THE EVERSHED REPORT AND ENGLISH PROCEDURAL REFORM

CHARLES E. CLARK

LAST July the Lord High Chancellor presented to Parliament the *Final Report of the Committee on Supreme Court Practice and Procedure,* already commonly known as the *Eversheed Report* from its chairman and principal draftsman, Sir Raymond Evershed, the distinguished Master of the Rolls. This is a bulky, close-printed document of 380 pages, available from Her Majesty's Stationery Office (Cmd. 8878) for the price of eleven shillings net. And it is a mine of information, certainly worth much more than its modest cost, to any student of procedure and procedural reform. In fact it seems to this reviewer quite the best account available of day-to-day high-court activities and the problems thereof in that country from which we take our law.

It is interesting, but not too strange, that this is so. Obviously the *Report* was not written for the instruction of American lawyers who are not likely to look to such a source for their information. Yet the Committee was observing a going system which it was set to improve; and to explain what it was studying and would change, it had to set forth the existing system. And so this is a report direct from the firing line presented in a reasonably objective way, though perhaps not unnaturally tinged with the conservatism we expect from lawyers and—to perhaps considerably less degree—from the English people generally. Thus if Americans wish to know the operation of the English circuit or assize system, the reasons for the lengthy oral arguments before the Court of Appeal, the impingement of the automobile on the staid High Court of Justice, the activities of barristers and solicitors, of "leaders" and "juniors," indeed a multitude of other practical activities and problems of English justice, here is the place to find it. One could have wished for an index; American readers are likely to flounder if they seek to locate discussion of a particular topic. But the difficulty is mitigated by a Complete Summary of Recommendations and Conclusions in twenty-four pages and 229 paragraphs near the end of the *Report;* and the style is not too dreary for a meaty report to make reading it through too painful.[1]

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[1] In fact there is considerable liveliness in the interstices of the discussion; one might almost feel that our English brethren, for all their love of pomp and circumstance which leads them to tolerate and pay for outworn court symbolism of various forms, yet like a quiet jest at undue solemnity. In particular they appear to have an addiction to expressions which border on the cute: the "leap-frog" scheme of appeal direct to the House

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Beyond the voluminous and complete character of the *Report* itself and the inevitable debate as to the efficacy of its recommendations, several other features may arouse the interest of American readers. First is the nature of the Committee itself. It was appointed by the Chancellor on April 22, 1947. During its six years of activity its personnel had surprisingly few changes for one whose number was so large and so distinguished, with many members carrying obvious burdens of both public and private character. Its number was twenty-three, including three High Court justices in addition to the chairman, with representatives from the barristers, leaders as well as juniors, solicitors, King's Bench and Chancery Masters, together with members of Parliament (including Labor members), accountants, directors of the Bank of England, a civil engineer, writers and scholars. Americans may like to recognize, among others, their illustrious compatriot, Professor Arthur L. Goodhart, Master of University College, Oxford, and editor of the *Law Quarterly Review;* Sir A. P. Herbert, the noted author; Mr. Geoffrey Crowther, editor of *The Economist;* and Professor T. H. Marshall, famous political scientist of the London School of Economics.[2] So far as this reviewer is aware, nothing like so varied and yet withal so distinguished a group of talents has been brought to the service of law reform in this country, though the explanation lies (in his judgment) in lack of invitation, rather than lack of willingness to serve.

Next we may remark on the low cost of the entire operation. The estimated cost of preparation of the *Report* and the three interim reports already published, including the expenses of the Committee, is £1,883, 15s., 1½d., of which £1,381, 16s., 10½d. is the estimated cost of printing and publishing the reports.[3] In American ventures of at all comparable nature, budget items for travel expense and hotel bills for committee meetings would run far beyond such sums, not to speak of such general costs as salaries and stenographic, clerical and publication expenses. Even with the savings resulting from the general centering of all things legal in London, the completion of so substantial a

of Lords, eschewing the Court of Appeal; the "preliminary canter" of the American pretrial conference; and the repeated exhortation to lawyers and judges for a more "robust" exercise of powers and authority already conferred or now recommended or brave hopes that they will now be "robustly" applied. Such expressions occur throughout the Final Report.

[2] One may perhaps comment on the substantial impact of that School upon pending procedural reform. Of the four members who filed a minority Addendum, calling for greater action—discussed below—three owe allegiance, either by present activity or prior training, to that School, while the most acute criticism of the Report to date comes from Professor Gower, as also discussed below. Lord Chorley's interest is well known; much of the present activity is previewed in his article, "Procedural Reform in England" in David Dudley Field Centenary Essays 98 (1949).

[3] Cmd. No. 8878 at 2 n. (1953).

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task at a total expense of a little over $5,000 and a cost of printing of less than $4,000 seems truly amazing.

