ENGLISH CIVIL LAW

IN this booklet Mr. Ormerod has surveyed the field of Civil Law as applied in the English Courts of Justice. He begins with an account of how the legal profession has evolved and how it is now organised, describes the procedure during the course of a civil action, and explains the work of the various Courts right up to and including the House of Lords.

Most persuasively and authoritatively written, this is an ideal companion booklet to Sir Maurice Amos's *British Criminal Justice*, a revised edition of which has recently been published.

Uniform with this booklet :

BRITISH CRIMINAL JUSTICE

Sir Maurice Amos

(Revised edition)

ENGLISH CIVIL LAW

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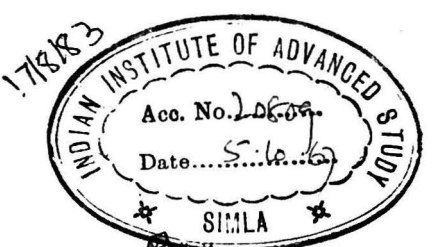

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To secure men's persons from death or violence
To dispose the property of their goods and chattels
For the preservation of their good names from shame and infamy.

SUCH, according to Bacon, are the uses of the law, and it is obvious at a glance that the casualty of a moment may render one or other of them necessary to any man, woman or child from the highest to the lowest.

It is the purpose of this essay to give some description of the English legal system by the processes of which a person who considers himself wronged may obtain redress, and it should be emphasized at the outset that, as its title 'English Civil Law' indicates, it deals exclusively with the system in force in England and Wales, and touches not at all on Scotland and Ireland.

Now if a man is contemplating litigation the first thing which he will do if he is sensible will be to seek advice from someone qualified to give it, and one of the things which that person in his turn must consider is the court in which his client should proceed. It is proposed, therefore, to give some account of the legal profession to which the citizen may turn for advice, and some account of the courts in which he may pursue his remedies; the High Court of Justice, the County Court, and the appellate courts to which appeal lies from these courts of first instance. In respect of both it is necessary to have some regard to the past, for the courts and the lawyers are inextricably linked in a long and continuous history extending back at least to the Norman Conquest.

THE LEGAL PROFESSION

It is a distinctive feature of the legal profession in England that it is divided into two orders; barristers, or counsel as they are also called; and solicitors who were previously

also known as attornies. So far as barristers are concerned, there is a sub-division into Queen's Counsel, or Leading Counsel, and Junior Counsel.

It is no easy task to define in terms which are both brief and accurate the exact difference in function between the two branches of the profession. The line of demarcation has never been authoritatively and definitively drawn, but in a typically English fashion has established itself through the centuries, shifting from time to time rather in the manner of a sandbank. However, for the purposes of this essay it is proposed to direct attention solely to the difference of function of the two branches in the conduct of litigation.

Put shortly, only barristers can appear and plead in the superior courts, and they must take their instructions, not from the lay client, but from solicitors to whom they must also look for payment of their fees. As regards Queen's Counsel, it may be said that they are confined to appearing at the trial of an action and may not do any of the preliminary work, such as drawing pleadings, which is the prerogative of the Junior Bar. They are usually only employed in cases of special difficulty or importance, and when they do appear in court they must have junior counsel with them.

The function of the solicitor is to advise his lay client generally; to take counsel's opinion on his behalf when he thinks it necessary; to take all necessary administrative steps in the offices of the court during the progress of an action; to prepare an action in its preliminary stages by making all necessary enquiries and taking statements from witnesses, and on the material which he has collected to prepare the Brief for counsel to enable him to conduct the case at its trial in court, the Brief being counsel's authority to conduct the case on behalf of his client, and the source of his information concerning it.

The Serjeants at Law

The historical nucleus of the Bar were the Serjeants, a

body which had a long and honourable history, and which for many ages embraced the entire profession.

In the years following the Norman Conquest the proceedings in the King's Court, or Curia Regis, were carried on in a foreign tongue, French or Latin, with the natural consequence that the parties who were engaged in actions were obliged to employ persons who were not only conversant with the law as administered but also familiar with the language of the court to draw their pleadings for them. These persons who drew the count, or pleading, were designated 'Conteurs', later known as 'Serjeants Conteurs', and finally simply as 'Serjeants'. It is probable that at first they were principally imported from the Norman courts, and no others were allowed to be heard. The well known passage from Chaucer shows that the Order was old when he was writing:

A serjeant of the lawe ware and wise
That often hadde yben at the parvis
There was also, ful riche of excellence
Discrete he was and of gret reverence;
He seemed swiche, his wordes were so wise.
Justice he was ful often in assise
By patent and by pleine commissioun.
For his science and for his high renown
Of fees and robes had he many on.
So grete a pourchaser was nowher non
All was fee simple to him in effect
His pourchasing might not ben in suspect
Nowher so besy a man as he ther n'as
And yet he seemed besier than he was.
In terms hadde he cas and domes alle
That fro the time of King Will. weren falle
Therto he coude endite, and make a thing
Ther coude no wight pinche at his writing
And every statute coude he plaine by rote.
He rode but homely in a medlee cote
Girt with a sein of silk, with barres smale
Of his array I tell no longer tale.

The Man of Lawe: Prologue to the *Canterbury Tales*.

The parvis, it should be explained, was a sort of Exchange at St. Paul's Cathedral. Each Serjeant had his allotted pillar where he might be found to give advice to such as sought it, 'if any came', as Fortescue, a writer of the fifteenth century, adds on a note of pessimism, indicating that unemployment at the Bar was not unknown in those far off days. For in those days the serjeants knew neither attornies nor solicitors, and every member of the Order communicated directly with the client who sought his aid.

After the fixing of the Court of Common Pleas at Westminster in the thirteenth century they became a body of the first importance. They acquired the exclusive right of audience in that court and retained it until 1846. Furthermore, until the abolition of the Order in 1877 the Judges were appointed exclusively from its members. Of the more distinguished serjeants the Crown retained some to be King's Serjeants. They were created by letters patent and fufilled the duties of the modern Attorney-General and Solicitor-General.

The distinguishing emblem of the serjeants was the coif which in its latter form was a close fitting, helmet-like head-dress of white silk bound by ligatures under the chin. The wearing of the coif was obligatory on any occasion when the serjeant was officially or professionally engaged and, as a peculiar mark of honour and distinction, he had the privilege of remaining covered even in the Royal presence. In the latter part of the seventeenth century the wearing of wigs became generally fashionable, and although they have long since been discarded from general use they have remained part of the judicial and forensic uniform. This created a difficulty as the wearing of the wig concealed the coif. The difficulty was eventually got over by making a circular depression in the crown of the wig and pinning in it a piece of white material to represent the coif. To this day, although it is sixty years since the last judge who was appointed from the serjeants died, the wig which a judge wears has this circular depression on its crown, a reminder

of the days when all judges of the common law courts were members of the Order of the Coif.

The apprentices

In the fifteenth century none could be admitted to the Order of Serjeants without having studied the law at least sixteen years. The ranks from which the serjeants were recruited were the apprentices, a word which suggests the form which legal education originally took. One may suppose that at some stage the serjeants became too few for the business to be transacted, and other counsellors were allowed to plead. Until the middle of the seventeenth century what we should now refer to as 'The Junior Bar' are often referred to as apprentices and students, for the apprentices, or at any rate the senior apprentices, were permitted to plead in court.

In one form or another this stratification of the English Bar has existed from the late thirteenth century until today. Since then, there have always been Leading Counsel, whether Serjeants or King's Counsel, holding their office by patent, and junior counsel without any patent or official position and relying solely on their experience and knowledge of the law.

In the thirteenth century schools were established for instruction in the laws of the land, and at that time the licensing of apprentices was in the hands of the judges. The fourteenth century saw the rise of the four Inns of Court, Lincoln's Inn, the Inner Temple, the Middle Temple and Gray's Inn, and at an unknown date they acquired the privilege which they have ever since retained of licensing apprentices, or, as it is now expressed, calling them to the Bar. They were in a sense legal universities.

Attached to the four great Inns of Court there were a number of smaller institutions known as Inns of Chancery. In the first instance a person intending to practise at the Bar would join one of the Inns of Chancery and there learn the first elements of the law. As he became proficient he

would be allowed to join one of the Inns of Court, and finally licensed to plead in court.

The word 'Barrister' first appears in a statute of 1532. The word actually used is 'utterbarrister', or outer barrister, a word which has suffered a curious transition of meaning. In 1532 an utterbarrister was an advanced apprentice who had passed beyond the bar of the Hall of his Inn and become one of the Gentlemen of the Bar, while the junior class, or students, were kept within the bar and called Inner Barristers. But in the courts the expression obtained in the course of time an exactly opposite meaning. The more advanced practitioners were by special favour called from the Outer Bar and were generally referred to as Gentlemen of the Inner Bar.

The bar, it should be mentioned, was an actual barrier which separated those who constituted the court, the judges and officials, from those who came before it as litigants and pleaders.

The attornies

The Inns of Chancery were not confined to persons destined for the Bar, but also admitted attornies who shared the advantages of the legal education provided. This is not surprising for it seems possible that the attornies and the apprentices had a common origin.

By the old common law of England the parties to a suit were compelled to appear in person, but by a writ from the Crown the privilege could be obtained of appearing by an attorney, or agent. By various statutes of the 13th century, the most important of which is one of 1285, the right of acting by attorney was granted. Shortly afterwards, in 1292, the King commanded John of Mettingham, who was then Chief Justice of the Court of Common Pleas, and his brethren that they should in their discretion look out for and appoint a certain number from every county of those of the best standing, and the most willing learners, according as they might think it good for their courts and the King's

subjects, and further that those so chosen should follow the court and deal with the business there, and no one else should. And it appeared to the King and his Council that one hundred and forty such persons might be enough.

