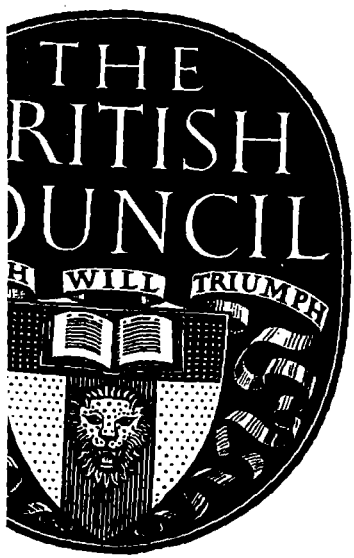

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THE COURT OF APPEAL IN ENGLAND

By
the Rt. Hon.
Sir RAYMOND EVERSHED
MASTER OF THE ROLLS

A LECTURE
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THE COURT OF APPEAL IN ENGLAND

I HAVE been asked to say something to you about the Court of Appeal—about its history, its present functions and the problems that affect its future. And I would like to say something too about the high office which I now have the honour to hold, the ancient and peculiar office of Master of the Rolls. There is something very English about it, something surprising and inconsequent. Who among foreigners would suppose that the holder of such a title had anything to do with the administration of the law—still less that it was the particular description of the day-to-day President of the Court of Appeal?

To all of us the existence of a court of appeal to which go appeals from all courts of first instance, both the High Court and the County Court, for a rehearing, seems so natural and inevitable, such an obvious and tidy arrangement, that we may not unnaturally suppose that it was ever thus. Yet it is in truth a most modern innovation. There are many living today the span of whose lives extends to the time when no such thing existed. The Court of Appeal has in fact existed for just seventy-five years—three-quarters of a century out of the seven or eight centuries during which our legal system has been established. The long continuous process is one of those characteristics of our way of life for which we commonly express pride and give thanks: and not indeed without good reason. There may no doubt be a tendency for archaism and formalism to persevere. On the other hand, a living organism has always within it—or should have within it—the means of new expression and the seeds of fresh growth. Change to meet the demands of new conditions and adaptability should be

easier to achieve in a system which has already proved itself capable of adaptation and thereby justified its long survival. It is an obvious danger of the modern technique of mass production that, when all the jigs and tools are prepared for turning out the approved model, the model itself will have become out of date: and in such cases modification may be an expensive and painful business. The truth is (I believe) that progress is the more sure if it has an anchor in past history. 'We study', said Professor Maitland, 'the day before yesterday so that yesterday may not paralyse today and today may not paralyse tomorrow.'

It is for these reasons that I believe that some appreciation of the conditions in regard to appeals of a hundred years ago is of more than academic interest. To the student of our laws, indeed, such knowledge is essential. Our system of precedent commands that we follow the rulings of our predecessors. But we cannot understand those rulings unless we understand also the conditions under which they were pronounced. In particular, so far as concerns appellate courts, it is essential to understand the procedural limits by which our predecessors were bound. Without an understanding of the procedural character of ancient appeals the decisions of the appellate courts, e.g. the Exchequer Chamber, may well be misunderstood.

And there is another reason why I believe that an appreciation of the conditions which preceded the constitution of the present Court of Appeal is today specially valuable. I am, as you may know, engaged elsewhere as Chairman of a Committee appointed for that purpose by the Lord Chancellor in 1947, in considering what reforms may be made in our existing Supreme Court practice or procedure in order, in conformity with modern conditions, to improve its efficiency and (more particularly) to reduce the cost of litigation. Of course, by any professional man in any profession changes of practice are apt to be looked upon with suspicion and disfavour. But the

most cursory examination of our legal history shows that from time to time great and apparently revolutionary changes have entirely failed to disturb the even tenor of our system's growth. On the other hand, the same examination provides ample means for distinguishing what is permanent and valuable from that which is specious and ephemeral and ample warning against undue reliance on expedients which have no basis in common sense.

The judicial system as it was in Lord Eldon's day exhibited the results of the English genius (in Walter Bagehot's phrase) for 'bit by bit growth'. By the early part of the nineteenth century the Court of Exchequer Chamber had become a court of appeal or court of revision for all the courts of Common Law. And so it is that judgments of the Exchequer Chamber are, from the point of view of precedent, regarded as equivalent to decisions of the Court of Appeal. But the procedure was not an appeal as we now understand it. It was in general by way of writ of error, a procedure as Sir William Holdsworth has observed at once both too narrow and too wide—too narrow because in order to succeed you had to establish some error upon the record, too wide because if you did, the court would generally be bound to give relief, however unsubstantial was the error shown. And the procedure did little or nothing to surmount the technical difficulties notoriously attendant on proceedings in any of the common law courts or to overcome the doubtful limits of their respective jurisdictions. In Mr. Hare's somewhat ecstatic preface to the eleventh volume of his *Reports on Cases before Page Wood, V.C.*, which followed the establishment of the Chancery Court of Appeal in 1851, the author went so far as to say that the changes brought about were the greatest since John de Waltham had invented the Writ of Subpoena in the days of King Richard II. Mr. Hare also drew forceful attention to the sad case of *Knight* v. *Lord Waterford* in which the plaintiff having started his proceedings in the Court of Exchequer learnt from the House of Lords

fourteen years later that whatever had been his merits (to which the Courts of Exchequer and Exchequer Chamber had indeed done their best to give effect) the truth was that he had selected the wrong method of attack and there was nothing to be done for him on the road he had chosen.