A third item deserving of notice preliminarily is the nature of the task set before and accepted by the Committee. For its prime focus was the *cost* of litigation. Specifically in its Terms of Reference from the Lord Chancellor it was directed to "enquire into the present practice and procedure of the Supreme Court . . . and to consider what reforms of such practice and procedure should now be introduced, whether by legislation or otherwise, for the purpose of reducing the cost of litigation and securing greater efficiency and expedition in the despatch of business."[4]

Commissions or committees to work for the improvement of law administration are not a new thing in English history. During only the present century there appear to have been some half dozen directed to the activities of the High Court of Justice, not to speak of others concerned with lower courts or specific subjects of law or legal justice. In fact this Committee's Terms of Reference required consideration of the activities of two such bodies. First were the three reports in 1933-36, Cmd. 4265, 4471 and 5066, of the Hanworth Committee on the Business of Courts under the chairmanship of Lord Hanworth, originally Master of the Rolls. This Committee was "to consider the state of business in the Supreme Court, and to report whether greater expedition in the dispatch of business, or greater economy in the administration of justice in the Court, is practicable."[5] And the Peel Royal Commission on the Despatch of Business at Common Law, 1934-36, under the chairmanship of Earl Peel, was concerned, as its name indicates, with the fusion or division of courts "with a view to greater despatch" of court business; its Report, Cmd. 5065, was made in 1936. Each of these bodies, composed of leading High Court justices and King's Counsel, with overlapping personnel in the shape of Baron Hanworth, the Master of the Rolls, and Sir Claud Schuster, the Lord Chancellor's Permanent Secretary for the Courts (later Baron Schuster), gave its attention to organization and calendars of the High Court Divisions. In certain aspects they disagreed, for example as to the absorption of the Probate, Divorce, and Admiralty Divisions into the other two divisions of the High Court. The Evershed Committee takes up in greater detail these same problems, with many additional ones. Its general trend, like that of the Peel Commission, is against present change in the court structure so long as the divorce jurisdiction

[4] Id. at 4.

[5] Cmd. No. 4265 at 3 (1933); Cmd. No. 4471 at 2 (1933); Cmd. No. 5066 at 2 (1936). The variation in the spelling of "dispatch" may be an English indiosyncrasy. See notes 1 and 4.

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remains as it is, although it does concede a rather strong case for an Admiralty and Commercial Court.

It will be noticed that this, though the "Final," is also the fourth Report of the Committee. The three interim reports, from 1949 to 1952, were briefer in scope and accomplishment. The first, Cmd. 7764, issued in 1949, is the most important; it recommended some expansion of the jurisdiction of the County Courts, chiefly by extending the limits from a maximum of £200 to £300, and it made suggestions of fixed dates for trials in the High Court—an important and troublesome problem, indeed.[6] The second, Cmd. 8176, issued in 1951, dealt with admiralty and chancery procedures and had some interesting suggestions for reducing the bulk and making manageable the English "White Book" or Annual Practice.[7] The third, Cmd. 8617, in 1952, dealt with a particular local court.[8]

How well has the Committee accomplished its over-all task? Enough has been said to indicate the completeness of the *Report* and the scholarly nature of its attention to details. And the number of its specific recommendations is great. The 229 numbered paragraphs of recommendation already referred to, in cumulative force are undoubtedly substantial. True, some are not extensive, touching such matters as permission to a witness to sit while giving testimony; some are negative, such as rejection of the American system of pre-trial or of written briefs on appeal. But the sheer bulk is impressive. If candor compels an expression of some disappointment that the Committee has stopped with measures less than bold, yet lack of boldness must be considered an occupational disease of reformers. Any one who has watched or participated in the slow and halting progress of reform in this country will realize that there are very few in a position to cast stones. And such a judgment is only that expressed by the four minority members in their Addendum and apparently by the Committee's own public and constituency. As Professor Gower observes in his able critique, discussed below, "professional reaction to the final report has been a mixture of disappointment and relief."[9]

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[6] See Gower, Interim Report of Committee on Supreme Court Practice and Procedure (Cmd. 7764), 12 Mod. L. Rev. 483 (1949). See also 99 L.J. 493 (1949); 203 L.T. 149 (1949); 16 Sol. 223 (1949); 93 Sol. J. 568 (1949); and Gower, The Cost of Litigation, 17 Mod. L. Rev. 1 (1954), which is discussed in the text below.

[7] It also discussed certain other procedures, as that of the Court of Protection and before Official Referees, as well as "Court Fees"—their nature, amount and taxation. See Cmd. No. 8176 at 52-60 (1951). See also 14 Mod. L. Rev. 325 (1951); 101 L.J. 171 (1951).

[8] The Durham Palatine Court. See Gower, The Cost of Litigation, 17 Mod. L. Rev. 1 (1954).