Here then we have a distinct body of men duly appointed by the judges who have continued to the present time, and who deal with the business of the court on behalf of their clients. It may well be that the persons who were licensed pursuant to the direction of 1292 were originally both attornies and apprentices, but by the fifteenth century the two bodies had differentiated themselves, and their paths had clearly diverged. By that time the licensing of the apprentices was in the hands of the Inns of Court, while the position of the attornies as legal practitioners had been regulated by a statute of 1402 which enacted that they should be examined by the judges who should have the discretion to put their names on the roll of practitioners.

It appears that at some time the attornies were admitted not only to the Inns of Chancery but also to the Inns of Court, but their behaviour seems to have brought discredit on the Inns, and on the 22nd June 1557 a general Order was promulgated by the authority of the Privy Council and the Judges for the regulation of the four Inns. It provided that 'None attorney shall be admitted into any of the houses, and that in all admissions from henceforth this condition shall be implied, that if he that shall be admitted practise any attorneyship, that then ipso facto to be dismissed, and to have liberty to repair to the Inn of Chancery from whence he came, or to any other if he were of none before'.

This Order may be said to mark the sharp division of the profession into two branches, though it seems to have been necessary to promulgate similar orders in 1574, 1614 and 1630. By the seventeenth century the smaller Inns were almost exclusively occupied by the attornies, while the Inns of Court were devoted to the Bar. The division of work between the two branches of the profession, however, was very different from what it is today. The attorney was then

little more than a glorified clerk; a mere ministerial officer performing the less important duties of conducting a suit through the forms of the court; suing out the process, and doing what was necessary in the offices of the court for bringing the case to trial and levying execution on the judgment. All the duties of substance, even the minutest, were undertaken by counsel who still advised personally with their clients. That the attornies enjoyed no very high reputation in the 18th century appears from the remark of Dr. Johnson that 'he did not care to speak ill of any man behind his back, but he believed the gentleman was an attorney'.

The three hundred years which have elapsed since the seventeenth century have seen a continuous rise in the standing and importance of the attornies, who have assumed more and more responsibility for advising their clients and acting on their behalf in the preliminary stages of an action, and even appearing for them as pleaders in the inferior courts. This trend was showing itself strongly during the eighteenth century, and by the end of that century the modern rule was in force that barristers could only accept instructions from attornies who thus became what they now are, the dispensers of all business which comes to the Bar.

Queen's Counsel

Mention has been made of Queen's Counsel. They are a body of comparatively late origin. The first Queen's Counsel was Francis Bacon who in 1594 obtained from Elizabeth I a rather vague and irregular retainer or appointment as Counsel for the Crown on extraordinary occasions, one of them being the trial of the Earl of Essex in 1601. In 1604 James I gave him a formal appointment at a salary of £40 a year, in those days quite a considerable sum. During the next sixty years there were a few such irregular appointments, and considerable scandal was caused by the appointment of Francis North in 1668. It was then said

that the King had no counsel at law except the serjeants. In the reign of William III there were eleven such appointments, but it was not until the reign of George II that they became frequent and regular, and before the time of George III very few of the judges had been King's Counsel.

They were treated as holding an office under the Crown, and were precluded from acting as counsel against the Crown or Government. After 1660 no fee was paid to them by the Crown and they were remunerated, as they now are, by fees for the work they did. In the course of the eighteenth century they became what they are now, a class of counsel who have been given a rank superior to that of ordinary counsel. It is, however, only in the course of this century that they have been exonerated from the obligation of obtaining special permission to appear against the Crown in any case in which they desired to do so.

The Queen's Counsel today constitute the Gentlemen of the Inner Bar, for on appointment they are formally called upon by the Judges to take their seat within the bar of the court.

It was inevitable that sooner or later there would be a clash between the old order of the serjeants and the new order of King's Counsel. There was not room for both, and in fact a long and rather undignified squabble took place between them. As has been mentioned, from very early days the Serjeants had the exclusive right of audience in the Court of Common Pleas, but in the other two courts, the Court of King's Bench and the Court of Exchequer, the practice grew up of the presiding judge calling the King's Counsel within the bar of the court. The Serjeants were not called within the bar of these courts, being under an ancient obligation to 'keep the Common Pleas bar'. In 1846 Queen's Counsel obtained the right of audience in that court, but it was not for several years that reciprocity was shown and the Serjeants called within the bar of the King's Bench and Exchequer. By this time the Order had come to be regarded as an anachronistic nuisance; the old rule that

judges must be appointed from its ranks was producing ever greater absurdities, and it was finally dissolved in 1877.

And so in 1877 we have the modern scheme of things complete, with Queen's Counsel, junior barristers and solicitors.

Legal education

Anyone desiring a career at the Bar must first be admitted as a member of one of the four Inns of Court. There as a student he must keep twelve terms, of which there are four a year, an obligation which is discharged by attending in the Hall of his Inn on six nights during each term and eating dinner; a faint echo of the days when he had to keep terms and study at his Inn, as an undergraduate now does at a University. He must also pass the examinations conducted by the Council of Legal Education, and he may then be called to the Bar by the Benchers of his Inn. Having equipped himself with wig and gown he is then entitled to appear in court, and plead his clients' causes.

As has been said, he must look for his work to solicitors who, alas, may be slow to hear of him and to recognise his merit. However, if, as is to be hoped, he prospers, then after some years he may, on the recommendation of the Lord Chancellor, be appointed one of Her Majesty's Counsel learned in the law and take his seat within the bar of the court.

The solicitor will follow a quite different course. For more than four hundred years from the statute of 1402 the attorney was examined by the judges, or by examiners appointed by them. The conduct of those examinations is now in the hands of the Law Society, a body which was incorporated by Royal Charter in 1831 and to which a series of statutes the latest of which was passed in 1956, has entrusted more and more of the matters concerning the admission to, and regulation of, the profession. But besides passing the examinations, the student, or articled clerk as he is called, must for a period of years, either three or five depending on

whether he has obtained a degree at a University, be articled to a practising solicitor; that is, in effect, be apprenticed to him, and learn the practical side of the work. When he has served his articles, and passed his examinations, and given proof of his good character he may be admitted to the Roll of Solicitors. This admission is effected by the Master of the Rolls signing an admission certificate, from which it will be seen that admission to the Roll still rests in the hands of a Judge. This is a point of no small practical importance. Solicitors are still officers of the court, as they have been since the days of John of Mettingham, and are still subject to the immediate disciplinary control of the judges, although in fact this disciplinary control is today exercised in the main by the Law Society by virtue of statutory provisions. Barristers, on the other hand, are not answerable for their professional conduct to the judges, but to the Benchers, or governing body, of their Inn, and it is this which ensures the complete independence of the Bar. Happily, conflicts between Bench and Bar are now a rarity, if not completely unknown, but the Bar's independence of the Bench coupled with the Judges' independence of the Crown, which they have enjoyed since the end of the seventeenth century, has been in the past and still remains an important bulwark of the liberties of the people.

Speaking in round figures, there are today about two thousand barristers of whom rather over two hundred are Queen's Counsel, and eighteen thousand solicitors. Barristers may not practise in partnership, and in London have their professional chambers in the Temple and Lincoln's Inn which are situate close by the Law Courts. There are also local Bars in the large provincial towns such as Birmingham and Manchester. Solicitors may practise either in partnership or on their own account, and firms vary in size from the one man firm to that of ten or more partners. One or more firms of solicitors will be found in every town down to the smallest.

The division of the profession

The merits of this system have been, and still are, subject to argument, but a hundred years ago Lord Campbell, who held the office both of Chief Justice and Lord Chancellor expressed the view that it had greatly contributed not only to the dignity of the Bar but also to the improvement of English jurisprudence. It has this practical advantage that it makes the most expert legal advice readily available to all. Any man living in any part of the country, however remote, who desires to be advised on any point of law, however abstruse, has only to go to his local town and consult his solicitor who can on his behalf obtain the opinion of counsel specialising in that particular branch of the law. In this present era, when the volume of the law is so vast that no one can be expected to master it all, this is no small advantage.

More important than this, however, the division of the profession is, rightly or wrongly, regarded as cardinal to the proper administration of justice, and inasmuch as it is this feature which distinguishes the English from many other systems it is worth while elaborating one of the considerations by which it is supported.

The fundamental proposition on which it is based, and one which appears to astonish some foreign observers, is that it is most undesirable that the person who conducts a case in court should previously interview the witnesses, other than his own client, but must examine them in court from written statements (known as their 'proofs') which have been taken by his solicitor and form part of his Brief. It is a rule of the English Bar, and one which a practitioner will disregard at his peril, that he must not, except for very good and exceptional reason, interview the witnesses before or during the trial. Still less must he indulge in the practice known in some quarters as 'drilling the witnesses'.

The complement of this rule is the further rule that counsel when examining his own witnesses in court must

not ask them 'leading questions', that is, questions which by their form suggest the answer which is desired.

The purpose of all this is to ensure, so far as is humanly possible, that the evidence which is given on oath in court is really the evidence and recollection of the witness and is not something which has been suggested to him by the lawyer who knows what evidence he wants in order to win his client's case. Litigants and their advisers must frame and conduct their cases in accordance with the truth of the matter, and must not manipulate the evidence to suit the case which they want to put forward.