The remedy for that particular ill was by way of re-hearing in the appellate court—the way of the Chancery Court of Appeal adopted and enshrined in the Judicature Act.

You will not think me so foolish as to suggest that there had never been anything amiss in Chancery. Lord Eldon and the Commission over which he presided seemed to have been of that opinion. But then, as Greville observed in his Memoirs: Eldon 'was consistent throughout and . . . offered a determined and uniform opposition to every measure of a Liberal description'. Indeed, the procedure in his day for re-hearing and appeal is, to modern eyes, hardly credible. At almost any stage there might be a discussion before the Master of the Rolls in his Rolls Court in Chancery Lane: a re-hearing before the same judge: an appeal to the Lord Chancellor and before him a re-hearing: and finally an appeal to the House of Lords wherein would be found again the same Lord Chancellor, flanked perhaps by a bishop and a lay peer unlucky enough to be pressed into service by an officer of the House.

And Lord Eldon himself had been a great doubter. After expressing a first opinion he would take the papers away for further reflection: and sometimes he thereafter lost them and in due course lost also all recollection of the case. According to the contemporary poem :

> Mr. Leach
> Made a speech
> Angry, neat but wrong.
>
> Mr. Hart,
> On the other part,
> Was heavy dull and long.

Mr. Parker
Made the case darker
Which was dark enough without.

Mr. Cook
Cited his book
And the Chancellor said—I doubt.

The Lord Chancellor indeed of those days sat a great deal by himself both at first instance and in appeal. So much so that when the Chancery Appeal Court was created in 1851 it was said of a Lord Chancellor who was a common lawyer that the reason for his support of the measure was that he was afraid to be left sitting alone in the dark.

The Chancery too had been pressed down with a great weight of sinecure officers. There had been twelve Masters, the Master of the Rolls being the senior and the remaining eleven in former days ecclesiastics; there had been the six Clerks and beneath them the sixty clerks; and a host more, but never a responsible and efficient judicial staff.

At the beginning of the nineteenth century there were powerful extraneous influences clamouring for reform. The Lord Chancellor was altogether overburdened with work to which imperial expansion was adding by increasing claims upon the services of the Judicial Committee of the Privy Council. It was the age of the Industrial Revolution. New kinds of problem called for solution in the courts at the suit of a new class of men who understood something of business organization. And there was the influence of Jeremy Bentham and the later influence, different in kind but not less powerful in effect, of Charles Dickens.

And so the work of reform began. First, the several reforms introduced by one of the Pepys family, Lord Chancellor Cottenham. And then in 1851 the creation, to which I have already alluded, of the Chancery Court of Appeal consisting of the Lord Chancellor (if he chose to sit), the Master of the Rolls

(if he chose or was deputed to sit) and two Lords Justices of whom the first were Sir James Knight Bruce and Lord Cranworth (succeeded on becoming Lord Chancellor shortly afterwards by Sir George Turner). A year later the ancient office of Master in Chancery disappeared—save for the Master of the Rolls—their title to be assumed later by the judges' chief clerks. It was at this stage that the reporter Mr. Hare was able to be so enthusiastic. Yet twenty years were to go by before the greatest evils—the separate and conflicting jurisdictions and the absence of efficient and uniform judicial staffs—were firmly dealt with.

The Judicature Act, 1873, was the culmination of this long period of reform which had begun in 1827. Its first purpose and achievement was to sweep away the separate existence of all the courts, not few in number, Common law, Equity, Bankruptcy, Admiralty and Ecclesiastical, operating not only side by side but in large measure competing, with no certain demarcation of their respective jurisdictions; and to substitute a single Supreme Court of Judicature with a single appellate tribunal governed by a single code of rules for all branches or divisions of the Court.

