviously telling the truth. We know where it had gone. Hidden—after the crime."

[At another session, a week or so later, as the trial had been interrupted to search for a missing witness, Carla Lüthe, the defendant's daughter, was questioned about a conversation with Hans Gregor on the fatal night. . . .]

"Hans Gregor knew nothing of the planned murder."

This time Martha felt that the audience did not believe the girl. If Hans had said nothing to her about the murder, why wouldn't she tell what he had confided in her that night?

"Did Hans Gregor tell you," the state's attorney asked, "that he had come from Bad Homburg to Frankfurt with your mother?"

After a little hesitation, Carla answered this question in the affirmative.

"Weren't you surprised that your mother hadn't come home?"

"He said she was going to go back to Bad Homburg."

Dr. Sand struck the table with his fist. "You contradict yourself again! Earlier you told us you knew nothing of a return by Gregor to Bad Homburg."

"I said that he said nothing to me about that," explained Carla Lüthe. "I mean, that he himself . . . But he said, my mother would only be gone a few hours. . . ."

The state's attorney seemed not to hear her. He addressed the jurors:

"Ladies and gentlemen—I ask you—what do you make of this story. The witness tells us that she found nothing surprising . . ." He began again. "Consider the situation. A woman interrupts her amorous weekend; goes to Frankfurt; returns; meets her lover again . . . and her daughter finds all this perfectly ordinary." He sat down. "Really, I have no more questions."

APPENDIX C

COMPARATIVE CHRONOLOGIES

These outlines will give an idea of the course of litigation in an ordinary negligence case under three differing systems of procedure. The cases are real ones chosen because they illustrate a wide range of procedural steps. The dates give some notion of the comparative pace of litigation but it would be unwise to draw any conclusions on the basis of such a minute sample as no single case is ever completely typical. For example, in the American case the complaint was filed unusually soon after the accident probably in an effort to get service on and take the deposition of an out-of-state defendant; and I am told that in the Israeli case the period between the close of arguments and rendering of judgment was two or three times as long as usual because of the exceptional complexity of the medical evidence. I am also told that an appeal to the Supreme Court of Israel must be taken within 30 days of the district court judgment and will ordinarily be finally disposed of within about six months from the date it is taken.

U.S.A. (Circuit Court for Lane County, Oregon)		AUSTRIA (Kreisgericht, Wels)		ISRAEL (Jerusalem District Court)	
Accident (The defendant was on a temporary visit to Oregon, his car struck the plaintiff, a 5-year-old boy who had pushed his bicycle out into a suburban street).	Aug. 11, 1955	Accident (Plaintiff, a 4 year-old girl, was run over while sledding by a horse drawn sled driven by defendant 1 while in the employ of defendant 2)	Mar. 16, 1958	Accident (The plaintiff, a factory employee, suffered a serious head injury allegedly due to the negligence of his employer in respect to equipment and work conditions).	Feb. 23, 1958
Complaint	Aug. 18	Complaint (see Appendix A)	Jan. 14, 1959		
Petition for appointment of guardian ad litem.	Aug. 18	Request to court to attempt service on defendant at different address.	Jan. 26	Statement of claim filed—damages claimed —IL 24, 145 (IL = Israeli pound = $.33).	Jan. 17, 1961
Motion to take defendant's deposition.	Aug. 18				
Order appointing guardian ad litem.	Aug. 18	Erste Tagsatung (A usually very brief preliminary conference. Counsel satisfy court as to right to represent parties, may move for default judgment or raise objections to jurisdiction. No discussion of merits. Court sets time for next proceeding).	Feb. 3	Application submitted to registrar to defer payment of court fees until conclusion of case.	Jan. 17
Order to take defendant's deposition.	Aug. 18				
Return of sheriff "defendant not found."	Aug. 18			Hearing of application before the registrar—decision of registrar to defer payment of court fees in respect of a claim in the sum of IL 23,382.	Mar. 21
Plaintiff's attorney's affidavit of compliance with non-resident motorist statute.	Sept. 1				

Acknowledgement of service by Secretary of State.	Sept. 2
Answer	Sept. 16
Motion to take plaintiff's deposition.	Sept. 16
Deposition of plaintiff's mother — the guardian ad litem— taken.	Sept. 23
Plaintiff's demurrer to answer.	Oct. 11
Argument on demurrer.	Oct. 24
Judges opinion sustaining demurrer.	Jan. 9, 1956
Order sustaining demurrer.	Jan. 12
Amended answer.	Jan. 16
Motion to set case for trial.	Jan. 19
Deposition of defendant and a witness taken.	July 16
Amended complaint.	July 17
Answer of defendant 2	Mar. 6
Answer of defendant 1	Apr. 15
Protokoll of conference (2 page summary of discussion between court and counsel. Clarification of pleadings. Proposals respecting proof and court's ruling thereon. 1 hour).	May 14
Schriftsatz (Nominating expert in log transport and reciting his qualifications). Plaintiff's medical history filed with court.	May 27
Protokoll of hearing (11 page summary of examination of 9 witnesses. Proposal respecting further proof. Hearing continued indefinitely. 4 hours).	Aug. 19
Request for extension of time to locate additional witnesses.	Sept. 1
Filing of amended statement of claim for damages in sum of IL 23,382.	May 4
Filing of statement of defence.	May 4
Submission of application by defendant for leave to present interrogatories to plaintiff.	June 2
Submission of applications by plaintiff for leave to present interrogatories to defendant; and for an order on defendant to disclose documents.	Dec. 27
Hearing by registrar on all the above applications and orders by registrar granting plaintiff's application for discovery of documents, and defendant's application relating to interrogatories.	Apr. 16, 1962
Order by registrar granting plaintiff's application relating to interrogatories.	May 10

Trial entry (Jury selected, trial proceeded to adjourn to proceeding day.	July 17
Trial entry (plaintiff and defendant rested; defendant moved for directed verdict; after argument court sustained motion, jury returned verdict and judgment was entered thereon.	July 18
Verdict	July 18
Judgment	July 18
Statement of disbursements.	July 19
Plaintiff's motion for new trial.	July 27
Argument on motion.	Aug. 27
Order denying motion.	Sept. 5
Plaintiff's notice of appeal.	Sept. 11
Plaintiff's motion for extension of time to file and settle bill of exception. Order granting motion.	Sept. 13
Motion proposing hearing of additional witness and indicating substance of his testimony.	Sept. 7
Motion (like above). Written report of medical expert filed with court.	Oct. 12
Protokoll of hearing (4 page summary of examination of medical expert. Court (Kreisgericht, Wels) orders examination of additional witnesses in Bezirksgericht, Mondsee. 1 hour).	Oct. 15
Protokoll of hearing (3 page summary of examination of 2 witnesses in Bezirksgericht. 1 hour).	Nov. 14
First instance judgnotes. (See Appendix D).	Feb. 1, 1960
Order setting expert's fee.	Feb. 2
Submission of application by plaintiff to advance the date of hearing by reason of his inability to work.	June 19
Hearing by registrar of above application and order to advance hearing as far as possible.	July 9
Hearing of evidence on behalf of the plaintiff and inspectiin in loco.	Mar. 4, 1963
Further hearing of evidence on behalf of the plaintiff.	May 9
Same	May 20
Same	June 6
Same	June 26
Close of plaintiff's case, and hearing of evidence on behalf of defendant.	Nov. 10
Hearing of further evidence on behalf of defendant and close of defendant's case.	Nov. 21
Argument by defendant's counsel	Jan. 12, 1964

Plaintiff's undertaking of appeal.	Sept. 19
Plaintiff's brief and abstract of record.	
Defendant's brief.	
Plaintiff's reply brief.	
Oral argument in Supreme court.	Feb. 5, 1959
Judgment of Supreme Court reversing and remanding for new trial.	Mar. 11
Petition for rehearing denied.	Apr. 1
Circuit Court judgment on mandate for Plaintiff for costs in the Supreme Court.	Apr. 14
Stipulation for dismissal with prejudice.	Sept. 23
Order of dismissal.	Sept. 23
Defendant 1's Berufung.	Feb. 26
Defendant 2's Berufung	Feb. 26
Order correcting typographical error in judgment (50% disability should have read 60%).	Mar. 2
Plaintiff's Berufung.	Mar. 7
Joint reply by both defendants to plaintiff's Berufung.	Mar. 23
Motion to postpone hearing on appeal pending approval by guardianship authorities of settlement proposed by defendant's insurer.	May 28
Disapproval of settlement.	
Second instance judgment of Oberlandesgericht, Linz (Affirming, in the main, but holding that in view of plaintiff's age it was not yet possible to de-	Oct. 4
Same	Jan. 20
Argument by plaintiff's counsel	Feb. 16
Same	Mar. 5
Same	Mar. 26
Judgment reserved	Mar. 26
Judgment allowing the claim in the sum of IL 22,751.75. Interest and IL 750 costs.	July 14

termine the percentage of disability).	
Defendant 2's Revisionsschrift.	Nov. 11
Plaintiff's reply to Revisionsschrift.	Nov. 25
Third instance judgof Oberstes Gerichtshof, Vienna (affirming the second instance judgment after considering the case without hearing the parties).	Dec. 10

APPENDIX D

A JUDGMENT OF AN AUSTRIAN COURT OF FIRST INSTANCE IN THE NAME OF THE REPUBLIC!