[9] Gower, supra note 8, at 2, referring "to a general feeling that the recommendations are less far-reaching than are needed and had been expected." Of how many American

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In attempting to give American readers some idea of the nature of this *Report,* and its wealth of information for students of procedure and reform, it is not my purpose to indulge in an extensive discussion and criticism of the recommendations presented. Such an attempt would be presumptuous; we do not have and cannot have the full knowledge of all ramifications of the problem to make the assay of value. I shall limit my review to such matters as seem of interest and point in our American setting. Nor will I try to deal with all or even a majority of the recommendations; here, too, I shall endeavor to set forth only some main trends, stressed by the Committee, as high lights of its proposals and efforts.

In its own appraisal the Committee seems to put most emphasis upon what it names and defines as the "New Approach." This appears to be an attitude of litigants, which necessarily means of counsel, toward the development of "less costly litigation"—an attitude which is to be urged strongly in any event, but is to be encouraged particularly through the device of the originating summons procedure. In the words of the *Report,* "To encourage a 'new approach' towards less costly litigation—(a) the originating summons procedure should be made more generally available and an analogous new procedure (by writ) should be introduced for use particularly in the Queen's Bench Division, and (b) the powers of the Master on the summons for directions should be considerably strengthened."[10]

The background of this recommendation was a finding by the Committee that for the simplest High Court witness action lasting about one day the taxed costs will be not less than between £150 to £200, one-third being numerous very small items and the balance consisting of the solicitor's "instructions for brief" and counsel fees.[11]

reports could the same be said! See also Goodhart, The Cost of Litigation, 69 L.Q. Rev. 463 (1953) (a note by the Editor); Elliott, Judicial Administration, 1953 Annual Surv. Am. L. 814-15, 29 N.Y.U.L. Rev. 155, 156 (1954); Keeton, The Evershed Report on Practice and Procedure, 20 Sol. 213 (1953); 216 L.T. 365 (1953); 103 L.J. 471, 490 (1953); 97 Sol. J. 499, 580, 598, 617, 646, 676 (1953). Both Professors Gower and Goodhart refer to an address by Lord Cooper, Lord President of the Court of Session, to the Society of Public Teachers of Law in September, 1953, which has not been available to the writer.

[10] Cmd. No. 8878 at 37 (1953).

[11] Cmd. No. 8878 ¶ 77 (1953). See also id. ¶ 682, where it is said that the successful party will probably not need to pay his own solicitor, in the absence of special circumstances, more than £25 to £30 beyond the taxed costs thus recovered. Professor Gower, concluding that "[t]aking the lowest figures this means that the loser will have to pay £325," goes on to say, "Anyone with experience will agree that this is an unusually low figure for a disputed Queen's Bench action, and that in most cases the loser will have to pay at least twice that sum." Gower, supra note 8, at 18. It is hard for an American to imagine having to pay $1,800-$2,000 for the privilege of losing a "relatively small action" or "the simplest" witness action in a court of general jurisdiction. See also Mullins, In Quest of Justice, c. 11, The Lawyer's Bill (1931).

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And this was supported by the further findings that the bill of costs increases directly with the passage of time and the costs increase directly with the length of time occupied by the trial. Hence some way was sought, by encouraging the parties to disclose at an early stage the true nature of the issue between them, to expedite the setting down of an action and to curtail the length of trial. But since "exhortations" to adopt a "new approach" may by themselves be inadequate, something more is necessary to remove the "screen" behind which each side marshals his forces for the day of trial and the other may not penetrate. So the Committee carefully examined the possibilities of a new approach, which, by removing this atmosphere of secrecy, would make a stock-taking process natural and at the same time eliminate many of the steps now taken almost as a matter of course before trial. This new approach is to be achieved in two ways: first, by change in the initiation and later conduct of a segment of cases in the High Court, and second, for cases where this is inappropriate, by a strengthening of the summons for direction and the Court's ancillary powers.[12]

The first step involves a further development of the "originating summons" procedure, now used in the Chancery Division in a certain group of cases such as those for the construction of a deed or other written instrument and for declaration of rights under it, and the establishment of an analogous (though not identical) new procedure by writ in the Queen's Bench Division. In either case the main features of the new procedure seem to be two: first, a less formal and more expeditious method of initiating the action than by the older writ of summons; and second, a further procedure whereby the plaintiff's statement of claim, supported by affidavits, will justify him in asking a Master to set down the action for trial, very likely in the short cause list, without further pleadings. Excepted from these procedures are to be cases of fraud, slander and the like, and in the Queen's Bench Division, the important personal injury actions (except those asking for approval of a settlement involving a person under disability). The actions thus eligible for it are those involving construction of a statute, regulation or document; or where the sole or principal question is of law; or, under the originating summons procedure, where there is no substantial dispute of fact or where evidence can be given by affidavit; or, under the analogous new procedure by writ, where the action can be properly tried on affidavits.[13]

When the Committee turned, for the remaining actions, to the strengthening of the practice of "the summons for directions" before a Master, it expressed consciousness "of treading again a well-worn

[12] Cmd. No. 8878 ¶¶ 77-80 (1953).
[13] Id. ¶¶ 81-103.