What a great change, what a revolution was that! Let me for a few moments take you back to that year 1873 and present to you the leading characters on the political stage. It was the time of Mr. Gladstone's first Ministry—according to Dr. Trevelyan perhaps the half-dozen most fruitful years of his life. It was the period of the educational reforms associated with the name of W. E. Forster and the Army reforms of Cardwell. The Lord Chancellor was Roundell Palmer, Lord Selborne, and my own predecessor was Sir John Romilly who, at the same time that he was Master of the Rolls, was also in the House of Commons as member of Parliament for Devonport—for until the great judicial changes of which I am now speaking the two positions were not regarded as incompatible. These changes amounted, in the political terminology of today, almost to

nationalization of the Law Courts. And the phrase is not so inapposite as might be thought; for the competition between the old diverse jurisdictions had been sustained, in no small measure, by the circumstance that the officials of the courts had thriven upon the fees and charges paid by the suitors and had the liveliest interest in attracting business to their respective tribunals.

I add, however, that this early experiment in nationalization (if it may fairly be so called), being the outcome of Commissions to which both political parties had contributed, was not, or not substantially, affected by political considerations. One important exception may be observed. The framers of the Act of 1873 had envisaged the newly established Court of Appeal as the final court of appeal for all purposes—and for all the kingdom. The House of Lords as a judicial body was to be no more; Her Majesty by Order in Council was empowered to transfer to the Court of Appeal the jurisdiction of the Privy Council. But this proposal was never implemented. The other provisions of the Judicature Act were brought into operation in 1875. In the meantime Mr. Gladstone had gone out of office. I think, by the way, it was during this Ministry that he had had it in mind to dispose of his budget surplus by the total abolition of the income tax. But this beneficent proposal also never came to fruition: and for other reasons he gave place to Disraeli and Lord Selborne gave place to Lord Cairns. An amending Judicature Act was passed and appeals to the House of Lords and the Judicial Committee survived.

I must not be taken as suggesting that the change merely reflected a change of political view. There were other and powerful considerations. One may wonder what Scotsmen and Irishmen would have thought of a final appeal to the English Court of Appeal. The result, however, has been to bequeath one of the most difficult of the problems now engaging the attention of my Committee. Though the right of appeal to the House of Lords has in more recent years been severely curtailed, there still remains for the ordinary case the possibility of

what is called a 'two-tier' appeal—and in some classes of case it is a three-tier edifice. To many a man in modern conditions this is said to be a terrifying vision. Should anything be done, and if so what? That is a subject to which I shall later return.

There was another characteristic of the Court of Appeal as originally designed by the Judicature Act that was altered by later events: but in this case accident and personalities were mainly responsible. According to the scheme of the Act the old Courts of Queen's Bench, Common Pleas and Exchequer, became divisions of the High Court and their presiding judges were also nominated as members of the Court of Appeal. When the Act came into force Sir Alexander Cockburn was Chief Justice of the Queen's Bench—Lord Chief Justice of England as he had come to be known; Lord Coleridge was Lord Chief Justice of the Common Pleas and Sir Fitzroy Kelly was the Lord Chief Baron. As you know, from looking at the Law Reports immediately following 1875, there persisted for a short time the Queen's Bench Division, the Common Pleas Division and the Exchequer Division: then in the year 1881 the two latter disappear. What had occurred? Sir Alexander Cockburn had died and Sir Fitzroy Kelly had died also. Whose was to be the succession? The problem of personalities was solved (by Order in Council pursuant to the Act following upon a resolution of the Council of Judges) by the merger of the three Divisions into one—and Lord Coleridge added the SS collar of the Lord Chief Justice of England to his SS collar of Lord Chief Justice of the Common Pleas.

But there is a third aspect of this great and revolutionary change which I particularly want to emphasize. And I do so with some pride. I have been brought up (professionally) at the Chancery Bar. If you will allow me to tell you a secret, of which you must on no account breathe a word to anyone, I believe that the Chancery Bar and the Chancery Bench are the superiors of their fellows in the other Divisions, both in beauty of mind and beauty of form. This you might think a heresy, for

is not the English common law among the greatest of our glories? Moreover, it was in or about the year 1868 that Charles Dickens had revised the first publication of *Bleak House*. In that famous and blistering commentary on contemporary Chancery procedure Dickens had improved upon the Shakespearean law's delays by substituting the Chancery for the law. Yet, so far as concerns the Court of Appeal, it was to the Chancery procedure that the legislators of 1873 turned for their precedent. The Chancery Appeal Court of 1873 of which James and Mellish, L.JJ., were the judges became the model for the new Court of Appeal and the Court of Appeal of 1950 remains true to its original of a hundred years ago.

This, then, is the history, in briefest summary. You may think that great changes were made—to many in those days, I doubt not, fearful innovations. Much was done—had to be done—in the way of adaptation in the years that followed; but broadly it is true that the organization of the High Court and of the Court of Appeal with which I am this evening particularly concerned, is that which was designed in 1873 and the somewhat cumbrous body of our rules of court has like parentage. The results have been, I believe, by no means negligible, but that greatly loved and erudite member of the Bar, Theo Mathew, was writing in 1939 that it was high time for another Judicial Commission; and some of the matters to which he drew attention were those to which I shall later refer in reference to the Court of Appeal.