The circuit court for Wels, through Oberlandesgerichter Dr. Johann Schönauer as judge, in the action brought by the plaintiff: Marianne Stockhammer, a minor, Keuschen No. 99, St. Leonhard, represented by her father Matthias Stockhammer, foreman, of Keuschen No. 99, who is represented by Dr. Heinrich Thun, advocate of Salzburg, against the defendants: D. Franz Mayrhofer, farm laborer of Keuschen No. 37, St. Leonhard, and 2) Matthias Aigl, sawmill operator of Keuschen No. 12, St. Leonhard, both represented by Dr. Hermann Eiselberg, advocate of Wels, for S45,166. and determination of future liability (stipulated value S50,000), has adjudged as follows:

The defendants are liable, indivisibly, to pay the sum of S30,166 to the plaintiff within 14 days or have execution issue.

It is determined that the plaintiff is entitled to as yet unascertainable damages resulting from her 50% disability, diminished chances of marriage and procuring of prosthetic devices, all traceable to the accident caused by the first named defendant on 16 March 1958 as driver of a horse drawn sled on the logging road in Keuschen.

The defendants are liable to pay the costs of the action, ascertained as S8,724.80 to the plaintiff within 14 days or have execution issue.

The demand that the defendant be held indivisibly liable to the plaintiff for damages for pain and suffering in the further sum of S15,000 is refused.

Grounds for the decision:

On 16 March 1958 there was an accident on the Schober logging road in Keuschen, St. Leonhard, in which the plaintiff (born 7 January 1954) was seriously injured. She was knocked down and dragged along by a horse-sled which the first defendant was driving in the employ of the second. As a result the first defendant, on 13 May 1958 in the Mondsee district court, was found guilty of endangering life under §335 of the Criminal Code. Thus far the facts are not in dispute.

The plaintiff prays for judgment . . . and alleges in support of the prayer: (Here the judge summarizes the complaint set out in Appendix A.)

The defendants take issue with the plaintiff both as to liability and damages, and pray for dismissal of the prayer for present damages and determination of future responsibility. They do not contest the amount of the bill incurred at the state hospital in Salzburg—S 166.

The first defendant claims—

[Here the judge summarizes the answers. Mayrhofer alleged that Marianne had scooted out of a side path on a sled immediately in front of him, so close that he could not have stopped even with a crupper. He denied he was going too fast or that the sled was overloaded. The absence of sleigh-bells made no difference because everybody living along the road knew it was in constant use. Aigl denied that Mayrhofer was inexperienced. He alleged he reasonably believed him to be competent and had provided him with adequate harness and other equipment and this was the extent of his duty.]

Proof was taken by examination of witnesses Anna Essl, Josef Mortl, Josef Wessbaumer, Josef Schwaighofer, Katharina Hierner, Karoline Mayrhofer and Johann Aigl, by hearing the experts Matthias Ramsauer and Dr. Hans Schattinger, by examination of both defendants as parties, by a view of the scene of the accident, and by reading the judgment of the Mondsee district court (U 76/58), the hospital records pages 49-51, the medical certificates (Exhibits C-E) and the bill of the Salzburg state hospital (Exhibit E). Based thereon are the following findings of fact:

The second defendant has a farm and sawmill at Keuschen No. 12 in the village of St. Leonhard bei Mondsee. The first defendant comes from a rural background and worked as a farm laborer until March 1959. From the age of 12 he had driven horse-sleds. Already at 13 he brought wood out of the forest alone by sled. He engaged in wood transport by sled almost every winter, on the farm, and with the second defendant for whom he often worked as a day laborer. One winter he worked steadily for him. After his discharge from the army in February 1958 he worked nearly everyday for the second defendant mainly at wood-transport. He, together with the witness Josef Schwaighofer, also employed by the second defendant, began bringing down wood by the Schober road to the St. Leonhard road five days before the accident. Each man used a one-horse sled. On the day before the accident sawlogs were brought down from the woods above houses No. 14 and 102 Keuschen. The drag of the logs on the snow was such that the horses had to pull despite the downgrade. On the last day, March 16th, piling rather than sawlogs were transported. The loads were more than one cubic meter. The accident happened about 3:30 P.M. about 12-15 meters north of the Hierner house, Keuschen No. 14, on the logging road. This road is about 2 meters wide. From its terminus at the St. Leonhard road it runs first straight and somewhat uphill and in a southerly direction past houses No. 12 and 102. These buildings are about 3 meters from the logging road and 30 meters from one another. Passing these houses—there are no others alongside the logging road—it has a grade of 7 or 8%. Some 70 meters south of No. 102 the road curves to the

right into the woods, and at this curve the grade increases to about 9.4%. Keuschen No. 99—the plaintiff's house—is on the St. Leonhard road, west of the logging road....

Before the accident the child was with the witness Katharina Hierner at No. 14. When she wanted to go home the witness went with her to the front door which is on the south side of the house. From here the view up the logging road toward the woods is blocked by No. 102. From the door the child went down the path to the road on her sled just as the first defendant came down the road. He had released the sled's brake at the end of the curve when he came out of the woods and had a clear view of the rest of his route. This increased his speed and the horse broke into an easy trot. Eight or ten meters above No. 14 he saw the plaintiff for the first time as she sledded into the road. He could not see her sooner because of house No. 102 and the snowbanks bordering the road. He called to her to get out of his way and also tried to stop by hauling on the reins, but could not prevent the accident. The horse avoided her but she was caught by the rear runners and seriously injured.

The first defendant had failed to harness up with sleigh bells and a crupper, which would have made it easier to stop the sled. Under the existing circumstances (easy trot, hard surface, one-horse sled loaded with one cubic meter of piling) the first defendant needed 15-16 meters to stop the sled. If a crupper had been used a stop within 5-6 meters would have been possible. (Report of expert Matthias Ramsauer, p. 84).

The second defendant had repeatedly urged the first defendant and also his other employees occupied in transporting wood, to harness up with crupper and sleighbells. He had this gear available in orderly condition, enough for six horses. The second defendant had not given special instructions with regard to the harnessing of the teams for the transport of wood over the Schober road and made no special check thereon. He didn't consider this transport of wood to be difficult and relied on the knowledge and experience of the men doing the work. (Testimony of both defendants as parties.)

Johann Eisl who had worked for the second defendant for two and a half years before New Year's 1958 as a stable boy had always used sleighbells and a crupper when driving a sleigh. He was replaced by Josef Nussbaumer, who had the job of stable boy for about four weeks. The latter had not always used sleighbells; especially not when he expected that, because of the condition of the road, no other sleighs would be out. Josef Nussbaumer used a crupper when he considered such equipment necessary. (Testimony of the witnesses Josef Nussbaumer, Johann Eisl and Josef Schwaighofer).

In the transport of wood over the Schober road, neither the first defendant nor the witness Josef Schwaighofer used either sleighbells or cruppers, not on the day of the accident nor on numerous days before. They considered both unnecessary. Also, on the other occasions in February and March 1958, both had been seen driving horsesleds without sleighbells and crupper. Josef Schwaighofer drove a sleigh four or five times together with the first defendant. On these trips, they never used sleighbells. (Testimony of the witnesses Johann Eisl and Josef Schwaighofer, testimony of the first defendant as party.)