More than one foreign lawyer to whom this has been explained has exclaimed in astonishment, 'But don't you want to win your cases?' To this one can only confess with a wry smile that counsel's task would be very much easier if he were allowed to 'drill' his witnesses, and get clearly into their heads before they went into the witness box exactly what it was that they were wanted to say. There is not a member of the Bar who has not on countless occasions suffered the embarrassment of a witness 'not coming up to his proof'; that is, the evidence given by the witness on oath in court proves to be not nearly as favourable to counsel's client as were the statements which he gave to the solicitor who took a proof of his evidence when preparing the Brief. Sometimes this is due to forgetfulness, nervousness or just plain stupidity, and in these cases it is often possible by legitimate tactful handling to jog the witness' memory into a recollection of the material point. But in a vast number of cases the truth of the matter is that the favourable statement in the proof was something which was suggested to the witness and which in fact went beyond his own knowledge and recollection, and the significance of which he possibly did not appreciate. If counsel just before the trial were entitled to 'drill' the witness, or if the person who took the proof were the person to conduct the case at the trial, there is little doubt that in many cases the witness would be brought to appreciate the importance of that statement

and of adhering to it in the witness box, sometimes no doubt even coming to believe that he really had seen or heard that vital piece of evidence.

The last thing which it is intended to suggest, and which the foregoing at first sight might seem to do, is that solicitors when taking statements deliberately suggest false evidence to a witness. Nothing could be further from the truth. But to take a statement which is concise, relevant and accurate, is a task requiring the utmost skill. It is also extremely tedious and laborious. Witnesses are often voluble and diffuse, and it is almost inevitable that sooner or later a person taking a statement, with a keen appreciation in his own mind of what is required, and in a laudable endeavour to bring the witness to the point, should suggest to him what is wanted. 'And then I suppose you saw the defendant's car hit the plantiff?' says the taker of the statement in all good faith, and believing that that is what the witness intends to say. 'Yes', says the witness. And down it goes in the proof, 'I saw the defendant's car hit the plaintiff.' Counsel reading his Brief before the trial heavily underlines this statement as most valuable evidence, and full of confidence calls the witness into the box. 'Do you know which car hit the plaintiff?' he asks. 'No', replies the witness. 'I can't say that for certain. There were two cars, and when they had passed I saw the plaintiff lying in the road.' And thereupon the plaintiff's case may fail for lack of evidence that it really was the defendant's which car hit him.

That is an imaginary instance, and may perhaps be thought rather absurd, but it is not as startling as the writer's own personal experience when a witness, who had given the most positive and detailed statement that he had witnessed the signing of a will, at the trial went into the witness box and denied that he was present on the occasion at all. The explanation of that was never discovered.

The rule does not extend to counsel interviewing his own client, or to his interviewing expert witnesses. With regard to the latter, usually scientists or professional men

called to give evidence on a matter which is peculiarly within their specialised knowledge, the danger is remote of their being open to suggestion. Furthermore, it is in many cases absolutely essential that counsel should have an opportunity of discussing the matter with the expert in order that he may have explained to him, and himself understand, the effect of the scientific evidence which is to be given.

It may be thought that if it is undesirable that counsel should see the independent witnesses it must be even more undesirable for him to see the actual parties, who are much more concerned with the result of the case, and who may be thought to be even more amenable to suggestion as to their evidence. In fact until the year 1852 the parties to an action were not allowed to give evidence, the assumption being that if they were they would naturally perjure themselves. Experience has shown that that was an unduly low view of human nature. It is probably true that wittingly or unwittingly it may be indicated that evidence on certain lines, a certain 'slant' to it, will materially strengthen the case, but a great safeguard is that before the parties see their counsel they will have given their statement of their case to their solicitor, and on this counsel may well have advised and settled the pleadings. But in any event overriding considerations of justice and convenience demand that the client must be allowed to consult with his counsel.

No such considerations arise in the case of independent witnesses. When, as so often happens, there is an acute conflict of evidence between the parties to an action the court is bound to pay the greatest attention to outside witnesses in an endeavour to arrive at the truth, and it is of primary importance that their evidence should really be their own evidence of what they saw and heard, and nothing more or less.

Such is the aim, and in conclusion it may not be unfit to recall the words of Dr. Johnson on the duties of the Bar, an occasion when he expressed himself as forcefully and accurately as on any other subject to which he addressed

his mind and disposed once and for all of the ill-considered criticism, still sometimes heard, of counsel presenting a case 'which he knows to be wrong'.

Boswell asked him if he did not think that the practice of the law, in some degree, hurt the nice feeling of honesty. Johnson. 'Why no, Sir, if you act properly. You are not to deceive your clients with false representations of your opinion : you are not to tell lies to a judge'. Boswell. 'But what do you think of supporting a cause which you know to be bad?' Johnson. 'Sir, you do not know it to be good or bad till the judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from supposing your arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself, may convince the judge to whom you urge it; and if it does convince him, why then, Sir, you are wrong and he is right.'

The Course of an Action

And now, having given some account of the origins and function of the legal profession, we will envisage them duly qualified and seated in their places of occupation, the barrister in his chambers and the solicitor in his office, and try to provide them with some business.

On a day in 1956 John Smith while crossing the street is knocked down by a motor car driven by one William Jones. He sustains severe injuries; is in hospital for several weeks; endures much pain and suffering, and is out of work and loses his wages for several months.

When he is recovered he turns his mind to the question whether he is not entitled to be compensated for all this by William Jones who, he says, was entirely to blame as a result of his negligence in driving his car. As a first step he goes to consult his solicitor who will take from him a full account of the circumstances of the accident and the names of any

persons who may have witnessed it. The solicitor will then endeavour to obtain from the witnesses their various accounts of the occurrence. Having done all this, he will then write to Mr. Jones and say that his client holds him responsible for the damages resulting from the accident, and will be glad to know whether Mr. Jones admits liability.

Mr. Jones, in his turn will, in all probability, consult his solicitor, who after investigating the matter, and taking Mr. Jones' statement, may reply on his behalf that according to his instructions the accident was caused solely by the negligence of Mr. Smith, who stepped off the kerb straight in front of Mr. Jones' car; that Mr. Jones had no opportunity of avoiding the accident, and that accordingly he repudiates liability. An impasse being thus reached, Mr. Smith has no option but to instruct his solicitor to commence an action in the courts if he is to recover the compensation to which he considers himself entitled.

As a first step the solicitor will prepare and send to a barrister of his choice, experienced in this class of case, instructions to advise on the whole matter and, if he thinks proper, to settle, that is to draft, the appropriate claim. These instructions will include the statements taken from Mr. Smith and the witnesses, and such observations as the solicitor may think helpful. In due course he receives back from counsel an opinion in which he states that on the information before him Mr. Smith has a good cause of action against Mr. Jones together with the form in which the claim will be made.

The Writ

The document by which the action is started is the Writ of Summons. This will be prepared by the solicitor, the claim, in the form drafted by counsel, being endorsed on the back. He will then take it with a copy to the appropriate room in the Royal Courts of Justice where both copies will be sealed with the seal of the court, one copy being handed

back to the solicitor, and the other retained for filing. The writ is thus issued and the action commenced.

The Writ will read as follows:

In the High Court of Justice.

1957. S. No. 101.

Queen's Bench Division.
Between

JOHN SMITH — *Plaintiff*

and

WILLIAM JONES — *Defendant*

Elizabeth the Second by the grace of God, of the United Kingdom of Great Britain and Northern Ireland and of Our Other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith

To William Jones

We command you that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of John Smith, and take notice that in default of your doing so the plaintiff may proceed thereon, and judgment may be given in your absence.

Witness David Viscount Kilmuir, Lord High Chancellor of Great Britain the first day of March in the year of our Lord One Thousand Nine Hundred and Fifty Seven.

On the back will be indorsed the claim

The plaintiff's claim is for damages for injury to the plaintiff caused by the negligent driving of the defendant or his servants.

Having issued the writ the next thing that the solicitor must do is to serve it on the defendant so that he may have notice of what is afoot, and until this is done no further step can be taken in the action. For it is one of the fundamental principles of British justice that throughout the course of the action each party must be kept fully aware of every step which the other party takes, and if by some mischance or fraud one steals an advantage on the other by taking a step of which the other party had no notice, that will, if necessary, be set aside.

In the normal way service of the writ is effected by

delivering a copy to the defendant personally and showing him the original, if he desires to see it.

The origin of the Courts

But before pursuing further the course of Mr. Smith's action it is worth while considering the form of the writ a little more closely, for a wealth of legal history is enshrined in it.

The first thing to be noticed is that it is in the form of a command by the Queen to William Jones, and purports to be issued by the Lord Chancellor. This is a reminder that the Courts are the Queen's courts; that the Queen is the fountain of justice, and that the law is administered by Her Officers and in Her Name. It was not always thus. In the centuries after the Norman Conquest there were many local and feudal courts which divided with the King the administration of justice, and it was not until the fifteenth century, after a long struggle by the Norman, Angevin and Plantagenet Kings, notably Henry II and Edward I, that the supremacy of the King's courts was achieved.

It is beyond the scope of this essay to make more than the briefest mention of the origins and rise of the King's courts, but an account of them today can hardly be complete or intelligible without some regard to their history.

The Courts of Common Pleas King's Bench and Exchequer

To return again to the Norman Conquest, the various branches of judicial business which became distributed among the four courts of Westminster, the Court of Chancery, the Court of Common Pleas, the Court of King's Bench, and the Court of Exchequer, were all administered in one. This supreme court was called the Aula, or Curia, Regis, from being held in the hall or court of the King's palace, and the history of the courts of justice is that of a long double process by which they separated themselves from the parent Curia Regis and from each other.