And now I come to say something of the Court of Appeal as it exists today, its present constitution and its work. In accordance with its original constitution the Lord Chancellor, the Lord Chief Justice and the President of the Probate, Divorce and Admiralty Division are ex-officio members and there were added in 1913 the Lords of Appeal in Ordinary. Both the Lord Chief Justice and the President do from time to time preside over divisions of the Court in order to assist in getting

through its business. But in the ordinary way the Court consists of the Master of the Rolls and the Lords Justices. It is my duty as Master of the Rolls to preside in Appeal Court I and to be responsible for the organization of the business of the whole Court. This last step in the rather strange career of the Master of the Rolls was, like so many things in English history, the result of chance. My early predecessors in the Middle Ages were known as Keepers or Curators of the Rolls. They were mostly clerics, and in addition to the custody of the court rolls they had the superintendence of the so-called *domus conversorum*; the house of the Jews converted to Christianity. For this purpose the Rolls Chapel on the site of the present Record Office was granted to the Keeper of the Rolls by Edward III. That particular duty has, so far as I have been able to ascertain, been nominal for a great many years and the Rolls Chapel became for a long period the Rolls Court. In the days of Henry VII the title of Master of the Rolls appears first to have been used and the Master of the Rolls was the senior of the twelve Masters appointed to assist the Lord Chancellor in his judicial duties. The right of the Master of the Rolls to sit alone as a judge of first instance depended upon commissions issued by the Lord Chancellor to act as his deputy. It was for this reason that until the reforming zeal of the last century destroyed what appears to me a happy arrangement, the Master of the Rolls was unable to sit on Wednesday and Friday afternoons during term, since at those times it was the habit of the Chancellor to sit himself. Although the Master of the Rolls was by the Act of 1873 one of the ex-officio Members of the Court of Appeal, he continued in practice to sit for most of his time as a judge of first instance. There then occurred an awkward situation. Lord Romilly had been succeeded by Sir George Jessel. Then Lord-Justice James died and the difficult question arose—who should, who indeed could, be appointed to succeed James, able to sit in judgment on appeal from Jessel? The solution was that Jessel should give up his court

of first instance and sit permanently in the Court of Appeal. And so it is that I am now to be found there every day.

In my young days there were five Lord Justices of Appeal, making with the Master of the Rolls six judges in all, sitting in two divisions commonly known as the Chancery Court of Appeal and the King's Bench Court of Appeal. I need not of course remind you that the Court of Appeal is a civil court only. The Criminal Court of Appeal, a creature of a much later statute, consists in practice of three judges of the King's Bench Division, the Lord Chief Justice usually acting as its president. It has been one of the questions submitted to my Committee (though not, I may say, greatly recommended) that the two appeal courts should be in some way amalgamated, thereby giving to the criminal appeal court the status of the civil court of appeal.

I am today only concerned with the latter. And I will notice here one small but important point in the organization of its work. It is normally contrived that in the Chancery Court of Appeal there shall be one common law Lord Justice and in the King's Bench Court of Appeal one Chancery Lord Justice, an arrangement designed in obedience to the command of the legislators of 1873 that law and equity should be fused together and contrived so that the common law Court of Appeal—and the Chancery Court of Appeal, too—should have its appropriate leaven.

Before I describe further the work that we do, I must draw attention to the important fact that in 1934 all appeals from the County Courts were made direct to the Court of Appeal. Previously an appellant from a judgment in the County Court went to a divisional court of two judges of the King's Bench Division. From that court an appeal lay to the Court of Appeal. There was therefore frequently a two-tier and sometimes a three-tier appeal from the County Court, and that was felt to be a serious matter since the advantages of the inexpensive County Court procedure were liable to be more than offset

by multiplicity of appeals. Moreover, a great strain was placed upon the 'judge-man-power' of the King's Bench Division.

But the change added greatly to the work of the Court of Appeal, and it has presented, for reasons that I shall later explain, difficult problems for my Committee. And in large part, by reason of the change in 1934, it became necessary to appoint three more Lord Justices.

So now there are nine of us, sitting from day to day in three divisions. Moreover, there is now power for the Court to sit in four Divisions—if and when we can find the Judges to man so many courts. It is on these occasions that the Lord Chief Justice and the President, as I told you, have come to our aid. The numbers have been made up by Judges of first instance to whom a letter is addressed on the Lord Chancellor's behalf requesting them to sit in the Court of Appeal—an exercise of his power under the Act (now the Judicature Act of 1925) to nominate judges for the purpose.