The plaintiff suffered a complete crushing of the left forearm and a spiral fracture of the left overarm. The left forearm had to be amputated just below the left elbow. Since it was impossible to put on a proper cast, the left upperarm could only be set by sewing with wire all around. Both injuries were termed very serious. The plaintiff further suffered a one-centimeter long lacerated wound on the parietal bone with haemotoma in the area and a covered injury to the cerebrum. These injuries are considered minor. The process of recovery in hospital lasted 32 days and was without complication. After the stay in the hospital, the plaintiff suffered a skin eruption and tic. The removal of the medullary nail and the wiring made necessary another shorter stay in hospital. The injuries of the plaintiff resulted in a week of continued severe pain, 14 days of continual medium pain, and two months of continual light pain. Following this, and till the end of 1959, she suffered minor pain, in the beginning frequently, later sporadically—taken altogether this was the equivalent of two months of continual light pain. A subsequent operation brought a day of continual severe pain and three days of continual mild pain. At the time of the examination of the defendant by a medical expert on Oct. 5, 1959, the defendant still had phantom pains and a painful scar on the left upper arm. According to the present legal annuity table, a permanent decrease of 60% in earning capacity is to be assumed with the loss of the left forearm. At this time, the stump of the forearm is still unfavorable for the fitting of an artificial limb. In the meantime, only a temporary artificial limb can be used. The danger exists of further muscular atrophy in the left upper arm which can be lessened by intensive physical therapy. In consideration of the age of the defendant and her otherwise good health she will presumably overcome the mental consequences of the injuries suffered in the accident after a relatively short time. (Experts report, medical history of case).

The details of the accident could be established from virtually uncontradicted evidence. Any dispute merely involved the place of the accident. According to the testimony of the witness Josef

Schwaighofer and that of the first defendant, she was found lying not further than 5 meters from the house, Keuschen No. 4. According to the testimony of the witnesses Katharina Hierner and Karoline Stockhammer, she was 12 to 15 meters north of the house. As the first defendant had seen the plantiff child only 8 to 10 meters before the junction of the path from Number 14, and, as he testified, stopped immediately after the accident, the location of the accident can be fixed with certainty about at the place established by the witnesses Hierner and Stockhammer. This is in consideration of the sleigh's stopping distance set by the expert Matthias Ramsauer at 15 to 16 meters and with regard to the necessary reaction time.

The ability of the first defendant and his experience in the transport of wood by sled are established by the uniform and credible testimony of the witnesses Anna Essel, Johann Eisl, Josef Schwaighofer and Josef Nussbaumer, as well as the testimony of both defendants as parties. It would also be very improbable if the first defendant, coming from a farming family, growing up in the area of Mondsee, and who, until recent times, was always employed as a farm worker, did not know how to handle horse sleighs, with which the transport of wood is chiefly carried out. The contrary records in the criminal case U 76/58 of the BG. Mondsee must rest on a mistake. Credible, corroborated testimony also establishes the availability of the prescribed equipment for the teams used in the defendant's business. That the second defendant had made a general order respecting the use of sleighbells and cruppers was proved by the testimony of the first defendant which confirmed that of the second defendant. For the transport in question, the second defendant, as he himself admitted, had made no special order because he was of the opinion that he could rely on his employees. The witnesses Josef Nussbaumer and Josef Schwaighofer agreed that, despite the order of the first defendant, they drove sleighs without sleighbells in the first months of the year. The testimony of the witness Johann Eisl goes to prove this with particular force.

By the judgment of the Mondsee district court of May 13 the first defendant was found guilty because of the accident in question. This is binding on the civil court. In the judgment, it was determined that the first defendant was to blame for the accident because he released the brakes, drove at a trot and used the sleigh without sleighbells and crupper. The evidence, received in the present proceedings proves the same factors of guilt. The first defendant consequently violated §56 par: 2 of the Traffic Code, according to which audible bells must be used on harnesses of draught animals. He failed to exercise the necessary caution when he released the braking chain on the downgrade, whereby the speed of

the sleigh increased. The lack of a crupper then made it impossible for him to stop the sled in a short distance when the emergency arose. All these factors combined in the accident. In particular, the bells ringing would have made the witness Katharina Hierner aware of the approaching sleigh at the right time. In this case, she would not have sent the child on her way alone. The bells ringing, too, would have meant a warning even for the four-year-old child. That the first defendant saw the road clear did not excuse him. He should have realized that someone might come out on the road from the Keuschen houses, numbers 14 and 102. He should have been even more careful since the approach to Number 14, could not be seen. Since an accident happened on the first trip of the day, his objection that the inhabitants of the adjacent houses had knowledge of the wood transport hardly has weight. The fault of the first defendant is therefore sufficiently established and therewith his liability for the plaintiff's claims.

The liability of the second defendant is based on §1315 of the General Civil Code. In answer to this, contrary to the assertion of the plaintiff party, it was clearly proved that the first defendant had previously and frequently driven horse sleighs and transported wood. It was further proved that the second defendant had not put inadequately equipped sleds at the disposal of his employees. An employee's "incompetence," in the sense of the section cited, however, may also be found if an accident's occurrence is traceable to a general propensity for negligence, to a lack of conscientiousness, and repeated non-observance of safety regulations. The first defendant, had not just displayed a gross lack of caution on one occasion but had already driven without sleighbells on the days preceding the accident in the months of February and March 1958 and therewith made clear that he was not willing to obey the traffic code. For safety in traffic a bellring is of vital necessity. In the case of the first defendant, we can therefore speak of a propensity to disregard this rule. The accident is therefore not to be attributed to a single failure on the part of an otherwise capable servant but to an inclination towards negligence in the first defendant, to a lack of conscientiousness. The negligence already existing before the accident, together with the first defendant's repeatedly displayed disregard of the regulations about sleigh-traffic, were, in conclusion, intrinsic joint causes of the accident on March 16, 1958. If one cannot conclude from the accident that there was a gross lack of ability or training, from the past conduct of the first defendant as a driver of horse sleighs one can find an "incompetence" in the exercise of this occupation in the sense of the code section. Therefore, the liability also falls on the second defendant, jointly with the first, for the

results of the accident. It makes no difference whether or not this incompetence was known to the second defendant. He cannot defend himself by the fact that he had given the appropriate orders.

Nor may the defendants claim a reduction of damages under §1310 of the General Civil Code. According to this section how far a child is responsible for her conduct depends on her age and mental development. A child barely four years old has no appreciation of danger, all the more if the child, as in the case of the plaintiff, is not made aware of the threatening danger by any circumstance whatsoever. The plantiff is therefore not to be considered accountable in the sense of the law.

The objection of the defending parties that the mother of the child bringing the action should have reckoned with the possibility of the appearance of a sleigh and that she violated her duty of supervision, needs no discussion. The fault of the mother can not be imputed to the child. The conduct of the mother was perhaps a cause of the accident, but this means only that the defendant may have some claim over against her.

The plaintiff is entitled to damages for pain and suffering under §1325 of the code. By these, all hardship which the injured child suffered as a result of the injury, should be made good. The court takes into consideration in fixing the amount, the above established extent and duration of the pain, the nature of the injuries, the course of recovery and, above all, the mental sufferings resulting from the physical injury. The unhappiness of being a cripple and the feeling of depression because of a permanent diminution of the ability to work, are objects which are of particular importance in determining the damages in the case in question. The court considers the entire injury from the accident of the plaintiff appropriately compensated by the sum of S30,000. The demand for a further S15,000 is therefore refused.

The demanded sum of S166.40 for the expenses incurred during the stay in the hospital is proven by the hospital bill (Exhibit B). The plaintiff's prayer is therefore granted in the sum of S30.166.40. The requisite legal interest for an establishment of future responsibility is present. The alleged decrease in earning capacity is established by the report of a medical expert. The loss of the left forearm can, if the plaintiff goes to work, occasion a substantial loss of income. In addition, decreased prospects of marriage are probable. As the child grows, it will be neccesary to repeatedly replace her artificial arm and this may occasion expense not forseeable today. For these reasons the prayer for establishment of responsibility is granted.

Costs are awarded in accordance with §41 of the Civil Procedure Law. No costs are allowed for the motion for an extension of time

(Document No. 20) or for the motion proposing proof (Document No. 23). These motions could have been made at the oral hearing which took place two days later.