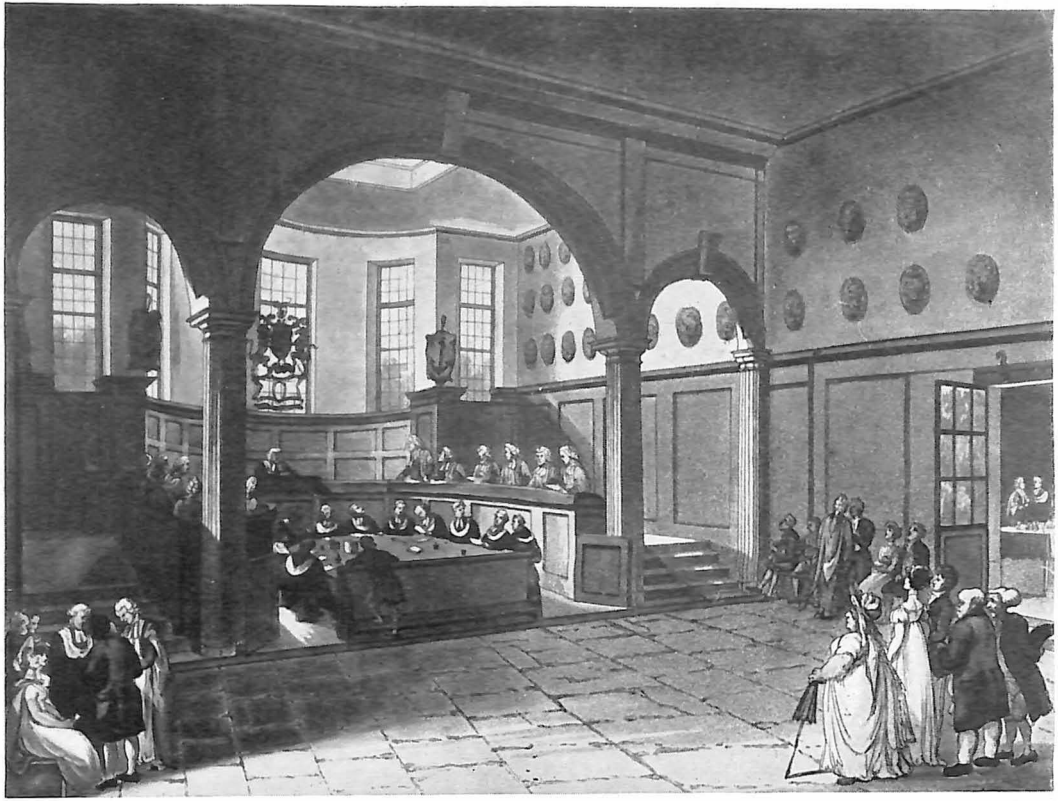
The Curia Regis necessarily from its nature followed the King's own movements, and in the palace in which he

happened to be resident, at London, Westminster, Windsor, Winchester, Gloucester or Salisbury, this supreme court was held, in the judicial department of which the King himself frequently presided. Its jurisdiction was unlimited in extent, comprising both civil and criminal cases, while the affairs of the revenue were administered in that branch of it called the Exchequer. The members of the Curia Regis consisted of various officers of the palace and the bishops and barons of the realm, but the judicial duties of the court were gradually left to the management of a few of the barons who were expressly selected on account of their superior judgment or attainments until by the advance of legal science and the increase of technical intricacies it became necessary at first to associate with them, and eventually to substitute for them, persons whose lives had been devoted to legal studies. The first of these was the Chief Justiciary, and in the sovereign's absence he presided in all criminal and civil cases, and also in the Exchequer, having by virtue of his office the principal management of the royal revenue. After a period of two hundred years this office was discontinued in the reign of Henry III when its principal judicial duties were transferred to the Chief Justice of the Court of King's Bench.

The fact that the Curia Regis followed the King caused great delay and expense to the litigants who had cases in his court, and by the seventeenth chapter of Magna Carta it was provided that 'Common pleas shall not follow Our Court, but shall be held in some fixed place.' This was intended to remove one practical grievance, but it had the most far-reaching results. Its immediate effect was to provide a separate court for the trial of common pleas, that is of civil actions, but by securing for them a permanent court it gave an impetus to the disintegrating process whereby the Curia Regis as an administrative body was differentiated from the Curia Regis as a Court of Justice. The special treatment accorded to common pleas emphasised the distinction between them and royal pleas, and so continued

Pictorial Press

1. Barrister before going into Court



By courtesy of the Librarian, the Inner Temple

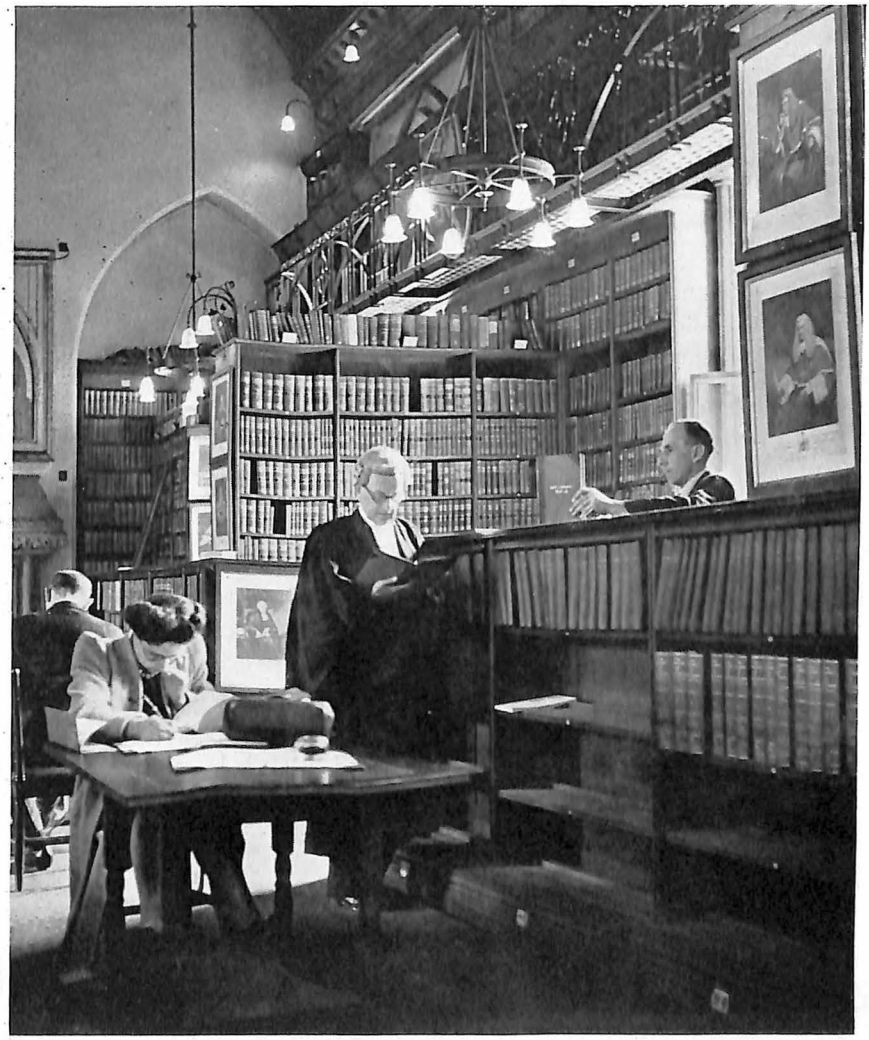
2. Court of Chancery. Lincoln's Inn Hall