And this has to be done so that we may keep abreast of the lists of cases waiting to be heard. Let me here say that this constant and exacting pressure is to me a matter of some regret. I used to hear it said that when a man was taken from the bustle of the Bar and elevated to the Bench, he was probably worse off materially but at least he could live the life of a gentleman—a phrase which I understood to mean a life of (comparative) ease. Well, in spite of the long—but now slightly diminishing—vacations, it is, I assure you, hardly a life of ease. And as to the position, I can't help thinking sometimes of Oscar Wilde's famous aphorism about the land—'Land—it gives you a position in the country but at the same time makes it impossible to keep it up.'

When the number of Lord Justices was increased from five to eight, it was, I believe, in the minds of those responsible at the time that the addition would enable the judges to take a day, as occasion demanded, not sitting in court in order to consider and write reserved judgments. So far it has not worked

out like that. As a judge of first instance you do get 'days off' every now and again—a case is settled or has to be adjourned. But not in the Court of Appeal. Cases which come to the Court of Appeal are almost never settled. There are no witnesses to be taken suddenly ill or adjournments required to summon fresh champions to the field. So we think—I hope not without justification—that we work very hard in the Court of Appeal. And because of the pressure I do not myself think that we reserve—that we are able to reserve—as many judgments as perhaps we should. By the same Act of 1934 which commanded that all appeals from the County Court should go to the Court of Appeal it was also provided that there should be no appeal as of right from the Court of Appeal to the House of Lords. An appeal should only lie by leave either of the Court of Appeal or of the House. Both provisions followed the report of the Committee presided over by my predecessor Lord Hanworth and both were designed to meet the fearsome prospect to the litigant, observed by Theo Mathew, of multiplicity of appeals.

In the vast majority of cases the decision of the Court of Appeal is the final answer. And because of our rule of precedent a Court of Appeal decision will be binding thereafter not only upon the Court of Appeal itself, but on all lower courts. A given decision may obviously affect many other cases. Many men and women will regulate their affairs according to their understanding of its terms. An ill-considered dictum—and there may, very occasionally, be such!—may cause no end of trouble and no end of heart-burning. It is an easy matter on an occasion such as this to say wise things about judicial dicta—that they are entitled to great or at least to proper respect: but that they have no binding force. But in practice it may be far less easy to distinguish with certainty between dictum on the one hand and decision or *ratio decidendi* on the other—especially when a judge may support his conclusion on more than one ground. Those of you who make it a practice to read that

exhilarating periodical, the *Law Quarterly Review*, may recall a most animated discussion in its pages not long ago on the question whether all or any part of a well-known judgment relating to the effect of the statutory fusion of law and equity was decision as distinct from dictum.

Foreign observers are, I believe, amazed when they discover that it is exceptional for the judgments of what is in most cases the final court of appeal in the country to be delivered otherwise than extempore and orally. A high proportion of the appeals which come to the Court of Appeal from the County Courts relate to the rent restriction legislation. I am one of those who think that the critical animadversions which it has been fashionable to direct upon that somewhat complex body of laws tend to exaggeration. But no one would be bold enough to suggest that the Acts provide a good example of concise and lucid legislation. They do, I believe, provide a useful illustration of the extent to which in modern times judicial exposition may usefully supplement the statute law and make it coherent. The subject matter is after all—like taxing legislation—one which invites the almost boundless resources of human ingenuity to find means of evading (avoiding is the politer word) Parliamentary intention. The problems presented are therefore often complex and difficult. The solution given in any case, naturally of great importance to the parties concerned, may have the most far-reaching effects. I have in mind in cases such as these the advantages of reserved judgments, the language of which can be carefully considered. And there is no doubt that, generally speaking, a reserved judgment can be made not only precise but brief. My own limited experience leaves me in no doubt that it is far easier to be long-winded than short—and that many extempore judgments tend by natural process to prolixity.

I referred a little time ago to the effect, as regards the Court of Appeal, of our rule of precedent, and before I pass on I would like to say a word or two more upon it and, perhaps, suggest a

thought to your minds. I have told you that, with few and negligible exceptions—for example, if it is shown that a decision has been given *per incuriam*—decisions of the Court of Appeal are binding not only upon inferior courts but upon the Court of Appeal itself. The rule was established by a decision of a full Court of Appeal—five judges sitting together for the purpose—in a case known as *Young* v. *Bristol Aeroplane Company*. It is a rule with an obvious basis in convenience. But it has given rise to a certain degree of lively and healthy controversy: it has excited the criticism of my old friend, that great legal personality of our day, Professor Goodhart. In the House of Lords, the principle of *stare decisis* has no such rigid application—as Lord Watson observed in the famous *Nordenfeldt* case the House can, and on occasions must, modify its previous pronouncements when they cease to conform to the social philosophy of the day. So long as such revising discretion remains in the highest tribunal in the land there is wisdom in the practice that cobblers in less exalted places should stick to their lasts and should leave to the supreme tribunal the task of making such modifications as the times may require to previously established rulings. But as I have shown, the opinions of the Upper House can no longer be had for the asking and the Court of Appeal is for the greatest part of litigation the final court. In such circumstances, should there be greater latitude allowed to the Appeal Court? Must (in Professor Goodhart's forceful phrase) the judges be slaves to the past and despots for the future?