Circuit Court Wels, Div. 2
1 February 1960
Dr. Johann Schönauer

APPENDIX E

INTRODUCTION OF EVIDENCE IN WRITING

1. The following provisions were added to the Israel Evidence Ordinance in 1954.

PART VII—EVIDENCE OF EXPERTS

25. The court may, unless it fears that a miscarriage of justice may result, receive in evidence, in writing, the opinion of an expert as to a matter of science, research, art of professional knowledge (hereinafter: "opinion") and a certificate or a physician as to the state of health of a person (hereinafter: "medical certificate").

30. (a) The provisions of section 25 do not derogate from the power of the court to order that an expert or a physician shall be examined in court, and the court shall accede to the request of a party for an order to such effect.

(b) Where it appears to the court that the request of a party for an expert or a physician to be examined in court was vexatious or frivolous, it may impose the cost of the examination on that party.

SCHEDULE

FORM OF OPINION

In the . . . Court
in the matter between . . . and . . .

EXPERT'S OPINION

Name of Expert .....
Address and Place of Work .....

I, the undersigned, have been requested by . . . to state my professional opinion as to the question set out hereunder, which has arisen in the court in the matter under reference. I give this opinion in lieu of testimony in court and hereby declare that I am well aware that for the purpose of criminal law concerning false testimony given on oath in court this opinion, when signed by me, will be treated like testimony on oath in court.

Particulars of Education .....
Particulars of Professional Experience .....
Opinion .....
Date .....Signature .....

FORM OF MEDICAL CERTIFICATE

Name of Physician .....
Address and Place of Work .....
Number of License .....
I, the undersigned, hereby attest and certify that on . . . at . . . I examined X. Y. and arrived at the following findings in regard to him . . .

This certificate is given by me for submission to the court as evidence, and I hereby declare that I am well aware that for the purpose of the provisions of the criminal law concerning false testimony given on oath in court this certificate, when signed by me, will be treated like testimony on oath in court.
Date .....Signature .....[1]

2. A very similar part VIII, relating to proof of the contents of official records, was added to the Evidence Ordinance in 1955.[2]

3. Another 1955 enactment, the Protection of Children Law, requires the police *and the courts* to obtain permission from a "youth interrogator," (*i.e.*, a social worker) before questioning, or hearing as a witness, a child under 14 in connection with offenses against morality. The act presumably contemplates that such permission ordinarily will be withheld and the child will be examined in private by the youth interrogator, in which case:

§ 9. Evidence as to an offense against morality taken and recorded by a youth interrogator and any minutes or report of an examination as to such an offense prepared by a youth interrogator during or after the examination, are admissible as evidence in court.

§ 10. Where evidence as referred to in Section 9 has been submitted to court, the accused or the prosecutor may require, and the judge may order, that the youth interrogator, reexamine the child and ask him a particular question; but the youth interrogator may refuse to ask all or any questions so required if he is of the opinion that asking them is likely to cause physical harm to the child.

§ 11. A person shall not be convicted on evidence under Section 9 unless it is supported by other evidence.[3]

4. A draft code of evidence prepared by the Harvard-Israel Project[4] contains the following sections:

Section 25: Testimony Outside the Jurisdiction.

The trial court may order that testimony that is to be heard at a place outside its jurisdiction be presented before another court or before a special examiner to be appointed for that purpose by the trial court, on such terms

1. 8 LAWS OF THE STATE OF ISRAEL 89, 90-91 (5714-1953/54).
2. 10 LAWS OF THE STATE OF ISRAEL 10 (5716-1955/56) ("admit as evidence a certificate concerning a thing recorded in an official document").
3. 9 LAWS OF THE STATE OF ISRAEL 102, 104 (5715-1954/55).
4. See note 27 accompanying main text *supra*.

as it may by order direct. Such testimony shall be considered as if it had been given before the trial court.

Section 26: Power of Single Judge to Hear Testimony.

A court composed of three judges or more, may impose upon one of them the duty of hearing testimony either generally or in a particular case or of a particular witness; testimony given before such judge shall be considered as if it had been given before the full bench.

Section 45: Power of Single Judge to Inspect.

A court composed of three or more judges may impose upon one of its members the duty of inspection; and inspection by such judge shall be considered as if it had been an inspection by the full bench.

APPENDIX F

A JUDGMENT OF AN ISRAELI COURT OF FIRST INSTANCE

In The Tel-Aviv District Court

Before Judge Dr. Y. Sussman

In the matter of:

The plaintiff: Yitzhak Rossi

v.

The defendants: 1. David Anschlovman
2. Tel-Aviv Municipality

Judgment

At 2 p.m. on 18 December 1950 the plaintiff, a 31-year-old man, was riding a motorcycle along Pinsker Street in Tel-Aviv, towards Mugrabi Square. As he was approaching the junction of Droynov Street and Pinsker Street, the plaintiff received a sudden blow and as a result of the impact he was thrown from his motorcycle and fell a distance of 1-1½ metres onto the ground. As a result of his fall, the plaintiff fractured his left thigh in two places, as described by the doctor who treated him, Dr. Stavorowsky, exhibit P/12.

The plaintiff was hospitalized a number of times in the Tel-Aviv Municipal Hospital, "Hadassah," and his leg was placed in a plaster cast. After treatment which continued about six months the fractures have healed, but the plaintiff limps and his damaged leg is 3 cms. shorter than his right leg, necessitating the use of a special orthopaedic shoe in order that both legs should be of equal length.

2. We could not ascertain from the plaintiff's words who was the man or what was the object which dealt him the blow, but the plaintiff and two other men, Assigman and Nachmias, have given

evidence that at the time of the accident there passed by the plaintiff a jeep driven by the first defendant. This vehicle did not stop immediately after the accident owing, it seems, to the fact that its driver, the first defendant, did not perceive what was happening, but the cries of passers-by caused him to come to a halt about 15 metres from the location of the accident.

3. It will be noticed that, although the accident took place whilst the jeep was overtaking the motorcycle, no one testified that the jeep struck the motorcycle or its rider, or that it was the jeep which dealt the plaintiff the blow which knocked him over.

The question that arises from these facts is—and I confess that I did not find it an easy one to resolve—whether there is anything in the very fact that the accident took place which can constitute proof that the defendant's negligent driving was the cause of the accident. This is not a question of fact, for we have not yet arrived at the stage where I must express an opinion as to whether or not I believe that the plaintiff fell as a result of the encounter; we are dealing with a question of law, viz., whether the testimony of the witnesses discloses any evidentiary material which can provide the basis for such an opinion. In other words: if the proceedings were to take place before a judge sitting with a jury, could the judge direct the jury to decide, on the basis of the evidence, whether the accident was caused by the first defendant, or would it be the judge's duty to dismiss the claim since the plaintiff had not submitted any evidence to be put before the jury?

The difficulty of solving this problem may be shown by a comparison of two precedents: Wakelin v. London & South Western Railway ((1882) 55 L.T. 709) on the one hand, and Jones v. Great Western Railway ((1931) 144 L.T. 194) on the other.

In the first case a man was found dead beside a level crossing which had been left open at the time of the accident (about 9 o'clock —see the account of the facts on page 709, ibid.); and it was proved that a train had passed through without giving a warning sign, and that after 8 o'clock the railway guard no longer worked by the crossing. It was held, however, that these facts did not constitute proof that the defendants had been negligent and that their negligence had caused the accident, the reason being that no explanation was provided of how the man came to be on the railway tracks.

In Jones' case a man was found killed, lying between the wagons of a train standing in the station. The cause of death was not ascertained, but it was established that railway workmen had been shunting the wagons and the company was held liable, since it did not prove that its workmen had given a warning. The Lord Chancel-

lor, Lord Hailsham (ibid, at page 196) struggled to make a distinction between the two cases; moreover, during the course of these exertions he said, mistakenly, that it was not proved in Wakelin's case whether the deceased man was killed before or after 8 o'clock, while in the account of the facts in Wakelin's case the time of the accident was fixed at 9 o'clock in the evening, i.e., when there was no longer a watchman at the level crossing.

It would seem, however, that in Wakelin's case judgment was given in the company's favour not because of its lack of negligence, but owing to the doubt as to whether its negligence was the cause of the accident.