By courtesy of the Librarian, the Inner Temple

3. Doctors Commons

Topical Press

4. Opening of Michaelmas Law Sittings

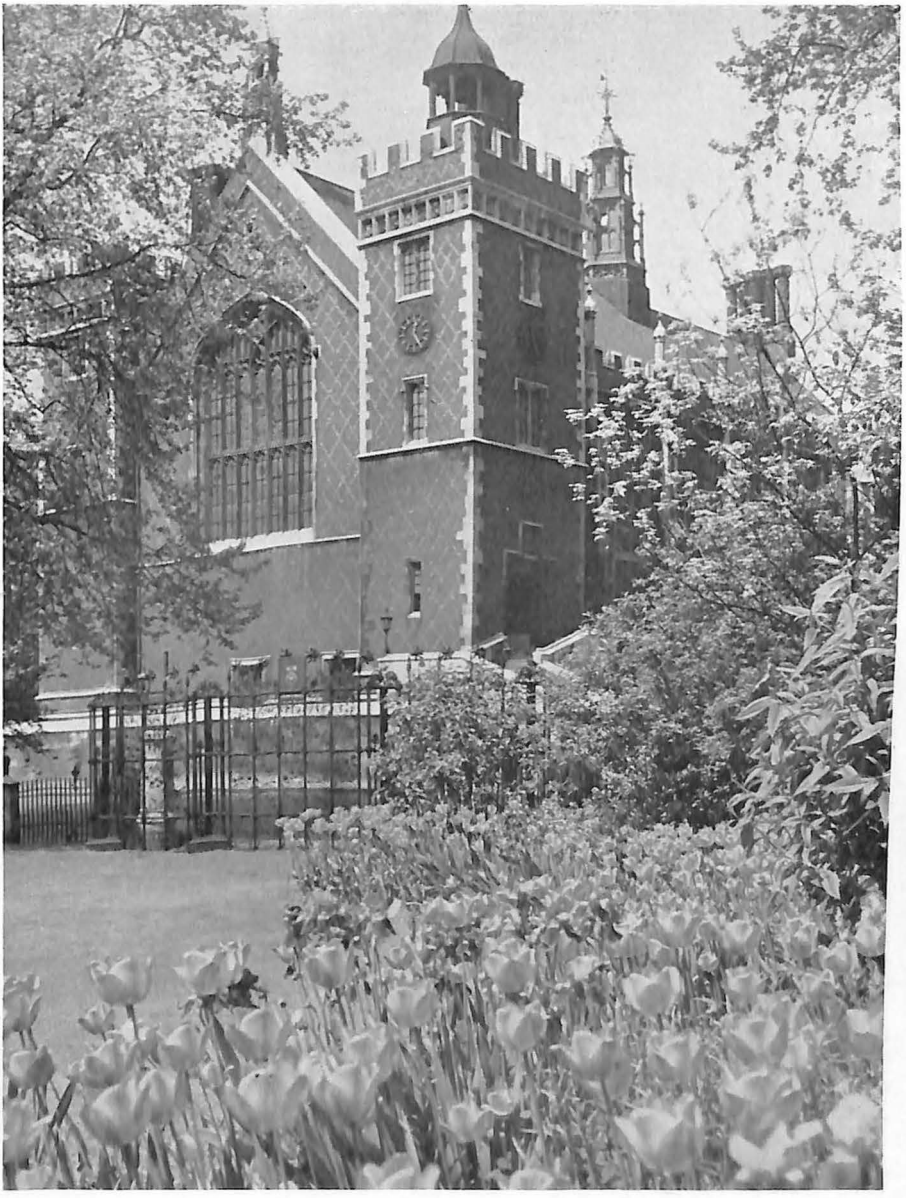


Keystone

5. The Bar Library

E. W. Tattersall

6. Law Courts, London



S. Dixon Scott

7. Lincoln's Inn New Hall

Alfieri

8. Guildhall, Kingston-on-Thames, used for Sessions of the County Court

the splitting up of the Curia Regis on its judicial side into two distinct tribunals. One group of judges was established for the hearing of common pleas (for a long time mainly concerned with land) and became known as the Court of Common Pleas. A second group was established for the hearing of royal pleas (including criminal cases) and became known as the Court of King's Bench. In due course a third court emerged, known as the Court of Exchequer, which was in its origin merely one department of the financial exchequer, where disputes affecting debts due to the Crown were decided. Throughout its existence the judges of this court were known as Barons of the Exchequer, a reminder of the personnel of the original Curia Regis.

Each of these courts was in theory confined to the special class of suits to which it owed its origin, but in the course of time all of them, by means which themselves form a fascinating object of study, encroached on each other's jurisdiction, and became three courts of similar and co-ordinate authority. Just one example of the method of encroachment must suffice, namely, the Writ of Quominus by which the Court of Exchequer extended its jurisdiction. A plaintiff who wished to proceed in that court was allowed to allege that the defendant was indebted to him, and that the delay of the defendant in paying the plaintiff caused the latter to be in default to the King,—'whereby (quo) the plaintiff is the less (minus) able to satisfy Us the debts which he owes Us in Our said Exchequer.' On this the action was allowed to proceed in the Court of Exchequer.

The number of the judges varied from time to time, but from the reign of Henry VIII to 1834 there were three judges of each court together with a Chief Justice or Chief Baron, and 'the twelve judges of England' came to be regarded as an almost sacred institution.

These three courts were known as the Courts of Common Law, administering that part of the law which was unenacted and was common to the whole land, as contrasted with statute, local custom and the royal prerogative, and

once established they endured for a period of six hundred years, until the 1st November, 1875.

The Court of Chancery

It remains to make mention of the Court of Chancery. The King's Chancellor was another officer of the Curia Regis who gradually became a regular counsellor in affairs of state until, when the office of the Chief Justiciary was finally abolished, he came to be considered the King's chief legal adviser. He had also many other duties and has been described as the King's secretary of state for all departments. The place where the business pertaining to his office was performed was known as the Chancery.

Notwithstanding the establishment of the courts of common law there were still cases in which for some reason or another a man could not get a remedy. There remained, however, a reserve of justice in the King, and such persons as could not get justice in the courts were in the habit of petitioning the King for a remedy. Such petitions would be referred by the King to his Chancellor, and gradually in the fourteenth century petitioners got into the habit of petitioning the Chancellor direct. In the course of time the Chancellor evolved his own methods of dealing with such petitions, and supplemented the technical and inflexible rules of the common law by giving redress on the merits of each case as it arose, and by evolving remedies unknown to the common law courts. By the end of the seventeenth century the jurisprudence of the Chancellor's Court, the Court of Chancery as it was then known, had itself become settled, and the law administered there became a recognised part of the law of the land under the name of Equity. One branch of the law which was evolved by, and remained the particular province of the Court of Chancery, was the law relating to Trusts. In its latter days the Court of Chancery which had come into existence with the object of mitigating the inflexibility of the common law itself became a by-word for technicality and procrastination.

The Judicature Acts. The Supreme Court of Judicature

By the nineteenth century the whole legal system, with the ill-defined and clashing jurisdictions of its various courts, had become a creaking and antiquated anachronism. After a quarter of a century of tinkering with it Parliament in 1875 radically recast and reformed the system. By the various Judicature Acts of 1873 onwards all the old courts were abolished, and in their place was established the Supreme Court of Judicature, consisting of the High Court of Justice, and over that the Court of Appeal.

The Chancery and Queen's Bench Divisions

For the sake of convenience in the transaction of business the High Court is divided into three divisions, the Chancery Division, the Queen's Bench Division, and the Probate Divorce and Admiralty Division, but it is to be stressed that these are not three separate courts, but three divisions of one and the same court. This was in 1875 a most radical and fundamental change.

Leaving on one side for the moment the Probate Divorce and Admiralty Division and dealing only with the other two divisions, certain classes of action (an example is those relating to Trusts) which in the old days would have been brought in the Court of Chancery must now be commenced in the Chancery Division, and certain actions which would have been brought in the old common law courts have to be commenced in the Queen's Bench Division, but otherwise it is open to the litigant to bring his action in whichever division he pleases. In a work of this nature it is not possible to describe in any detail the work of the Chancery Division beyond saying that it is in the main concerned with questions of property such as the administration of the estates of deceased persons; the construction of wills and settlements; various actions concerning land; Limited Companies and partnerships, as well as with the wardship of infants.

The Probate Divorce and Admiralty Division

A special word must be said about the Probate Divorce and Admiralty Division, which at first sight seems an odd conglomeration, lumping together the 'wills, wives and wrecks' as the saying goes. The explanation of this curious alliance must be sought in the history of the courts which originally exercised these jurisdictions.

From very early times the Church, through the Ecclesiastical Courts, had complete control over the law of divorce and of the granting of probate of wills, and administered a code quite distinct from the common law. From the early fifteenth century there was also a Court of Admiralty which administered a civil and criminal jurisdiction in piracy and other maritime cases, including the law of Prize, that is the law relating to the property of a belligerent captured at sea in time of war. This Court also developed a code of its own, based not on the common law but on Roman law. In the course of time the Crown through the Privy Council asserted a growing influence both over the Ecclesiastical Courts and the Court of Admiralty, and under this influence and the influence of a common antagonism or rivalry to the common law these courts whose jurisprudence had a common foundation in Roman law, developed a growing affinity to each other, so that in their latter days both sat in the same place, namely Doctors Commons, and in fact the Judge of the Court of Admiralty and the Judge of the Ecclesiastical Court were often the same person. In 1857 the Ecclesiastical Courts were abolished and in their place were set up two courts, a Court for Divorce and Matrimonial Causes and a Court of Probate, and it was provided that the same person should be the Judge of each Court. It was also specifically provided that when the next vacancy occurred in the Court of Admiralty the Judge of the Probate Court should thereafter be the same person as the Judge of the Court of Admiralty.

The alliance being as close as this, it was quite natural that

when the Judicature Acts effected the complete reorganisation of the courts the business of these three courts, which had been completely distinct from the Common Law Courts and the Court of Chancery, should be assigned to one division of the High Court. Traces of the old differences are still to be seen, for the procedure in this Division is still today different in some respects from the procedure in the other two divisions.

The Judges

There are today fifty Judges of the Supreme Court of Judicature, not including the Lord Chancellor who is an ex officio Judge. The Court of Appeal consists of the Master of the Rolls, who is the acting president and eight Lords Justice of Appeal. To the Chancery Division there are assigned seven Judges. The president of the Queen's Bench Division is the Lord Chief Justice of England, and with him there are twenty-five Judges. In the Probate Divorce and Admiralty Division there are the President and seven Judges. Since the end of the war, and in order to cope with the great increase in divorce work, which it was hoped would be temporary, it has been the custom also to appoint Special Commissioners to hear divorce cases.

The Judges are appointed by the Queen, and once appointed they are for all practical purposes irremovable except on an address of both Houses of Parliament. The qualification is that they should be barristers of at least ten years' standing or, in the case of appointment to the Court of Appeal, barristers of at least fifteen years' standing. Usually, but not always, they are appointed from the ranks of Queen's Counsel.

Appearance in the action

To return to Mr. Smith's action in which in the mean time the writ has been served on the defendant. His claim is for damages for negligence, a claim arising under the Common Law which would have been brought in one of the old

Common Law Courts, and accordingly the writ has been issued in the Queen's Bench Division.

The next thing to be observed is that the writ directs the defendant to enter an appearance. This is an important matter, as appearance is the formal act by which the defendant submits himself to the jurisdiction of the court, and until he has entered an appearance he is not entitled to take any step in the action. If he desires to assert that for any reason he is not amenable to the jurisdiction of the court this is the moment at which he must say so and take the appropriate steps to set the writ aside. If he enters an unconditional appearance he cannot afterwards object to the jurisdiction of the court.