You will have appreciated that normally a division of the Court of Appeal consists of three judges. It is provided by the rules of court that for some limited purposes—e.g. in vacations or for giving directions pending the hearing of an appeal—one of the appeal judges can exercise the jurisdiction of the Court of Appeal. Moreover, interlocutory appeals, that is appeals from orders made upon some application before the trial of the action—for further particulars of the claim, disclosure of docu-

ments and the like—may be heard, and not uncommonly are heard, by two judges of appeal. But with these exceptions, three judges must, according to the rules made under the Judicature Act, sit to hear an appeal. And this is a desirable provision, for if but two judges sit and they should disagree, then the decision of the court below must stand—a result not very satisfactory to the losing party. By agreement, however, between the parties to an appeal the rule may be relaxed; but the rule requires that the agreement should be in writing, made and recorded before the appeal is heard: and it is further provided that should the two judges disagree the unsuccessful litigant may claim a re-hearing before a fully constituted court.

I have said earlier that under the modern practice—and in accordance indeed with the terms of the relevant rule—every appeal is a re-hearing, a matter I have emphasized as one of the important and beneficial changes made in 1873. What does that phrase mean? It means that the court is not trammelled in any way by the record or the terms of the order that has been made. The court is free to adjudicate upon the real questions at issue in the case and it is free to affirm the conclusion of the judge below and to dismiss the appeal though the grounds for its conclusion may be different from those entertained by the judge from whom the appeal is brought. In the case of appeals from the High Court the appellant in his notice of appeal is not bound to specify the grounds of his appeal. He may challenge the judge's decision on any ground that he chooses—and the respondent may in like manner support the decision on any ground whether or not that ground was relied upon in the judgment. In the case of an appeal from a County Court the rule is different. In such a case, though the respondent may support the judge's judgment on any ground of his choice, the appellant must specify the grounds of his appeal: and he is moreover limited to points taken by him in the County Court. The apparent anomaly is not, however, a matter of mere accident. As I shall have occasion to observe again upon another

topic, the judges of the County Court have to get through a great deal of business in a very limited time, and they have to do so in the absence of such modern contrivances as the taking of shorthand notes of all that is said. I would not have you think that these privations are attributable to Treasury parsimony or archaic organization. It is the first principle of County Court jurisdiction that it should be available and accessible to the man of slender means. If the County Court is to perform its primary purpose it is of the essence of the matter that it should dispose of its cases quickly and with the minimum of formality and expense: and this purpose would be impossible of achievement if the judge were bound to take elaborate notes and consider possible points not suggested to him by the parties or their representatives. There is, too, an ancient and important principle, the benefit of which no one can, I think, dispute—namely, that it is in the general public interest that there should be an end of litigation. It is for these cogent reasons that by the rules made applicable, an appellant from the County Court must state in his notice of appeal (and thereby notify his opponent of) the grounds upon which he seeks a review of the County Court judge's decision and that he is limited in claiming such a review to points which he took in the County Court.

The basis of these limitations to County Court appeals is largely, if not wholly, absent in the case of appeals from the High Court. There is, I think, an argument for the view that an appellant to the High Court should specify the grounds of his appeal and notify his opponent accordingly—the point is one now under the consideration of my Committee. The argument is however in this respect less compelling; in the nature of things, all available points are likely in the High Court to have been already debated. But for my own part I see no good reason for any further application to High Court appeals of the rules I have mentioned appertaining to appeals from the County Court.

You will no doubt be well aware that though an appeal to the Court of Appeal is a re-hearing, there is no re-hearing of the witnesses. In certain rare cases—and they are very rare because of the obvious validity of the principle that there must be an end of litigation—further evidence may be adduced in the Court of Appeal. It must be shown that the new evidence sought to be adduced is evidence which at the time was in fact unknown to the party applying and could not with reasonable diligence have been discovered: and it must further be shown that the new evidence, if given and if believed, is at the least likely to have a determining influence upon the case.

And so it is that appeals in the Court of Appeal are for practical purposes confined to argument upon the material already laid before the court below. The human interest of seeing and hearing witnesses is an experience rarely enjoyed by us. In my own experience there has only been one case in which witnesses were called, examined and cross-examined, in the Court of Appeal: and so exciting was it that we reversed the judgment of the judge below and decided the appeal almost wholly on the new evidence we had heard. But the case went to the House of Lords and the noble Lords, deprived of the stimulus which we had experienced, firmly reversed our conclusion and restored the judgment of the judge of first instance.