This is not the problem which arises in the present case. The question here is not whether the first defendant's negligence caused the accident (for there is no doubt that, if the first defendant's vehicle did strike the plaintiff he was negligent, and that this was the blow which knocked the plantiff over); the question here is whether the first defendant struck the plaintiff at all while he was overtaking him. When may evidentiary material be considered proof of the defendant's negligence, and when not?

The answer to this question, although we are concerned with a legal matter, is in fact provided by logic. When evidence is submitted to the court and is offered by one of the parties as the grounds for a conclusion which he wishes the court to draw, it may be that the entire evidence directs the court to the same conclusion, it may be that it does not direct it at all to that conclusion, but it may also be equivocal, that is to say that the conclusion sought may be a plausible one without being a necessary one. In this third class of case—with which we are here concerned—it is the judge's duty to weigh up the possibilities; and the only way in which he can do this is by the light of human experience and by asking himself:

"In view of what has taken place, does the outcome indicate negligence on the part of the defendant, or is it equally consistent with the possibility that he was not negligent?"

In the second case, where the possibilities are evenly balanced, the evidentiary material loses its probative value for the purposes of attaching blame to the defendant, since if it is equally possible that the defendant is or is not to blame it would be repugnant to see him as guilty, and he is presumed to be innocent. In the first case, on the other hand, when the evidentiary material indeed gives rise to the possible conclusion that the defendant was not guilty of negligence, but this conclusion is no nearer the truth than the alternative conclusion which indicates negligence on the part of the defendant, the more certain of the solutions is to be preferred, and

it is this preference which sanctions the evidence for the purposes of proving the negligence.

Let us now return to the matter in hand. Counsel for the defendants places emphasis on the fact that the plaintiff himself did not see the encounter; he did not testify that the jeep struck him, but used the following words: "Suddenly I received a blow and I fell." Now we know that at that same moment the jeep overtook the plaintiff. Let us suppose a man were knifed or struck from behind: it would be impossible for him to see the man who stabbed him or who dealt the blow, but if immediately afterwards there should appear beside him another man, Y, is not X entitled to conclude and to state that Y was the man who struck him? And it will not be said that X is lying because he could not see Y at the time when the blow was struck, since the objective situation supports his view and provides a foundation on which to base his conclusion.

It seems to me that the situation here is similar. One of the witnesses testified that the plaintiff was travelling slowly and that he rode the motorcycle at a slow rate "with a tendency to wobble." However insofar as the possibility that the plaintiff fell from the motorcycle as a result of such a tendency exists at all, it does not measure up against the alternative that he was thrown from his motorcycle as a result of an impact; for that the second alternative merits decisive preference is evident from the fact that the plaintiff came off the motorcycle with a jerk which precipitated him over a distance of a meter or more. From this I infer that the plaintiff did not simply fall, but that he was brought down by a force stronger than himself; and consequently I am of the opinion that the facts which are known to us constitute admissible evidence that the motorcycle was hit by the vehicle which was overtaking it.

3. In the light of the fact that we are entitled to conclude that the first defendant knocked the plaintiff down, the question arises whether we would be right in reaching this conclusion?

Here counsel for the defendants points out the important fact that plaintiff fell on his left side, and the motorcycle, also, continued towards the left after the accident, until the witness Nachmias went up to it and turned off the engine.

The defendant overtook on the same side (the left), and if he struck the motorcycle on this side (and it must be added that if he struck it at all he must have struck the rear part of the motorcycle, for otherwise the plaintiff would have seen it happen), while travelling like a vehicle does when overtaking, that is to say, moving ahead alongside the motorcycle, possibly with a leftward deviation, would

not the impact of the collision have given the motorcycle a rightward direction?

The parties to the action for some reason did not find it necessary to bring any expert evidence to explain the accident and insofar as the laws of physics are a common heritage and do not require evidence, I agree that the change in direction undergone by the motorcycle, according to the law of parallel forces, seems to be evidence of a blow from the right, i.e. not from the side on which the plaintiff was overtaken. However as against this I am taking into account the following factors:

First, that the jeep was travelling at least twice as fast as the motorcycle, and its weight exceeded that of the motorcycle; these two factors might well have altered the direction taken by the latter.

Secondly, the motorcycle is a vehicle of which many of the parts protrude, many as for instance its engine, its electrical system, and its parking stand; this applies, moreover, to the driver himself. Should the motorcycle or driver receive a blow from the left by a vehicle overtaking them, it is quite possible for the vehicle to 'drag' him along, if only for a second, and thereby alter his direction.

Here it must be pointed out that at the time the jeep was overtaking it was describing an arc until it returned to its original path. In contesting this fact the defendants rely on the evidence of Assigman, who gave evidence that the two vehicles were travelling parallel to one another. On this question, however, I prefer the evidence of the witness Nachmias: first, because he was in a better position to see than Assigman, since the two vehicles were travelling towards him whereas Assigman was parked by the side, and secondly, because Assigman himself agrees that the jeep eventually braked and drew into the kerb on the right, and this amounts to drawing an arc.

The first defendant elected not to give evidence and we have consequently heard no explanation from him as to how the accident took place. He was travelling behind the plaintiff and he is in a position to offer an explanation, whereas the plaintiff cannot do so. Had the first defendant entered the witness box and stated that he had not struck the plaintiff, I might have taken the view that such evidence negatived the probative value that I attribute to the objective situation and might have magnified the doubt to such an extent that I should no longer be prepared to find as a fact that it was he who had caused the accident. The defendant, however, did not give evidence; there was no other force near the location of the accident which could have thrown the plaintiff from his motorcycle, and consequently I prefer to draw the conclusion that the first defendant, when he was overtaking the plaintiff, drove his jeep in such

a way that in drawing the arc the back part (so it seems) of the jeep struck the rear end of the motorcycle and the plaintiff fell on his left side *behind* the overtaking vehicle; thus the vehicle succeeded in passing without running over the plaintiff.

4. What was the damage suffered by the plaintiff as a result of the negligence?

Firstly, the plaintiff claims his medical expenses to the sum of IL 360.—.[1] Receipts as to a part of this sum were submitted, the details of which were not clarified by the plaintiff's evidence, but the defense attorney hinted that he was refraining from examining on this question and that he had no intention of refuting these particular expenses.

Secondly, the plaintiff claims IL 900.- loss of income over a period of 6 months. The plaintiff is, it appears, a partner in a carpentry works. Every week he would draw the sum of between twenty and twenty-five pounds from the funds of the business, besides which the partners would share out money from time to time, when there was a cash balance to their credit. However, even if we accept that the plaintiff's share of the profits of the enterprise totalled IL 150.- per month, we must take into account that its activities were not entirely suspended by the accident; for the machines were hired out to other carpenters who paid rental fees for their use, and the plaintiff is entitled only to the sum which his own personal labours would have brought him. In view of the meagerness of the evidence by the plaintiff—we do not know how long the partnership has been in existence or how much time the plaintiff devoted to his work before he was injured—I estimate the plaintiff's loss of earnings to be IL 75.-, that is to say IL 450.- over the period of six months.

The plaintiff further claims the sum of IL 400.- for future medical treatment, but I reject this claim since I am convinced neither of the need for this treatment nor of the expenditure which it involves.

There remains the claim for general damages. There is no doubt that the plaintiff suffered pain and discomfort and was confined to his bed for a lengthy period of time. His injured leg is shorter than the other one, but here again we are ignorant and the doctor who treated the plaintiff, Dr. Stavorowsky, was not questioned as to his chances of recovery and improvement in the future. Without any expert medical guidance I am not prepared to consider these factors as an adequate basis for a judgment to the sum of IL 4.000. which the plaintiff claims, and I shall fix the amount of general damages at IL 1.000.

It has not been disputed that the first plaintiff was driving the

1. About $120.00. IL=Israeli pound=about $ .33.

vehicle in question while he was in the service of the second defendant and in the course of his employment; consequently the second defendant too is liable, under section 12 of the Civil Wrong Ordinance, 1944.

The defendants are jointly liable to pay the plaintiff the sum of IL 1.810.- plus 9% interest as from today.

Seeing as the plaintiff has been only partially successful in his claim, I shall make no order as to costs.

Judgment delivered in public in the presence of advocates Barak and Hendelsman today, Dec. 12, 1951.

APPENDIX G

OPINIONS OF THE SUPREME COURT OF ISRAEL

Three times each week for the past ten years, the Jerusalem Post, an English language newspaper published in Jerusalem, has printed summaries of significant and interesting opinion of the Israeli court. A sampling of these is collected here in an effort to give a suggestion of the flavor of Israeli legal methods and institutions.