As Mr. Jones desires to defend the action, and can raise no objection to the jurisdiction of the court his solicitor will enter an appearance for him in the offices of the court and the action can proceed.

If a defendant fails to enter an appearance then the plaintiff can on proof of the service of the writ obtain judgment in his absence.

The Pleadings

In the administration of any system of law one of the most important elements must be the method which is adopted of ascertaining the facts on which the court is to reach its conclusions. By the English system it is left to the parties themselves to decide what evidence they will call to support their case, and this evidence must be given *viva voce* in open court at the trial, and be subject to cross-examination by counsel for the opposing party.

Enormous importance is attached to the judge hearing the witnesses personally, and having an opportunity of observing their demeanour in the witness box. Evidence which in a transcript of a shorthand note will read very convincingly may sound very different to a judge who hears it at first hand and has observed, let us say, some significant pauses before the witness answered certain questions and his

evasiveness and uneasiness under cross-examination, matters which it is quite impossible to reproduce or convey in a note. Appellate courts, which do not themselves hear the witnesses, are most reluctant to reverse any finding of fact made by the judge who has this advantage of observing the witnesses and of forming his own opinion as to their credibility.

It is obvious that no litigant or his advisers can know what witnesses they should call at the trial unless they know clearly in advance what are the issues in dispute to which they must direct their evidence. This is achieved by the system of Pleadings. Each party must in a written document signed by his counsel set out what his case is.

Statement of Claim

The writ need do no more than indicate the nature of the plaintiff's claim. But thereafter, if an appearance is entered by the defendant and the action proceeds, the plaintiff must by a Statement of Claim allege specifically what his cause of action against the defendant is, and what relief he seeks, and at the trial he will not be allowed to depart from this and introduce some new complaint. The drawing of the pleadings is, therefore, a matter of great importance requiring considerable care, experience and skill. A properly drawn Statement of Claim will set out and allege such facts as, if proved, will entitle the plaintiff to the relief claimed, and will clearly indicate to the defendant what it is that is alleged against him.

The Statement of Claim in John Smith's action will read something as follows:

(1) On the 3rd day of March 1956 the plaintiff travelled by omnibus from London Bridge to the Royal Courts of Justice, Strand in the County of London.

(2) On arrival at the Royal Courts of Justice the plaintiff, having waited for the said omnibus to stop at the recognised stopping place, alighted from the same and proceeded to cross the road.

(3) While the plaintiff was crossing the road as aforesaid the defendant so negligently drove a motor car along the said road that he knocked down and injured the plaintiff. The plaintiff has thereby been put to loss and expense and has suffered damage.

Particulars of negligence

The defendant was negligent in that he

(a) drove too fast

(b) drove on the wrong side of the road

(c) failed to keep any proper look-out

(d) failed to give any, or any sufficient, warning of his approach

(e) passed too close to a stationary vehicle from which passengers were or might be alighting.

The Statement of Claim will also contain particulars of the injuries which the plaintiff suffered, such as, for example, shock, concussion, a broken leg, loss of hearing in one ear, or as the case may be, and will also set out the loss and expenses to which he has been put, such as the cost of hospital treatment and doctors' fees, and loss of wages, and will conclude with the words

And the plaintiff claims damages.

Defence

Having received this document William Jones, the defendant, must consider which, if any, of the allegations he is going to admit, and which he is going to deny, and generally what his defence is going to be.

We will assume that in this case he decides that he will admit nothing, but put the plaintiff to the proof of all his allegations, and also put forward the defence of contributory negligence.

His written Defence which will be delivered to the plaintiff will be in the following form:

(1) The defendant denies that he was negligent as alleged or at all.

(2) The defendant denies that the accident alleged, or any injuries, loss or damage, was caused by the alleged or any negligence of the defendant. It was caused, or contributed to, by the negligence of the plaintiff who stepped off the kerb in front of the defendant's motor car, in consequence whereof the defendant had no opportunity of avoiding the collision.

(3) The alleged injuries, loss and damage are not admitted.

On this both parties know where they stand. The plaintiff must prove by his own evidence, and that of bystanders who may have witnessed the accident, that he was knocked down by the defendant's car in circumstances which show that the defendant was negligent; that is that he was careless and was not driving with the care and caution which he ought to have used. He knows too that the defendant is going to say that it was he, the plaintiff, who was the cause of the accident because he stepped off the kerb right in front of the defendant's car.

The defendant knows in what respect he is alleged to have been negligent, and that he must come into court prepared to deal with these allegations. He will, no doubt, have witnesses on his side to say that he was driving with every care, and that it was the plaintiff who was the cause of the accident.

The plaintiff must also prove, probably by the evidence of a doctor, the extent of his injuries, and must satisfy the court of the loss which he has suffered.

Opinion on evidence

Before the trial counsel on each side, having considered the pleadings and appreciated the issues which have been

raised, will advise their respective solicitors what evidence they should have available at the trial and what witnesses they should call.

Briefing of counsel

Matters having reached this stage, and it being apparent that if the plaintiff succeeds the award of damages may be large, the solicitors on both sides decide that the case is of sufficient importance to justify the briefing of leading counsel.

Each leading counsel will appear in court with the junior barrister who signed the pleadings and, as a general rule, the junior barrister will be entitled to be paid a fee equal in amount to two thirds of his leader's fee.

These fees must be marked on the briefs before the trial and must not be departed from, for it is the grossest misconduct on the part of counsel to agree to accept a fee which is to be proportionate to the amount of damages recovered, or to be dependent in any way on the success or failure of the action. If, however, an action lasts more than five hours counsel are entitled to a further fee known by the picturesque and expressive name of a Refresher.

The payment of these fees is the personal responsibility of the solicitor delivering the brief, and he is responsible for their payment whether or not he receives them from the lay client. Counsel has no legal right to his fees, and cannot bring an action to recover them either from the solicitor or the lay client, and in view of this he is entitled to demand that the fee be paid on the delivery of the brief. In days gone by this was the almost universal practice, but such has been the rise in the standing and integrity of the solicitors' profession that it is now a rarity. Failure to pay counsel's fees (more particularly if they have been received from the lay client) is regarded by the Law Society representing the solicitors' profession as professional misconduct in respect of which disciplinary action may be taken.

The trial

Eventually the day of trial comes, and by 10.30 a.m., the hour of the sitting of the court, the solicitors on both sides will have marshalled into court their clients, their witnesses, and their documents, and will be endeavouring to allay the fears of the anxious and to answer the questions of the curious. Counsel will be in their seats, no doubt having a few last hurried words of consultation before the entry of the Judge, the case being tried at the Royal Courts of Justice in London before a Judge alone.

The jury

If these events had happened thirty or forty years ago it is most likely that the case would have been tried before a judge and jury, as it still could be today. Since 1914, however, there has been a progressive decline in the use of a jury in civil actions. In 1913 the great majority of civil actions were tried with a jury, while now the proportion of actions so tried is not more than two or three per cent of the whole. Today the Court has an absolute discretion whether or not to direct trial with a jury except in cases tried in the Queen's Bench Division of libel, slander, malicious prosecution, false imprisonment or breach of promise of marriage, and in cases involving charges of fraud, in which cases the parties have a right to insist on a jury. This is a statutory provision of 1933 but it only reflects the decreasing popularity of the jury in civil actions, one of the reasons for which is that a jury does undoubtedly tend to increase the length and expense of a trial.

The course of the trial can only be sketched in outline. Leading counsel for the plaintiff will open his case, that is, outline it to the judge stating the circumstances in which, as he alleges, the accident occurred and the extent of the injuries and damage and indicating the evidence which will be called. In the case envisaged no disputed question of law is likely to arise, it being common ground that if the defendant

was negligent he is liable to pay damages. In other and more complicated cases counsel in opening the case will also address the judge on the law referring to those reported cases which he considers relevant, being careful not to omit those cases, if any, which appear adverse to his cause. For counsel is under an obligation not only, as Dr. Johnson said, to state facts fairly but also not to misrepresent the law to the court which relies very much on counsel to bring to its attention all authorities, favourable or unfavourable, which may have a bearing on the case.

This is a matter of the greatest importance for by the rule of precedent a decision of a superior court is binding on all inferior courts to the extent of the proposition of law which it establishes, while the decision of a judge of concurrent jurisdiction, though not absolutely binding, is regarded as being at any rate of persuasive authority. This rule must be at least as old as Shakespeare's time for one recalls the words of Portia in the *Merchant of Venice*: 'It must not be.—T'will be recorded for a precedent and many an error by the same example will rush into the state.' In our own day more than one faulty decision has confused the law for years simply because, for one reason or another, a judge has not known of the existence of a relevant authority.

Unfortunately, the huge and ever growing mass of reported decisions makes it a matter of ever increasing difficulty to ensure that no relevant authority is overlooked, but if counsel does know of the existence of a decision which seems relevant it is his duty to bring it to the attention of the judge, even if apparently adverse to his case, and distinguish it if he can.

Having opened the case, a task which according to its nature may take a few minutes or several days, counsel will then call the plaintiff into the witness box to give evidence. The evidence is given in the form of question and answer, a method which is designed to cut out irrelevancies and to keep the witness, who will undoubtedly have an urge to stray into all manner of irrelevant details, to the material

points. But the questions must not be leading questions. As has been mentioned above, counsel in examining a witness 'in chief', that is examining a witness called in support of his case, must cast his questions in such a form that they do not suggest the answer which is desired. For example, he must not ask, 'Were you in the middle of the road when you were knocked down?', but 'Where were you when you were knocked down?'.