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path."[14] For recommendations of a similar import had been made in the Hanworth and Peel reports; and it might have added that the practice has been widely discussed and admired in America, where it served as a stimulus to developing the "pre-trial" procedure, best symbolized by the famous Rule 16 of the Federal Rules of Civil Procedure.[15] But the first thing the Committee does is to consider and reject (for compelling reasons of cost, as we shall see) the American pre-trial, the procedure for discovery by examination successful in British Columbia, and the summons for immediate relief used in South Australia. Of course certain of the matters to be settled by the Master on giving his directions do parallel Federal Rule 16, and undoubtedly these experienced court officials do assist in the simplification of the case and the expediting of the trial—prime objectives of the American device. But the Committee concurred with the Peel Commission in holding that the summons for directions should be generally heard by a Master, and not a judge. In this and in other ways, coupled with the outright rejection, it showed it was not ready for the American system. Perhaps its most interesting suggestion here is toward certain attempts to limit expense; a suggestion for later consideration that taxable costs should be limited to one fee for counsel *and* solicitor on a summons for direction, save where the Court otherwise directs in exceptional circumstances; a provision that the Master should certify whether or not the case is fit for the employment of two counsel, and a limitation of taxable costs accordingly; and a declination of any attempt to settle the lawyer's fee bill to his own client.[16] Interesting, also, is the discussion and rejection of proposals for both more detailed and less detailed pleadings, for more and for less discovery, and so on.[17]

To an American observer the trend and direction of these recommendations seems unmistakable and in the same general direction toward which are headed such advanced American systems as the federal courts and the American states which have adopted the federal procedure.[18] But it seems only correct and proper to say that they appear

[14] Id. ¶ 209.

[15] See, e.g., Greenbaum & Reade, The King's Bench Masters and English Interlocutory Practice (1932); McCormick, Lights and Shadows in English Justice, 18 A.B.A.J. 608 (1932); Millar, A Septennium of English Civil Procedure, 1932-1939, 25 Wash. U.L.Q. 525 (1940); Millar, Civil Procedure of the Trial Court in Historical Perspective 229-36 (1952); Clark, Cases on Modern Pleading 529, 530 (1952). The literature on the American pre-trial—monographs, essays, articles—is already so voluminous as to defy citation.

[16] Recommendations appear in Cmd. No. 8878 ¶ 246 (1953). See also id. ¶¶ 209-46.

[17] Id. ¶¶ 105-208.

[18] The Federal Rules of Civil Procedure of course apply in the far-flung system of federal courts, including those of the District of Columbia; beyond this they have been fully adopted and apply in Alaska, Arizona, Colorado, Kentucky, Minnesota, Nevada, New Jersey, New Mexico, Puerto Rico and Utah, and, for both courts of law and equity, though separately adopted for each, in Delaware. Substantial portions of the practice,

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to constitute in total effect a somewhat halting and less than forthright approach to the end really in view. Recalling the long leadership of England in procedural reform, and particularly in initiating such steps as the summary judgment and the summons for directions,[19] one may well feel that there is some falling off in boldness of attack. The procedures of the new approach seem hardly as effective as the now complete summary judgment of the American jurisdictions noted; moreover, without the direct and immediate control of the judge, successful operation of the system may actually go no further than the exhortations to the parties and counsel may accomplish—a weak reed, indeed! And the complications of the process seem enough to slow it down—representing a tendency away from the simplification of process, pleading and court structure which is a keystone of our ideas of reform in law administration.[20] Instead of one simple form of process and pleading directed to bringing the action before a single court, we see here in the High Court alone (not to think of the County and other courts) a total of four processes and procedures, two each for each Division of the Court. The lines of demarcation must be clearer than have seemed possible in the history of procedure or else entanglement seems indicated.

The Committee points out that it has been concerned, "almost entirely," with civil procedure.[21] But even on its own terms as to scope, American experience in court reform would suggest a further and major omission, namely, as to court organization and simplification of structure, together with the establishment of a directing head. With us the argument for the "integrated" court, covering all divisions of court operation and subject to central control through an administrative

notably the discovery section, and to a lesser extent that of party joinder, have been taken over in widely separated states, e.g., Florida, Iowa, Louisiana, Maryland, Missouri, New York, Pennsylvania, South Dakota, Texas and Washington; individual federal rules have been adopted in other states, such as California, Connecticut and North Dakota; while the pre-trial rule, Fed. R. Civ. P. 16, has been quite widely adopted. See Clark, "Clarifying" Amendments to the Federal Rules?, 14 Ohio St. L.J. 241, 243 (1953); Clark, The Federal Rules in State Practice, 23 Rocky Mt. L. Rev. 520 (1951).