Four of the opinions are referred to in the text or footnotes of my article. The fifth, *Malcha v. Attorney General*, is included because it deals with an important and troublesome point of tort law, liability for unforseen consequences, and is especially suggestive of the legal kinship of Israel with other common law jurisdictions.

Bear in mind that these are condensations and summaries rather than strict translations. They were written by Doris Lankin, a member of the Jerusalem bar, and I am told that they are considered by Mrs. Lankin's colleagues, and indeed by the authors of the opinions themselves, to be a very fair and accurate representation of the courts' work.

Readers interested in more intensive study of Israeli jurisprudence are referred to the Selected Judgments of the Supreme Court of Israel, a recently inaugurated series of reports containing full English translations of selected Israeli opinions. These reports are published in the United States by Oceana Publications, Inc. The first two volumes were the subject of an extended "Book Report": Laufer, *Israel's Supreme Court: The First Decade*, 17 J. LEG. ED. 43 (1964).

The permission of the Jerusalem Post to reprint the following opinions is gratefully acknowledged.

JUDGMENT IN CRIMINAL CASE NOT ADMISSIBLE AS EVIDENCE

Tennenholz v. Poplikitz

The first appellant, while driving a lorry owned by the Shelev company, the second appellants, collided with the respondent, who was riding a motor-cycle, near Citrus House in Tel Aviv. The appellants were ordered by the District Court to pay the respondent IL.I,701 damages. They appealed to the Supreme Court against this decision, while Poplikitz counter-appealed against the amount of damages awarded.

Judgment

Justice Sussman, in delivering the judgment of the Supreme Court, after analysing the circumstances of the case, held that the District

Court had not erred in concluding that the accident had been due to the first appellant's negligence.

In considering M. Kritzman's complaint that the District Court had accepted as evidence the fact that Tennenholz had been convicted on a criminal charge in connection with the same accident, Justice Sussman pointed out that the Supreme Court had already held (in C.A. 102/47—Psakim B/63) that a judgment delivered in a criminal case between the Attorney General and the accused could not be used as evidence in a civil case brought by someone who was not a party to the criminal case. The fact that in that case the accused had been acquitted, whereas in the present case he had been found guilty, made, in the opinion of the Justice, no difference in so far as the principle was concerned.

If it were contended that the judgment in the criminal case should at least be regarded as prima facie evidence of the accused's negligence, then this contention, too, must be dismissed, the Justice held, since the factual findings of the judge in the criminal case—based on evidence which he had heard and seen—must be regarded by the judge in the civil case as hearsay evidence, and thus not admissible. In the civil case the judge must base his decision on the evidence produced by both parties before him on the conclusions which he himself draws, not relying on the conclusions of another, be he even another judge (Hollington v. Hawthorn, 1943, 2 A.E.R. 35).

Justice Sussman emphasized that the Court was well aware of the fact that there was a substantial difference between an acquittal and a conviction in the criminal case. It was quite clear that an acquittal in a criminal case would not stop the plaintiff from filing a civil suit against the defendant since, in the criminal case, he had not appeared as a party and could not plead his cause. The question would be asked, therefore, why conviction should not be used against the defendant who had been given every opportunity of pleading his case in the criminal court. The answer to this question, continued Justice Sussman, lay in the differences between the demands of criminal law and that of civil law on the matter of evidence: while criminal law allowed for a conviction on the uncorroborated evidence of one person, civil law demanded corroboration.

The judgment in a criminal case was therefore inadmissible as evidence in a civil case. But, Justice Sussman held, as the District Court judge had not based his decision in the civil case on the judgment in the criminal case, therefore the Supreme Court considered that the hearing of the inadmissible evidence could not invalidate the judgment.

In dealing with the amount of compensation granted by the District

Court, Justice Sussman held that the lower court had erred in estimating the damages accruing to the respondent up to the time of the filing of the claim. It had been laid down by the Supreme Court that damages of this nature must be proved by the plaintiff, and if no satisfactory proof were forthcoming the judge was not entitled to estimate these damages but had to dismiss the claim. Since the respondent had not proved the amount of damage suffered by him until his filing of the claim, therefore, Justice Sussman held, an amount of IL. 126 must be deducted from the total award.

The Court dismissed the respondent's counter-claim for increased damages on the grounds that while no denial was necessary from the defendant as to the amount of damages claimed, nor of any allegation in connection with damages (Rules 87 and 115 of the Rules of Civil Procedure) the plaintiff, on the other hand, must prove his every claim.

Judgment given on December 17, 1954.

Cross Examination by Judges

Moshe Green v. The Attorney General

The Supreme Court allowed an appeal against a verdict of the Haifa District Court, delivered on June 26, 1955 (Cr. C. 80/54) which found the appellant guilty of unintentionally causing the death of a child by want of precaution not amounting to criminal negligence; he was fined IL200 and given nine months' suspended sentence.

One day in 1953 a group of small children were playing on the appellant's stationary ice van. After delivering the ice in the neighborhood, Green moved his van further. When the van started moving, one of the children—five-year old Ramsi Ben Naim—fell beneath it, his skull being crushed by one of the back-wheels. When Green was brought to trial in the Haifa District Court two years later on a charge of having caused the child's death through carelessness (Section 218 of the Criminal Code Ordinance) there were only two witnesses: Leila, the dead boy's eight-year old sister, and Nuri, his 16-year old brother. When Leila was questioned by the prosecuting council, she stated that her brother had been run over by the ice van but that she was unable to explain how the accident had happened since she had not seen where Ramsi was sitting and had not been watching when he was run over. The defense counsel chose not to cross-examine her, and Judge Khassan then put several questions to her. In reply to these questions Leila told an entirely different story. She related how she had seen her brother sitting on the back step of

the van, and how he had rolled off when the van started moving and thus fallen under the wheel and been crushed to death.

Nuri testified to having seen three children sitting on the step of the van, two of whom jumped off when the van started moving and third of whom fell.

In his judgment Judge Khassan found, on the strength of Leila's evidence as corroborated by Nuri, that Ramsi had been killed when he fell off the step of the ice van on which he had been sitting as the van moved off. In explanation of the contradictory evidence given by Leila he put forward the theory that she had actually been sitting on the step with her little brother but had been afraid of admitting this lest she should be punished by her parents for not taking sufficient care of him. He therefore found Green guilty of causing the boy's death through carelessness.

Mr. Tsherniak appeared for the appellant, Mr. Bach, Assistant to the State Attorney, for the respondent.

Judgment

Justice Cheshin, in delivering the judgment of the Supreme Court, discussed at the outset the admissibility of evidence of a witness who contradicts himself, pointing out that it had already been held in Cr.A. 228/54 (P.D. 9/718) that contradictory evidence could not be used as a basis for any factual finding. In the same judgment, however, it had been held further that discrepancies might possibly lend themselves to some satisfactory explanation. What possible explanation could there be for the contradictory evidence given by the girl? The theory propounded by Judge Khassan was untenable for two reasons (on which Justice Chesin expounded in detail) and it would seem that the real reason was to be found in the way the judge had questioned her.

Both counsel had admitted that the judge had put leading questions to the girl, but Mr. Bach maintained that this was permissible, relying on English precedents and authorities for this viewpoint. While this was indeed so, continued Justice Cheshin, nevertheless a certain measure of restraint and proportion should be preserved. It is permissible for a judge to question a witness on controversial issues in order to throw further light on any point—both for his own sake and that of the opposing counsel; but the judge must confine himself to putting his questions objectively and must not noticeably appear to be taking sides. It was very likely—as argued by Mr. Bach—that in the case of a young timorous child who has to be coaxed into giving evidence by soft words and a soothing touch, the approach should be entirely different from that towards an adult witness. But

in that case the District Court judge might justifiably have taken the child's evidence himself, from beginning to end. It was very possible that the Supreme Court would have taken no exception to such procedure. However, this had not been done. Only after the prosecuting counsel had questioned the witness and had not succeeded in obtaining any evidence on which the accused could have been convicted, and only after the defense counsel had refrained from cross-examining, had the judge taken the initiative and by his questioning succeeded in extracting incriminating evidence against the accused. In other words he had thrown the full measure of his weight on the side of the prosecution.