One other matter before I pass to the final part of this address: in cases of appeals from the High Court we can rehear the case not only upon the law but upon the facts—in other cases, particularly appeals from the County Court, the appellant is limited, in effect, to questions of law. Again, you would say, there is an apparent anomaly—and I shall have a little more to say upon it hereafter. But the anomaly, you may think, disappears upon closer examination. As I have said, the witnesses are never heard again : if the appeal is upon a matter of fact, the material must consist of the notes—under modern conditions, transcripts of shorthand notes—taken of the evidence in the court below. In the case of High Court appeals

there is no mechanical difficulty. Moreover, in the kind of case that has been tried in the High Court the issues tend to be more complex and questions of law and fact to be mixed together. In the County Court there are no shorthand writers —if there were, the expenses of trial would be largely increased. And if the County Court judge is to get through his day's list, how can he contrive to take a sufficient note of all the witnesses say? I have already referred to the great burden of work which the County Court judges have to sustain and I take this opportunity of paying a most sincere tribute to them for the work that they do. One of their members recently gave evidence before my Committee and produced for our edification a sample of one of his ordinary day's lists. Here it is:

1 Adoption petition
1 Payment out of Court
11 Judgment Summonses
4 Applications of various kinds
13 Possession actions
Remitted action
Action for work done
Injunction for nuisance
Dissolution of partnership.

I would add finally that in any case the distinction is less great than is supposed, for by a ruling of the House of Lords the Court of Appeal will not reverse a High Court judge upon a question of fact where it is apparant that his finding is based not only upon the words that the witnesses have used but upon his conclusions about the witnesses' credibility derived from his observation of their demeanour in the witness-box. A wise and experienced judge will not easily expose himself to the risk of reversal on matters of fact!

I have given you a somewhat sketchy account of the work of the Court of Appeal in which I have tried to emphasize those aspects of its jurisdiction which most naturally lead to the question I shall pose in the last part of this address. In what

respects is there now a case for further reform? Upon such questions I cannot for obvious reasons suggest to you any answers for they are, all of them, now the subject of my Committee's inquiry. But they are questions which must be of interest to every public-spirited man and woman and on that account I shall put to you the main problems—four in number—that have been presented.

First and obvious among them is the matter already indicated and suggested by Mr. Mathew. What is the justification for more than one appeal?

In order to deal with this question I must pose one that precedes it: should there be any right of appeal at all? Upon this there seems to be unanimity of opinion both in this country and abroad. So far as I am aware, no system of jurisprudence in any civilized country fails to provide some appellate tribunal. St. Paul's famous cry, 'I appeal unto Caesar,' expresses, I believe, a fundamental instinct in humanity. This view is of course no reflection whatever on the skill and probity of the judges of first instance—certainly not the English judges—but all of us are human and it is human to err. Then there is another saying—three heads are better than one. One suggestion might be that there should be three judges in every court of first instance so that you would get from the start the benefit of a combined judicial operation. But it is manifest that such a system would require so great an addition to judicial strength, and I think also so great an addition to cost, that I have no doubt it must be regarded as impossible. We are, therefore, left with this at least, that there should be some Court of Appeal—that there should be at least one chance of review available as an insurance against possible injustices. You will remember that for every one who wins an action there is someone else who has lost it. Winners would no doubt be well enough satisfied that matters should rest with the court of first instance, but no one I think could doubt that losers who had no right to claim some review of the case, would feel a real and burning sense of

grievance. Observe too that there is, as I think, a real and essential difference in function between a court of first instance and an appeal court. The primary function of the trial judge is to collect and assess all the material that may be brought into the case and, having done so, to reach his decision upon it. So far as is compatible with careful hearing, speed is a matter of first importance, certainly if costs are to be kept down: for experience leaves no doubt whatever that the costs of litigation vary directly with the length of trials. And I need not remind you that this proposition is of especial force in the County Court. In the Court of Appeal, on the other hand, where the material has all been collected and put together, the primary function, at least under our system and I think under most systems, is to deliberate upon the legal consequences: and where, as here, you have the rule of precedent, the judgments of the appellate court are matters of important judicial authority. You have three judges at least. And so you have in the deliberation of the case the great advantage of what I have called a 'combined judicial operation'. I do not of course for a moment deny that speed is important also in the appellate court, and that all reasonable and proper steps must be taken to minimize waste of time and waste of costs. But it is, I am sure, no good approaching the problem of appellate courts unless you bear in mind that from the necessity of the case hearings must be full and deliberate. If you try too hard to reduce the costs in the courts of appeal you may destroy the main justification for their existence.

If, then, I am right so far, we are faced at once with the competing claims of the Court of Appeal on one hand and the House of Lords or Privy Council on the other. Ought we—can we—go back to the ideas of 1873? Can we in some way amalgamate all three and have a single appellate body, the different divisions of which would perform different functions at different levels? For my part I gravely doubt it. We continue to be vexed by two persistent features of our way of life.