[19] On the former see Clark & Samenow, The Summary Judgment, 38 Yale L.J. 423 (1929); Millar, A Septennium of English Civil Procedure, 1932-1939, 25 Wash. U.L.Q. 525, 536 (1940). And for the American practice see Clark, The Summary Judgment, 36 Minn. L. Rev. 567 (1952), and the many references given in Clark, Cases on Modern Pleading 502, 507 et seq. (1952). On the former, see note 15 supra. Compare in general Sunderland, The English Struggle for Procedural Reform, 39 Harv. L. Rev. 725 (1926); Clark, Code Pleading 17-21 (2d ed. 1947).

[20] This has been often discussed in American legal literature; see, e.g., references given in Elliott, supra note 9; Vanderbilt, The Essentials of a Sound Judicial System, 48 Nw. U.L. Rev. 1 (1953)); 1953 Conference of Chief Justices, 26 State Govt. 241 (1953); Clark, Code Pleading 54-71 (2d ed. 1947). For references to particular court reorganizations, see note 22 infra.

[21] Cmd. No. 8878 ¶ 5 (1953).

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office and under the direction of a chief justice, has been found compelling; and the examples in New Jersey and Puerto Rico suggest the real accomplishments of such a reorganization of the judicial system.[22] The Committee's assignment to consider practice and procedure in the Supreme Court of course tended to confine the scope of its activities. Thus the fact that another committee had just reported extensively on procedure in the County Courts[23] undoubtedly served to stress the existing boundaries. But complete separation of course proved impossible and this Committee did make recommendations covering the extension of jurisdiction of the County Courts and broadening the appeals therefrom to the High Court.[24] Moreover, the Committee does consider extensively the organization of the High Court, notably with respect to distribution of the Probate, Divorce, and Admiralty Divisions and with appeals to the Court of Appeal and to the House of Lords, although it concludes against any change of structure.[25]

Since the Committee shows that it was somewhat intrigued by the American devices for simplification of the litigious process, as well as similar projects from Canada and Australia, why was not more of an attempt made at comparative evaluation and possible choice for experimentation at least of those which seem most promising? Such a course would have been most profitable for American reformers. It must be conceded that a great deal of our planning must look to the future for proof, since it lies still so largely in the realm of endeavor, rather than accomplishment. Certainly none of us can afford to brag unduly or to point with too much pride to an execution which is yet far short of

22 Vanderbilt, The Reorganization of the New Jersey Courts, 34 Chi. Bar Record 161 (1953); Clark & Rogers, The New Judiciary Act of Puerto Rico: A Definitive Court Reorganization, 61 Yale L.J. 1147 (1952); Snyder, New Puerto Rico Judicial System is Modern and Efficient, 36 J. Am. Jud. Soc'y 134 (1953); Clark & Clark, Court Integration in Connecticut: A Case Study of Steps in Judicial Reform, 59 Yale L. J. 1395 (1950); Clark (E.), Realistic Court Reform—A Study of Pending Proposals, 27 Conn. B.J. 11 (1952).

23 This was a Committee on County Court Procedure, headed by Austin-Jones, J., with Final Report, Cmd. No. 7668 (1949). See comments in 12 Mod. L. Rev. 354 (1949); 99 L.J. 241, 255 (1949); 206 L.T. 84 (1948); 207 L.T. 291, 307 (1949); 16 Sol. 153 (1949); 94 Sol. J. 543 (1950). Its interim report, Cmd. No. 7468 (1948), was commented on in 11 Mod. L. Rev. 470 (1948).

24 See note 6 supra, referring to Cmd. No. 7764 (1949); also Cmd. No. 8878 ¶¶ 552-61 (1953). The recommendation for more extensive review on the facts is criticized in Gower, supra note 8, at 11, 12, 19. The proposals for sound recording, Cmd. No. 8878 ¶ 560 (1953), are similar to, though not as far-reaching as, those adopted in the P.R. Judiciary Act § 19, ¶ 4 (1952), discussed in Clark & Rogers, supra note 22, and Snyder, supra note 22.

25 Cmd. No. 8878 ¶¶ 472-564 (1953), dealing with Rights of Appeal; id. ¶¶ 565-630, Procedure on Appeal; id. ¶¶ 874-923, Distribution of Business in the High Court. Its proposals for "leap-frogging" the Court of Appeal and going direct to the House of Lords on certificate of a judge of the High Court in a limited class of cases appear in the earlier section, id. ¶¶ 483-504, 510(c), 517, 537, 543, 562.

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promise. But if the general level of objective is as yet quite discouragingly low, there is still enough reaching for the stars to give a lift to the entire movement; and it would have been exhilarating to have found support from our leaders of the past. The answer may be found in the limited Terms of Reference for the Committee's activities, which were originally defined by the Chancellor as not to include the question of fusion of the profession and were so interpreted throughout.[26] But as the minority's Addendum[27] shows, a request for more extensive attack could have been made and it could have been buttressed by conclusions drawn from the extensive investigations it had conducted. The failure to attempt it highlights one of the key problems now presented in English legal and professional life—the present organization of the legal profession and its effect on the prime question before the Committee, that of the cost of litigation.