Since, without the assistance of the judge, there would have been no evidence on which to convict the accused, this irregularity in procedure could not be overlooked. On the contrary, it emphasized the unreliability of the evidence given by the girl. As to the corroborative evidence of Nuri, the facts showed that he had carried his little brother to the hospital after the accident and had summoned the police, but nevertheless had not told anyone—not the police or his parents—that he had been a witness of the accident. His explanation that he had not wished to give his parents any further pain is specious. Therefore, his corroborative evidence, given for the first time in the District Court, was not acceptable.

Appeal allowed on December 12, reasoned judgment given on December 27, 1955.

Wrongdoer Responsible Only for Foreseeable Consequences

Malcha v. The Attorney General

On September 1, 1953, David Malcha, who was driving a tender, knocked down a two-year-old boy. The accident was held to have been caused by negligent driving on his part. The boy suffered an internal fracture of his arm, without any skin abrasions. In the circumstances, the doctors who treated him decided against giving him anti-tetanus injection. After a few days a suppurating infection appeared in the region of the fracture. The child's doctors still did not consider it necessary to give him an anti-tetanus injection, because, presumably, they considered that as some time had elapsed since the child's body had been in contact with the ground, and during that time there had been no open wound, there was no likelihood of his having been infected with tetanus. Nevertheless, eight days after the accident, the child developed tetanus and died.

Malcha was charged in the Haifa District Court with having by want of precaution or by carelessness, not amounting to culpable

negligence (Section 218 of the Criminal Code Ordinance), unintentionally caused the death of the child. Judge Winogradoff, basing her verdict on the English leading case (*In re* Polemis, 1921, 3 K.B. 560) held that despite the unusual circumstances there had been a direct causal connection between the death of the child and the accused's negligent driving, the question as to whether the accused's negligent driving had been foreseeable or not being immaterial, and found the accused guilty. He was fined IL75.

Judgment

Justice Silberg delivered the judgment of the Supreme Court; Justices Goitein and Berinson concurring. After discussing the question of remoteness of damage in general, he gave a detailed analysis of the *Polemis* case, with reference to legal authorities and commentaries, comparing it with the Talmudic parallel of the money placed in a cot of bulrushes. He then summed up the decision in the *Polemis* case as being exactly equivalent to that in the Talmudic case: a negligent beginning, an accidental result, he is liable (t'hilato befshiya vesofo be'ones—hayav), as long as the accidental result is directly derived from the negligence. In other words, a wrongdoer is responsible for all the consequences arising from his wrongful act—whether they were foreseeable and possible of contemplation, or not.

If this principle were applied to the case under consideration, said Justice Silberg, then the appellant would be guilty of the offence ascribed to him, since there had been a negligent beginning—his careless driving which had led to his knocking down of the child; the result had been accidental—the unfortunate mischance of the child's having contracted tetanus, which even the medical experts did not foresee; and the accidental result was directly derived from the negligence, as the child would not have contracted tetanus if his arm had not been injured during the collision.

The next question to be decided, therefore, was whether this principle is applicable. In order to decide this, three preliminary points would have to be considered: whether the rule laid down in the *Polemis* case is the accepted rule in England; whether it is also binding on the courts of Israel; and, thirdly, whether this rule, mutatis mutandis, is applicable to an offence under section 218 of the Criminal Code Ordinance.

English Doctrine

As to the first point, Justice Silberg held that, although the rule had not been sanctified by the House of Lords, and although it had been subjected to criticism, it must nevertheless be regarded as the

guiding principle in English courts of law. In considering the second point, he first discussed in detail the various theories with regard to the applicability of the *Polemis* judgment to cases in tort and in contract; he then compared the decision in that case with that in an earlier English case (Hadley v. Baxendale, 156 E.R. 145) in which Alderson, B. had held that where a party to the contract breaks the contract then "the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered . . . arising naturally, *i.e.* according to the usual course of things, from such breach of contract itself."

There is no doubt, Justice Silberg concluded, that the test in *Hadley v. Baxendale*, suitably adapted to cases in tort, differs from that in the *Polemis* case. The former test could be summed up as one of "foreseeability." But as foreseeability is also a condition precedent to negligence, it is an essential element also in the rule in the *Polemis* case. The only difference between the two rules is, therefore, that, in accordance with *Hadley v. Baxendale*, the foreseeability applies not only to the possibility of any damage occurring but also to the kind of damage which might possibly occur.

If thus the responsibility of the appellant in the present case were considered, mutatis mutandis, in the light of the test applied in *Hadley v. Baxendale*, he would obviously be acquitted, as he could not possibly have foreseen the kind of fatal consequence which arose from his imitial wrong act.

Test in Civil Wrong Cases

The final point to be considered, therefore, said Justice Silberg, is what test of responsibility should be applied to a person accused of an offense under section 218 of the Criminal Code: is the extent of his responsibility equal to, or different from, that of a wrongdoer in a civil wrongs case; and if it is equal, what principle should be used in deciding the extent of a civil wrongdoer's responsibility.

As to the comparative extent of responsibility, it had already been held (in Cr. A. 35/52) that a person would not be convicted of an offence under section 218 unless he failed in his duty to take care towards the victim to the extent that in a civil case damages would be awarded against him. In other words, the extent of responsibility equalled that of a wrongdoer in a civil wrongs case. And as to the principle to be applied in deciding what is the extent of responsibility, this could be gathered from a comparison of section 60(a) of the Civil Wrongs Ordinance with the principle laid down in *Hadley v. Baxendale*. This section states that "where the plaintiff has suffered damage, compensation shall only be awarded in respect of such

damage as would naturally arise in the usual course of things and which directly arose from the defendant's civil wrong"—a rule practically identical with that laid down, mutatis mutandis, by Alderson, B. with regard to a tortious delict.

The conclusion to be drawn from this, said Justice Silberg, is that the Mandatory legislature had adopted the rule in *Hadley v. Baxendale* in preference to that laid down in the *Polemis* case—a preference which was in no way to be regretted. The rule to be applied in the case under consideration was therefor that of the foreseeability of the kind of damage likely to result from an initial wrong act. In applying this rule, the appellant must be acquitted.

Appeal allowed and sentence quashed.

Judgment given on October 24, 1956.

HIGH DEGREE OF CORROBORATION REQUIRED WHEN CHILD'S EVIDENCE TAKEN BY YOUTH INTERROGATOR

Yehudai v. The Attorney General

The appellant, David Yehudai, was sentenced by District Court Judge Gaulan to three years' imprisonment for having unlawful sexual intercourse with a girl of 12. The main evidence against the accused had been that of the girl herself which had been taken by a youth interrogator out of Court, in accordance with the provisions of the Evidence Revision (Protection of Children) Law.

The girl had told the youth interrogator that Yehudai and a man by the name of Kriof had taken her to the former's hotel room and had had sexual intercourse with her one after the other against her will and by use of force.

Yehudai had admitted that he and Kriof had brought the girl to his room and that Kriof had committed an indecent act upon her person. He admitted too that he had intended having intercourse with the girl but when he saw how young she was, had had a pang of conscience and changed his mind. He had then demanded the return of his money from Kriof who had given part of it back to him.

Judge Gaulan found support of the girl's evidence in Yehudai's admission that he had taken the girl to his room and in the fact that he had refused to make any statement to the police immediately after he had been apprehended.

In the appeal to the Supreme Court, the appellant appeared on his own behalf, and Mr. Bach, Assistant to the State Attorney, for the respondent.

Judgment

Justice Landau, who delivered the judgment of the Supreme Court Justices Sussman and Berinson concurring, said that in his opinion there had been insufficient grounds for convicting the appellant on the basis of the evidence of the girl, or on the basis of his own evidence or of both testimonies together.

The Evidence Revision (Protection of Children) Law of 1955, he explained, introduced an innovation into the laws of evidence in that the legislator, concerned for the spiritual health of a child who had been involved in an offence against morality, had precluded any possibility of that child's being caused any further mental harm through having to give testimony in court.

But, he continued, it should not be presumed that the legislator, in his anxiety for the health of the child, had wished in any way to detract from those basic guarantees of an accused person's rights which are characteristic of our criminal procedure. And yet the child's evidence is delivered at second hand, which deprives the judge of the opportunity of deciding for himself the witness' credibility and deprives the accused of the opportunity of cross-examining him. In compensation, therefore, the legislator laid down, in Section 11 of the law, that no person should be convicted on the evidence of a child given through the medium of a youth interrogator, unless that evidence is supported by other evidence.