When the plaintiff has given his evidence 'in chief' he will be cross-examined by counsel for the defendant, who will endeavour to destroy the value of his evidence by showing either that he is lying or that his recollection is at fault, very often by the method of asking the witness whether he has not made previous statements inconsistent with his present evidence. Inasmuch as a witness under cross-examination is presumed to be hostile, counsel may ask as many leading questions as he pleases. It is perfectly permissible for the defendant's counsel to ask the plaintiff, 'I suggest to you that when you were knocked down you were only a foot from the kerb,' or 'Did you not shortly after the accident make a statement to the police in which you said that when you were knocked down you were only a foot from the kerb?' To take an actual example from a recent case; in an action against a transport undertaking the chief witness for the plaintiff said that when the plaintiff boarded the bus it was stationary. In cross-examination he was asked whether he had not given a statement to the defendants that the bus was moving when the plaintiff tried to board it. He admitted that this was so, and the plaintiff lost his action.

The same course will be followed with each of the other witnesses for the plaintiff, they being examined and cross-examined until the plaintiff's case is completed. Then it is the defendant's turn, when the same course will be followed with him and his witnesses.

When the evidence is complete counsel for the defendant will address the judge, summing up the defendant's case, to be followed by counsel for the plaintiff.

On the conclusion of these speeches the judge will deliver his judgment, for in the great majority of cases the judgment is given then and there, and it is only in cases of exceptional difficulty that judgment is reserved, the judge taking time to consider it.

In his judgment the judge will review the evidence, stating which witness he considers reliable, and which unreliable, and on his review of the evidence will come to his final decision which, in this case, we will assume to be that Mr. Smith had in fact stepped off the kerb in front of the defendant's car, without looking; that the defendant had no opportunity of avoiding the accident, and that accordingly he was not negligent. However, in case there should be an appeal he assesses the damages at £2,000, as being the figure which he would have awarded if he had found that the defendant was entirely responsible for the accident.

The consequence is that Mr. Smith's action fails and is dismissed with costs. This means that Mr. Smith will have to pay not only his own costs of bringing the action, but also the costs which an official of the court, known as the Taxing Master, shall certify to have been reasonably incurred on the part of Mr. Jones in defending the action. For the normal rule is 'costs follow the event'. The loser pays.

Order XIV

An action for damages for personal injuries has been taken as a typical example to illustrate the progress of a High Court action as at the present time actions of this nature constitute a high proportion of the business of the Court, but an account of the English legal system would hardly be complete without at any rate a short reference to what is known as the 'Order XIV procedure', a method of obtaining summary judgment which, it is believed, is unusual if not unique. This procedure is applicable to a wide range of actions, but its main use is in connection with claims for

liquidated sums of money as, for example, a claim for the repayment of money lent, or for the price of goods sold. Under this procedure where the defendant has appeared to the Writ the plaintiff may swear an affidavit stating that in his belief there is no defence to the action, and may immediately apply to the Court for judgment on his claim. Thereupon unless the defendant can satisfy the Court that he has a good defence to the action the Court will immediately give judgment for the plaintiff. The object of this procedure is not to prevent a defendant who has a bona fide defence from putting it forward, but to prevent a defendant who has no real defence to the action adopting delaying tactics and forcing the plaintiff to go through all the stages of an action, which may be prolonged, in order to enforce his just rights and obtain his money. In a great many cases where the plaintiff avails himself of this procedure, the defendant does in fact satisfy the Court that he has a defence which he ought to be allowed to put forward, and the action then proceeds in the normal way. But in a very large number of cases, it being quite apparent at the outset that the defendant has no defence whatsoever and is merely playing for time, judgment is given for the plaintiff forthwith. Very large sums of money in the aggregate are recovered every year under this procedure.

The Assizes

It has been assumed that Mr. Smith's action was tried in London at the Royal Courts of Justice. It could equally well have been tried on Assize, for three times a year the judges of the High Court go on circuit and hold an Assize in each of the counties of England and Wales trying both criminal and civil cases. The procedure at the trial of an action on Assize is exactly the same as in London.

Whether an action is tried in London or on Assize will depend on the question of general convenience. If, for example, the parties and their witnesses are all resident in Gloucestershire, it will be far more convenient for them

that the action should be tried at the Gloucester Assizes than they should all have to travel up to London.

The position of the Judge of Assize is one of almost unique importance, and is an echo of the days when the King administered justice in person in the different parts of his realm, for while on Assize the Judge is regarded as directly representing the Queen and is entitled to precedence over everyone else, of whatever rank or sex.

As an illustration of this it may be permissible to tell the old, but well authenticated story of Baron Huddleston and Mr. Justice Manisty who were dining with the Lord Mayor during the Liverpool Assizes. The Queen's health being proposed, Mr. Justice Manisty stood up, whereupon Baron Huddleston pulled him violently by the sleeve saying, 'Sit down, Manisty, you damned fool. We are the Queen'.

The Court of Appeal

Understandably enough, Mr. Smith is considerably chagrined at the result of his action, and insists on an appeal being lodged.

This appeal lies to the Court of Appeal, the full court of which consists of the Lord Chancellor, the Master of the Rolls and the eight Lords Justices, the Lord Chancellor being *ex officio* President. In fact the Lord Chancellor rarely sits. The acting President is the Master of the Rolls, and the court usually sits in three divisions of three judges each.

The Master of the Rolls

The position of the Master of the Rolls is anomalous as he is not only a Judge, coming third in the judicial hierarchy and taking precedence after the Lord Chancellor and the Lord Chief Justice, but also the person responsible for all the Public Records of the country, his ancient title being 'Our Keeper or Master of the Rolls and Records of Our Chancery of England'. This curious and onerous combination of function is an historical accident, and it is

believed that the only country which has deliberately chosen to adopt it in imitation is Prince Edward Island.

The origins of the Court of Chancery have already been briefly indicated. The Chancellor became the Judge of that Court, and discharged its ever increasing business with the assistance of certain officials known as Masters in Chancery, the chief of whom was the Master of the Rolls who, as his title indicates, was responsible for the safe keeping of the records of the Chancery. As the volume of business increased the Master of the Rolls tended more and more to sit and determine cases as the deputy of the Chançellor, and in time came to be referred to as the Vice-Chancellor. In 1726 a controversy arose as to the nature and extent of his jurisdiction, and in 1730 the position was regularised by statute which conferred upon the Master of the Rolls the status of an independent judge, although there still remained a number of matters which he could not hear, and a case which had been before him might be taken before the Chancellor for rehearing.

On the passing of the Judicature Acts which set up the Court of Appeal as we now know it, the Master of the Rolls became one of the *ex officio* members of the Court, but in practice he continued to sit for most of his time as a judge of first instance. In 1881, however, another statute provided that he should cease to be a judge of first instance, but should continue by virtue of his office to be a Judge of the Court of Appeal.

The course of an appeal

An appeal to the Court of Appeal is said to be by way of rehearing, that is to say, it is open to the Court to consider all the questions of law and fact, and to reverse the findings of the trial judge on any of them.

The proceedings in the court of first instance are recorded in shorthand, and for the purposes of the appeal each judge is provided with a transcript. Although the court is reluctant to disturb the findings of fact made by a judge who had the

advantage of seeing and hearing the witnesses, it is quite willing, if it thinks right, to draw different conclusions from the ascertained facts. In this connection it may be remarked that with the decline of the jury in civil actions the Court of Appeal has acquired a considerably increased scope. The verdict of a jury is in most cases a simple finding for the plaintiff or the defendant on all the facts, primary and secondary; the secondary facts being the inferences drawn from the primary facts. Inasmuch as it is impossible to know on what basis a jury arrives at its decision an appellate court will generally not interfere with its verdict unless it is clear that there is no evidence to support it. No such difficulty arises with an appeal from a judge sitting alone for from reading the transcript of the judgment the Court of Appeal has ample opportunity for deciding that the judge has erred in the inferences which he has drawn.

It would be unprofitable to follow the conduct of Mr. Smith's appeal, or to do more than report the result, namely, that the Court comes to the conclusion that the defendant was negligent, but that the plaintiff was guilty of contributory negligence, the blame being laid as to one third on the defendant and two thirds on the plaintiff. The judge having assessed the damages on the basis of full liability at £2,000, Mr. Smith recovers £666 13s. 4d., and the order for costs is varied by directing that the defendant shall pay the plaintiff the costs of the appeal, and that so far as the proceedings in the court of first instance are concerned each shall pay his own costs.

The House of Lords

The supreme Court of Appeal is the House of Lords. As the House of Lords is one of the Houses of Parliament this appears to be a confounding of the functions of the legislature and the judiciary, and in fact the position is an inheritance from those remote days when the Curia Regis possessed legislative, executive and judicial powers.

The judicial jurisdiction was then, of course, an original

jurisdiction. By a statute of 1340 it was provided that one bishop, two earls and two barons should be entrusted with the King's Commission to hear by petition all complaints of delay of grievances in the Courts of King's Bench, Common Pleas and Exchequer. That is to say, an appellate jurisdiction was conferred. Nevertheless, the House of Lords continued to assert and exercise an original jurisdiction to try cases. In the seventeenth century, after disputes with the House of Commons, the claim to this original jurisdiction was abandoned, but the House of Lords continued to exercise its right as a court of appeal.