In rejecting the American pre-trial conference the Committee pointed out the general agreement that for its successful operation it needed not only judges of some skill and experience, but also lawyers of competence to represent their clients completely, even to the point of full admissions as to details of their case.[28] This meant, so the Committee concluded (quite inevitably), that the litigant's solicitor must brief a team of barristers not merely for trial, but also for the "preliminary canter" of the pre-trial. And this meant in many cases actually doubling the already heavy burden of counsel fees (taxed, as we have seen, against the losing side) and, in all cases pretried, a very substantial increase. Small wonder that the Committee, whose task it was to reduce the cost of litigation, paused.[29] And the caution thus shown seems to be identical with that disclosed in other parts of the *Report*.

It may seem to be drawing too extensive a deduction to hold, from the reasons for its conclusion here stated, that respect for the traditional division of the profession into solicitors and barristers was so completely a restraining influence as to prevent even consideration of revamping of the court structure. Quite probably a statement here in terms of cause and effect is too sweeping; rather the cause may be in traditional respect for settled institutions which requires that both profession and courts be left untouched. Nevertheless it seems clear that a crusading spirit as to one would have carried over to bring about a reform of the other. But such an experienced observer as Pro-

[26] Id. ¶¶ 24, 29, 765.

[27] Addendum by Sir Thomas Barnes, Mr. Crowther, Dr. Fletcher and Professor Marshall, id. at 314-18.

[28] This is surely true; it is illustrated by a recent American case of dismissal of an action for want of such representation at pre-trial. Stanley v. City of Hartford, 103 A.2d 147 (Conn. 1954).

[29] Cmd. No. 8878 ¶¶ 214, 223 (1953). See particularly id. ¶ 221.

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fessor Gower, noting the important effects of the "divided profession" on the cost of litigation, has this to say: "Reading the Evershed Report one is struck by the number of fertile proposals which had to be rejected solely or mainly because of the divided profession."[30] As examples he lists not only the pre-trial conference already considered, but also appeals by filing written briefs and limitation of costs on the basis of a proportion of the amount at stake. Both of these are of such interest as to deserve further comment.

On the use of written briefs the Committee had the advantage of hearing evidence from Mr. Justice Frankfurter and John W. Davis, from whom they gained an impression of by no means wholehearted favor for the American system and some envy of the system of unrestricted oral argument, not possible in American courts in view of the amount and pressure of appellate work. The Committee thought, too, that the English system of unrestricted oral argument led to greater unanimity of opinion and less dissent. But the strongest objection, in its view, rested upon the absence of anything like American legal firms, permitting of team work in the preparation of briefs, and the need that all court activity be conducted by the barrister.[31] So here its recommendations are limited to such matters as cutting down upon the long and tedious practice of reading even formal written documents at the opening of an argument of perhaps several days' duration in the Court of Appeal.[32] The writer is bound to say that he is not as convinced as are many of his colleagues of the virtues of oral argument, quite possibly because it is rarely presented by an advocate approaching the training and grace of an English barrister; he fears, too, his patience would disappear on the oral reading of long documents more quickly perusable in chambers. But be that as it may, one concludes that the system disclosed is designed for more leisurely days where expense was less. This, too, it seems, is a type of legal procedure not adjustable with ease to the automobile and airplane age.[33]

The question of costs is of course quite crucial. In England, as we have seen, the principle of substantial indemnity is followed to provide for recovery of counsel fees and litigation expenses as a part of the taxed costs. As between party and party, costs are taxed at a somewhat lower rate than prevails in the case of solicitor and own

30 Gower, supra note 8, at 22.

31 Cmd. No. 8878 ¶ 574 (1953); see generally id. ¶¶ 568-75.

32 Ibid. See also id. ¶¶ 583-98. Suggestions for limitations upon the reading of reserved judgments in open court are contained in id. ¶¶ 599-601.

33 The automobile appears to have hit the High Court, for the Report is concerned with the fact that more than 40 per cent of all actions tried in the Queen's Bench Division are "personal injuries actions," id. ¶ 58; and a special Section, V, id. ¶¶ 321-72, is devoted to the discussion (and substantial rejection, as impracticable or otherwise undesirable) of various procedures for the more effective disposition of such cases.