The corroboration necessary, Justice Landau continued, is, because of the peculiar characteristics of evidence given through the medium of a youth interrogator, considerably more than mere "technical" corroboration. No judge could possibly be fully persuaded of a witness' veracity when he has not seen or heard the witness and must thus exercise the greater care before giving such evidence any weight.

This is particularly necessary in view of the fact that in sexual crimes the courts will not convict a person on the sole evidence of the complainant, even when that evidence is given in Court, let alone when it is given second hand. In view of the way in which the child's evidence is presented to the court, therefore, continued Justice Landau, the court must be doubly conscientious in examining the corroboratory evidence produced by the prosecution.

Girl Suspected

In the present case, Justice Landau held, from the evidence before the court, there were grounds for the regretable and painful suspicion that the girl, despite her tender age, had been a professional prostitute. There had, therefore, been no sufficient cause for the District

Court to make a positive evaluation of her veracity. And as to the corroboration which the District Court had found in the appellant's evidence, there was no confirmation in it of those important facts which he had categorically denied.

Nor should the fact that the appellant had refused to make a statement to the police be given exaggerated weight and no conclusion should in any case be drawn from it unless the prosecution had produced some prima facie evidence against the accused (see Cr.A. 139/52, P.D. 7/619). In the present case, the appellant's silence could be reconciled with his iimocence of the offence of rape and attributed to his desire to conceal his part in Kriof's offence against the girl.

In short, Justice Landau held, there had not been sufficient evidence before the District Court to find the appellant guilty of unlawful sexual relations with a child under the age of 16. There had, however, been sufficient evidence to convict him of aiding and abetting Kriof to commit an indecent act upon the person of the girl (it had not having been proved he had actually had sexual intercourse with her) which is an offence against Sections 159 and 23 of the Criminal Code Ordinance. For this offence he should serve a sentence of nine months' imprisonment and the previous sentence of three years should be quashed.

Judgment given on February 28, 1957.

NO COMPENSATION FOR CIVILIAN WORKER POISONED BY FORBIDDEN ARMY FOOD

The Attorney General v. Rachel Berkowitz

Yitzhak Berkowitz was a civilian employed by the Army in a military camp. In accordance with the regulations he was not allowed to eat in the army canteens unless he had special permission to do so and uuless he had provided himself with food coupons for wlhich he paid either in cash or by way of deductions from his salary. He nevertheless occasionally ate free of charge in the camp canteen with the unauthorized permission of one of the sergeants in charge of the kitchen. On one such occasion the food served was contaminated and he, together with about a hundred soldiers, contracted ptomaine poisoning, from which he died three days later.

His widow, the respondent, sued the Army for damages in the Tel Aviv District Court. Judge Harpazi found that as the deceased had obtained his food in defiance of the military authorities' prohibition he was in the nature of a trespasser, and that prima facie the Army, therefore, owed him no duty, in accordance with the

principles of English common law. He went on, however, to make a thorough and extensive survey of the law and found a solution more to his own liking, holding that section 50 of the Civil Wrongs Ordinance, which deals with negligence, does not distinguish between trespassers and non-trespassers, that the fact that section 2 of the ordinance refers us to English principles of legal interpretation does not make the courts of Israel completely subject to the English common law, and that in any case, in English law too, the rule with regard to trespassers is not uniformly strict, recognizing occasions when even trespassers are entitled to damages. Judge Harpazi went on to enumerate such occasions, with particular emphasis on the instance when a duty to take care exists vis-a-vis a crowd of people whose presence in a place is foreseeable (as, for example, in a restaurant or in a public vehicle). In such a case, he held, the fact that one member of the crowd has failed to fulfil one of certain conditions (such as paying for a meal or for a ticket) this failure, having no connection whatsoever with his subsequent injury, would not relieve the wrongdoer of liability towards him.

He therefore found that, in the present case, although the deceased had been a trespasser, the Army nevertheless had a duty towards him and were liable for his death, which had resulted from their negligence.

The Attorney-General appealed against this decision to the Supreme Court.

Section 50 (2) of the Civil Wrongs Ordinance provides that: ". . . every person owes a duty to all persons whom . . . a reasonable person ought in the circumstances to have contemplated as likely in the usual course of things to be affected by the doing or failure to do any act or the failure to use proper skill or to take proper care. . . ."

Dr. Eltiss, Deputy State Attorney, appeared for the appellant and Mr. V. Hassan for the respondent.

Judgment

Justice Witkon, who delivered the judgment of the Supreme Court, the President and Justice Agranat concurring, dealt firstly with the question of whether recourse should be had to English law or not. It is true, he said, that section 50 of the Civil Wrongs Ordinance does not expressly refer to trespassers, but then neither does English statutory law differentiate between the three grades of injured persons, invitees, licensees and trespassers, this differentiation having its roots in the common law, as propounded by the English courts. He for his part, continued Justice Witkon, was also of the opinion that

the courts of Israel were not indiscriminately bound by all the interpretations and precedents which issued from the courts of England, as such complete dependence would be inconsistent with the status of Israel as an independent sovereign state (see C.A.81/55, P.D. 11/225). On the other hand, he continued, the reference to English principles of law in section 2 of the Ordinance cannot be completely ignored and the fact that the courts of Israel are not obliged to adopt the principles of English common law *holus bolus* should not be interpreted as meaning that some of the finest principles of the English common law should not be emulated (see also C.A.294/54, P.D.12/421). Insofar as the distinction between various grades of injured persons is concerned, he continued, the courts of Israel have in fact accepted the English doctrine, as witness the judgment in C.A.59/55 (Psakin 25/137) and C.A.224/51 (P.D.7/686), amongst many others.

Justice Witkon then went on to discuss Judge Harpazi's opinion that section 50(2) of the Ordinance imposes a duty to take care towards all persons, even trespassers, whom a reasonable person should have contemplated as likely to be affected. This interpretation, he said, places too much emphasis on the criterion of "foreseeability," without paying sufficient attention to the fact that the law specifies that the damage *ought* to have been foreseen by a reasonable person. In other words, he continued, there are certain classes of people whose likelihood of being affected might very well be foreseen, but, nevertheless, no reasonable person would be expected to take this eventuality into account; and of such are trespassers whose presence is unbeknown to the wrongdoer. In respect of such trespassers, the wrongdoer has no moral-social duty to contemplate any possible effects of his acts, constructive knowledge of their presence being insufficient (in contradistinction to the case of invitees and licensees) to make him liable for any harm they might suffer. Any other approach to the question, he continued, would lead inevitably to absolute responsibility and he very much doubted whether this was either desirable or practicable, unless covered by national insurance.

Judge Harpazi, continued Justice Witkon, had not gone so far as to hold all trespassers entitled to compensation. But the distinctions he had drawn between one kind of trespasser and another could not stand the test of logic, as he proceeded to show. In short, held Justice Witkon, even when the injured trespasser is one of a crowd of persons entitled to have been in the place where the injury occurred—as in the case under consideration—his being a trespasser deprives him of any right to compensation. Nor is this conclusion an unjust one, he continued, for a trespasser would most certainly not be covered

by any insurance which the wrongdoer might carry; and even if it were possible to insure against a risk of this nature the high premium would eventually be borne by those paying for the lawful use of the wrongdoer's services and not by the trespasser—which was hardly justifiable.

As to the argument that the deceased had not been a trespasser as he had been permitted to eat in the canteen by the sergeant in charge, the case under consideration, held Justice Witkon, must be distinguished from C.A.119/54 (P.D.10/156) as here the deceased had been well aware of the fact that the sergeants or officers in charge of the Army canteen were forbidden to allow civilian employees to eat in them unless they fulfilled the conditions laid down by the military authorities. As the deceased had not fulfilled these conditions he was a trespasser, despite the permission he had received from the sergeant.

In conclusion, Justice Witkon expressed regret at the fact that the *ex gratia* payment, which the Ministry of Defence had expressed their readiness to give the respondent in the event she lost the appeal, had not been deferred to her originally, so sparing her the lengthy litigation and the disappointment of losing her claim five years after the tragedy had occurred.

Appeal allowed without any costs.

Judgment given on February 5, 1960.