To put it mildly, the position in the eighteenth and early nineteenth centuries was far from satisfactory. All members of the House were entitled to sit and hear appeals, and a quorum of three was necessary. The legal attainments of the peers was not high, nor had they much enthusiasm for the task. It often happened that when an appeal was to be heard the Lord Chancellor alone attended, which led to the necessity of impressing other peers. To quote Lord Westbury's description, 'The officers of the House were sometimes obliged to catch a Bishop and invite him to act as a dummy; a lay peer was sometimes pressed into service, and the Lord Chancellor gravely assisted by these two mutes administered justice in a final manner.'

Various attempts at reform were made during the nineteenth century, and at the time of the Judicature Act it was proposed that the appellate jurisdiction of the House of Lords should be abolished, and that the Court of Appeal should be the final court of appeal in all cases. Many people have thought it a great pity that this was not done, for the possibility of a double appeal is one to daunt the stoutest heart and all but the deepest pocket, and in fact it has been found necessary to put severe limitations on this right of appeal.

However, the jurisdiction was reprieved, but by the Appellate Jurisdiction Acts of 1876 and 1887 the composition of the tribunal was radically changed. The Crown was then

empowered to appoint persons for the purpose of aiding the House of Lords in the hearing of appeals who should be known as Lords of Appeal in Ordinary, and should be entitled to sit and vote in the House of Lords during their life.

Appeals are now heard by a tribunal consisting of not less than three of the following persons, designated Lords of Appeal, namely, the Lord Chancellor, the Lords of Appeal in Ordinary (of whom there are now nine) and any Peer of Parliament who holds, or has held, high judicial office. In theory any member of the House of Lords is entitled to sit on the hearing of appeals, but no lay peer has in fact so sat since 1883.

The Lords of Appeal in Ordinary are usually, but by no means always, appointed from members of the Court of Appeal.

The Lord Chancellor is an anomalous figure inasmuch as, although he is the senior Judge of the country, he is a politician and retires from office with the Government of which he is a member.

Appeal to the House of Lords now lies only with the permission of the Court of Appeal or the House of Lords, and such permission is only given in cases involving doubtful questions of general importance.

The House of Lords regards itself as bound by its own previous decisions, but not by the decisions of other tribunals, and the right of appeal does, among other things, afford a most useful opportunity of reviewing and, if necessary, discarding rules of law which the passage of time has rendered inconvenient and obsolete, and which otherwise could only be got rid of by legislation.

The County Court

The High Court of Justice, the Court of Appeal and the House of Lords, with their roots and traditions far back in the past, are the courts which with a certain traditional

solemnity and majesty administer, mould and to some extent create the law. But the vast majority of the disputes litigated in the country concern people of humble or moderate means whose claims, though vital enough to them, may be comparatively trivial; the assertion of which would not warrant the rather ponderous and expensive procedure of a High Court action. And it remains to consider the County Courts which, though referred to as inferior courts, exist for the bulk of the population as the real and substantial dispensers of civil justice, where 90 per cent of all civil proceedings are dealt with.

The term County Court is misleading as the courts have no necessary connection with any county, and are not affected by county boundaries. They are probably called County Courts for historical reasons, for there was in England a very ancient court known as the county court. The present County Courts, however, are an entirely modern creation of statute, owing their origin to an Act of 1846 the purpose of which is sufficiently clear from its title, 'An Act for the more easy recovery of small debts and demands in England'. The jurisdiction was then limited to claims not exceeding £20. Since that time there have been passed a number of statutes, the latest of which was in 1956, dealing with the County Courts and vastly extending their jurisdiction which, in actions of contract and tort, now stands at £400.

The Courts would more properly be called District Courts. The district over which each court exercises its jurisdiction is delimited by Order of the Lord Chancellor, and may be varied from time to time as circumstances require. Thus, as in London, the area may be a few square miles; or, as in the sparsely populated area of Cumberland and Westmorland, a few hundred square miles. In sparsely populated areas a number of Districts are linked together in one Circuit, the Judge of the Circuit holding his court from time to time in each district according to the amount of work. On the other hand, in London and other big cities

a Circuit may consist of only one district, but the amount of business may require two or more judges. It must be stressed that the County Court Circuits have no connection whatsoever with the Circuits on which the Judges of the High Court hold the Assizes.

There are at present about four hundred districts grouped into sixty circuits. There is thus in every part of the country a court easy of access to all.

Although the fundamental principles on which justice is administered are the same as in the High Court there are considerable differences in procedure. The procedure in the County Court has as its objects cheapness, simplicity, avoidance of technicality, flexibility and speed of determination, with a view to enabling the small suitor to obtain speedy redress at small cost without the necessity of legal representation. If, on the other hand, he desires legal assistance he may be represented either by a solicitor or counsel, solicitors having a right of audience in the County Court.

In marked distinction to the High Court procedure, and with a view to a speedy trial, from the moment of the commencement of the proceedings a day is fixed for the hearing of the case. This, it must be confessed, has its disadvantages, for it means that the time of the Judge is allocated several weeks in advance, and if a case is not finished on the day originally fixed it may have to be adjourned for several weeks, with the possible result that on the resumed hearing memories have faded of what took place on the previous occasion. On occasion this can go far to defeat the object of a speedy determination.

Extensive use is made of prescribed printed forms which, at any rate in a simple case, the litigant can fill up for himself, perhaps with the assistance of an official of the court. On the other hand, in a case involving larger sums the pleadings will be drawn by counsel and will differ little, if at all, from those in a High Court case.

A much tighter hand is kept by the Court on the progress of an action than in the High Court, and many of the steps

in the action, such as service of process, are undertaken by officers of the court.

The costs are regulated by scales and proportioned to the amount at stake. Thus on a claim for £5 the successful party will recover little by way of costs and will have no inducement to incur large expense in instructing lawyers. On a claim for £400, however, the costs on both sides may be very considerable.

Inasmuch as almost the entire range of civil jurisdiction (one of the most important exceptions being divorce) falls within the ambit of the County Court, subject only to a limit fixed by reference to the amount involved, considerable versatility is required of a County Court Judge who has been dubbed 'the judicial maid of all work'. Not only does he administer the most widely differing branches of the law, but he must also be prepared to cope with the most diverse types of litigants and modes of conducting actions. At one moment he will be trying a claim of some hundreds of pounds arising on a contract, with counsel on both sides prepared to argue the law as fully and as carefully as in a High Court action; at another he will have before him two not very well educated litigants in person wrangling over a claim of £2, and will be endeavouring as best he may, to disentangle some coherent tale from their utterly confused evidence. And it will be borne in mind that the difficulty of the issues involved has no necessary relation to the amount at stake.

However, such is the calibre of the judges, and such is the satisfaction they have given, that the tendency is to increase their jurisdiction, and indeed in certain spheres Parliament has gone so far as to confer upon them what amounts to an exclusive jurisdiction. The most important of these is the Rent Restriction Acts, those Acts which in one form or another have since 1915 restricted the right of a landlord to raise the rent of dwelling houses and to recover possession of them from the tenant. It is felt that it is better that these cases, involving as they do the well-being and happiness of

thousands of families, should be tried locally by a judge who has first hand knowledge of the housing conditions in the vicinity and all the difficulties which they may involve.

There are today sixty six County Court Judges who are appointed by the Queen on the recommendation of the Lord Chancellor, the qualification being that they should be barristers of at least seven years standing.

An appeal lies to the Court of Appeal from the County Court on questions of law; on questions of fact an appeal only lies, generally speaking, where the claim exceeds £200.

Costs and Legal Aid

And finally, what of the cost? It is an old jibe that the Queen's courts are open to all—like the Ritz Hotel; and unfortunately there is too much truth in the implication that lack of money may mean a denial of justice.

The ordinary rule is that 'costs follow the event'; the loser pays the winner's costs. There is a certain rough justice in this on the assumption that if the plaintiff fails it necessarily follows that he ought not to have gone to law; and if the defendant fails, that he ought not to have resisted the plaintiff's claim and put him to the expense of asserting his rights by action. Unfortunately, the assumption fails to take account of the fact that in some respects the law is uncertain; that a case is not known to be good or bad until a judge decides it, and that for one reason or another many a case has failed which a suitor was quite justified in putting forward. The possibility of being saddled with two sets of costs in the event of failure, and perhaps with the costs of one, or even two appeals, has been enough to deter many a man from asserting a just claim.

To some extent, but only to some extent, the position has been improved by the scheme of Legal Aid which came into force in 1950, and now operates in the High Court, the Court of Appeal and the County Courts. This scheme, however, is only available to those who can show that they

have a disposable income of not more than £420 a year, or a disposable capital of not more than £500, sums of money which are worth appreciably less now than they were in 1950.

A person who desires to avail himself of the scheme must satisfy the appropriate body that he has a reasonable cause of action; not a certainty, but a good *prima facie* case; and is required to make a contribution proportionate to his means. However, once he has obtained the benefit of the scheme, and has been granted a Legal Aid Certificate, he is in a very favourable position, for he is then entitled at the expense of the State, which pays all the fees, to prosecute or defend his action with the assistance of solicitors and counsel of his own choosing. In the event of failure he is only liable to pay to his opponent by way of costs such sum as the judge shall consider reasonable having regard to all the circumstances, including the financial position of the parties.

Although the scheme has without doubt been successful and beneficent there is one class of person which it has placed in a worse position than before, namely, the person of moderate means who is not within the financial limits of the scheme and who is sued by a legally assisted person. The whole resources of the State are arrayed against him, and if he wins he may have little chance of recovering much or anything by way of costs.

It has been suggested that in these circumstances, the State having financed and sponsored the unsuccessful litigant, common justice requires that the State should also compensate the litigant who has successfully defended at his own expense. That, however, is a point of view which has, so far, failed to commend itself to successive British Governments.

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