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client costs, so that not all the cost of a lawsuit is thus recoverable by the winner. But this system is quite other than that prevailing here, where our statutory taxable costs have become largely nominal over the years and without connection with the value of the litigation.[34] The Committee considered various plans from abolishing the English system of indemnity to control of the own client relationship, and a minority at least favored a Canadian system of costs proportionate chiefly to the amount at stake, but with some regard to the time involved. Eventually, however, it contented itself with recommending retention of the existing system subject to some minor improvements.[35] So as to the employment of counsel its recommendations are limited. It will be noticed that in a case worthy of the attention of a Queen's Counsel, he must be accompanied by a "Junior," so that there is required on each side, in addition to the solicitors and any additional expert aid, such as accountants, as may be needed in particular types of actions, two highly trained barristers. The Committee did make some suggestions for reducing the taxed costs where a Master ruled that two counsel were unnecessary and with certain other reductions in special instances, of which the two most important are a reduced scale of "refresher" fees after the original retainer and a descending fractional scale in place of the present "two-thirds" rule under which the junior is entitled to a retainer equal to two-thirds that paid his leader.[36] These recommendations, it is said, are those which have been received with the "least enthusiasm" by members of the Bar.[37]

Here, however, the four minority members of the Committee would go much farther in various steps for control of this most substantial part of the cost of litigation. Thus they would abolish the two-thirds rule entirely and permit reimbursement to the junior on the same basis as to the leader. They attack the anomaly of the absence of any contractual relationship between the barrister and the lay client and the absence of direct legal liability to the person to be served who must foot the bills. They also suggest, as do indeed the majority, that the question of partnerships between barristers is worthy of consideration. And finally, while accepting the ruling that consideration of any proposal for fusion of the two branches of the profession was outside the Committee's Terms of Reference, they went on to say that it "ought

[34] The classic exposition is in Goodhart, Costs, 38 Yale L.J. 849 (1929). See also Cmd. No. 8878 ¶¶ 764-873 (1953), and note 11 supra; Note, Use of Taxable Costs to Regulate the Conduct of Litigants, 53 Col. L. Rev. 78 (1953).

[35] Cmd. No. 8878 ¶¶ 678-763 (1953). For recommendation of some litigation at public expense, see id. ¶¶ 631-77.

[36] Id. ¶¶ 764-873; see also id. ¶ 246; for the minority views see id. at 314-18.

[37] Goodhart, The Cost of Litigation, 69 L.Q. Rev. 463, 464 (1953). And see also Gower, supra note 8, at 2, 14.

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to be considered forthwith by an appropriate body constituted for the purpose with appropriate terms of reference," and that if that was undertaken two other questions of equal importance should be examined, namely, the reorganization of the circuit system and decentralization of the Supreme Court. And they go on to point out how closely the existing system is tied to the division of the profession and suggest that decentralization of court business would imply a fundamental reorganization of the profession.[38]

"Among the suggestions which are being canvassed some such as fusion of the legal profession, and the decentralization of the High Court are hardy annuals." So said Lord Chorley when he was with us in 1948.[39] In discussions of reform in England, these questions come up recurringly. Many writers and distinguished advocates have recommended fusion; but it is obviously a subject to be approached gingerly. It reminds me of the difficulty in my own state of Connecticut of attacking the firmly entrenched probate fees from estates as the support of the entire system of probate courts—a system likewise to the advantage of the few who are richly rewarded and to the disadvantage of the many who are not and of the general public which bears the cost.[40] That system, however, lacks the positive benefits of the English plan where a superior brand of legal service is afforded for those who can afford it. Surely every judge must envy the English organization; for his British colleague is at all times attended and advised by highly competent lawyers, the reverse of our system, where the ablest lawyers tend to eschew the courtroom for the greater rewards of office practice. But the English system seems truly aristocratic both in the sense of its high standard of competence and in its limitation to the few. We are told that, while solicitors generally are busy, 80 per cent of the barristers are not, and it is said that there are not more than perhaps 100 really successful barristers; but the example and the hope suggested by the 20 per cent minority and the forces of tradition are such that the profession does not support fusion.[41] So the exponents of reform in law administration have usually limited themselves to saying that (a) fusion must come, (b) it will not come soon, and (c) nothing can really be done to hasten it.[42] Even Professor Gower, who

[38] Cmd. No. 8878 at 314-18 (1953) (addendum by the four minority members), and see also id. ¶ 28. Professor Gower's discussion, supra note 8, at 13-17, is valuable here as elsewhere.

[39] In his essay, supra note 2, at 112.

[40] Discussed in articles cited in note 22 supra.

[41] Gower, The Future of the English Legal Profession, 9 Mod. L. Rev. 211, 232 (1946); Whitney, Inside the English Courts, 3 The Record 365 (1948); 21 Tenn. L. Rev. 32 (1949).

[42] Jackson, The Machinery of Justice in England 200-02 (1940); Mullins, In Quest of Justice 403, 411-19 (1931); Chorley, supra note 2, at 112.

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at one time looked upon fusion as a near-possibility if aided by a shove from the Government, now seems to think that view overoptimistic, and is disposed to settle for lesser reforms.[43] Even admitting the strong pressure against change, this does seem to us a little strange; for have not the English been willing to attempt many things forbidden to American reformers ranging from reorganizing industry to remaking the medical profession? Moreover, as we know, they are engaged in extensive plans now to supply aid through governmental help to indigent persons, the legal aid scheme, which, as the Committee points out, tends to worsen the lot of those in the middle income brackets.[44] And finally what is left to a reformer if he may not hope and dream and plan in the light of dreams? For sometimes he does wake up to find that his dreams have surprisingly come true. That is the way of reform.

At any rate, Professor Gower's lesser proposals[45] certainly are worthy of careful study against the background of the *Report* itself. They are an attempt to provide for the decentralization of the High Court before fusion. Their heart is the conferment of unlimited jurisdiction on the County Courts, with limitation of the original civil jurisdiction of the High Court to cases where both parties agree to the case being heard there, and with appeal from the County Court on questions of law only.[46] The basic step of substituting the County Court as the main trial court would seem sound; there is little reason for duplicating courts unless one is to be made in some way aristocratic, the dispenser of more expensive justice. Bringing the courts back to the general public and away from the present centralization in London is in line with modern American theories. It should be noted that the concept of an integrated court is not the same as that of a centralized court, operating in a single metropolitan area. It is a *directed* court

[43] His original prophecy of the approach of fusion was contained in his article, supra note 41, which called forth interesting comments in 81 Ir. L.T. 61 (1947) and 64 So. Afr. L.J. 220 (1947). He now says, Gower, supra note 8, at 22, n.93: "the writer no longer believes, as he did in his callow youth (see 9 M.L.R. at pp. 221 et seq.), that any Government would have the courage to fuse the profession whether its leaders liked it or not."

[44] Cmd. No. 8878 ¶ 20 (1953); Gower, supra note 8. The legal aid scheme is discussed, inter alia, in Thompson, Developments in the British Legal Aid Experiment, 53 Col. L. Rev. 789 (1953); Joyce, How the New Legal Aid Service Works in England, 20 U. of Chi. L. Rev. 235 (1953); Jowitt, Legal Aid in England, 24 N.Y.U.L.Q. Rev. 757 (1949); Smith, The English Legal Assistance Plan: Its Significance for American Legal Institutions, 35 A.B.A.J. 453 (1949); Abrahams, The English Legal Assistance Plan: A Description of its Machinery, 36 id. 31 (1950); The British Legal Aid and Advice Bill, 59 Yale L.J. 320 (1950).

[45] Gower, supra note 8, at 18-23.

[46] As he points out, Gower, supra note 8, at 19 and n.83, retention of present limitations on the scope of appeal from the County Courts is contra to the Committee's recommendation. See also note 24 supra.

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with interchangeable personnel, so that all parts can be kept equally operable; but it is not a court piled in a heap. Indeed for a decentralized court to be at the same time efficient, the control of an administrative director and chief justice is more than ever necessary.

So this proposal is attractive. Its approach to the question of fusion of the profession is at least ingenious. Since barristers are not required in the County Courts, since very likely they, or many of them, may not wish to leave London, a kind of fusion may develop of its own accord where solicitors may perform the duties of trial counsel in these then important courts. Perhaps here is a bit of oversimplification, at least as a matter of hope or prophecy. For the division may not so easily die, and reform somewhat by indirection may not actually occur. If the public still feels that London justice is worth the cost and if solicitors still brief the stylish barrister of the Inns of Court, then County Court justice will inevitably bear a stigma in comparison with what others can pay for. On the other hand, such a reform might well work a reorganization of activity whereby the barrister might become the leading adviser to business and industry in London, the commercial center of the country, while litigation went more and more to others in other places. At any rate it would mark a development of absorbing interest to students both of the law and of social change.

It is not practicable here to go into others of the many interesting suggestions contained in this *Report*. Enough has been said, it is hoped, to show the interest it arouses, as well as the kinds of questions it suggests but does not answer. Perhaps one further thought may be ventured. The Committee uncovers drives for court improvement not only in its own country and in America, but in Canada and Australia, which show a consistent and widespread purpose to achieve better court administration. It is perhaps unfortunate that there is so little interchange of the knowledge thus acquired and of the good will for reform and so little pooling of interests. In the United States the diversity is of course particularly great because of the diverse jurisdictions showing still so many types of procedure and of reform. Perhaps there ought to be a united body of advisory committees and of procedure commissions to serve as a clearing house and common meeting ground for all procedural reformers who should be blood brothers under the skin.[47] Among our many organizations there ought to be room for another which would bring together those in various parts of the world following the English law who are charged with official responsibility of trying to keep the tools of justice always bright.

[47] A suggestion of this kind, although limited to American committees, was presented in an important address by Dean Pirsig of Minnesota, member of the Advisory Committee of the Supreme Court of the United States on Rules of Civil Procedure, before the Section of Judicial Administration of the ABA at Boston in August, 1953.

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