First, the rule of precedent and, secondly, Scotsmen (to whom I must add Northern Irishmen). As regards the first you will see that if the House of Lords ceases to exist as an appellate body, you would be left with no court having authority comparable to that of the past judgments of the Upper House. Those past judgments would remain like some sacred tablets of the law, unchanged and unchangeable. Inevitably, as time went on, much in the sacred writings might become archaic, might become a fetter on the natural development of our law. True, Parliament is in more or less constant session, but the time of Parliament is much occupied and I cannot see Parliamentary time being allowed for periodical bills designed to overcome past rulings which seem no longer acceptable. You could of course abolish the rule of precedent. But you would also have to abolish Scotsmen and Ulstermen. So long as Scotland and Northern Ireland constitute with England the United Kingdom and so long as the laws which Parliament enacts are (as mostly they are) applicable throughout the length and breadth of the Kingdom, you must as it seems to me have some tribunal which can be a final Court of Appeal for Scottish, Irish and English cases. The House of Lords appears to be the practical solution to the problem.

One suggestion has been made to us, a suggestion to which my distinguished predecessor gave much thought and which has come to be known as the 'leap-frog' system. The suggestion is that any case which, it can be shown, would in the normal way go eventually to the House of Lords should, by appropriate machinery, go direct to that tribunal, thereby 'leap-frogging' the Court of Appeal. There are plainly difficulties to be considered: for example, the appropriate machinery has to be established. There is also the difficulty that it is not always easy at the close of the trial to conclude whether or no the case is one which should, or would in the ordinary circumstances, go to the House. Many decisions which have come to be regarded as leading cases of great importance have become so by reason,

and by reason only, of the judgments actually delivered by the particular judges who heard the case. These, however, are matters for consideration. I can express at this time no conclusion. I pass the suggestion to you as one of interest and fit for your consideration.

The second problem relates to the way in which cases are heard, and always have been heard, in the Court of Appeal, and indeed in all our courts. As you know, before a case is opened in the Court of Appeal the judges have no knowledge whatever of it. It is the duty of counsel in opening the case to give to the court all the necessary facts and the whole matter is thrashed out in open court by argument and, to a greater or less degree, by the Socratic method of question and answer. It is said, and said truly, that the result is that the actual hearing takes some time. In some other countries, notably in the United States of America, it is the practice for an appellate court to be provided with written briefs which contain in convenient form not only a statement of all the relevant facts, but also the argument and the citations from authority. The briefs must be read at some stage by the judges, but they need not be read, and are by no means universally read, before the hearing. Then the case appears in the list and short oral arguments only are heard—each side, for example, is limited to one hour. It is plain that if the court has not previously read the papers there can be little question and answer. It is plain also in any case that judgments will almost always be reserved.

It is, I think, clear that serious consideration must be given to a procedure that has found favour in other countries, even though a great departure were made from the ways in which we have been brought up. The supporters of this suggestion aver that the great shortening of the hearings results in a great diminution in costs. It is, however, to be remembered that the written brief must be carefully prepared, presumably by counsel, and that fees would have to be paid in respect of the written briefs, as well as in respect of the actual hearing. For my part I

can well understand that in long and heavy cases you might achieve a great shortening of time reflected in a substantial reduction in cost. On the other hand, the jurisdiction of the Court of Appeal is by no means confined like that of the Supreme Court of the United States of America to cases of great pith and moment. One third of the cases which come to the Court of Appeal (approximately) are from the County Courts and very many of these and of other appeals (e.g. appeals on damages only in personal injuries actions) are disposed of within an hour or two and involve very little paper. I should be afraid that in such cases a system of written briefs, if applicable, would increase rather than reduce costs, and whatever might be the result in large and heavy cases it would plainly be regrettable to introduce a system which increased costs in cases where the litigants were persons of slender means. You could, in this matter as in others, treat County Court appeals separately. But that would not suffice. As I have said, many High Court appeals are shortly disposed of and involve little paper —I think it true to say that only a small proportion of the total appeals that come to the Court of Appeal can fairly be described as heavy, substantial cases. It seems to be that it would be very difficult, among High Court appeals, to define the class of case to which alone the proposed procedure should be applicable so as to secure that it operated as a means of saving costs.

Under this heading there is a further consideration. I have already used on two occasions the phrase 'combined judicial operation'. I have no doubt at all from my own experience that by our method this advantage is in fact achieved. The three Appeal Judges learn the case together: each, by hearing the questions of his colleagues, has the benefit of understanding the working upon the matter in hand of two minds in addition to his own. I make bold to assert that as a consequence the conclusions of the Court of Appeal reflect, so to speak, the highest common denominator of its judges. In quality and maturity they have at any rate the opportunity of superiority.

And, as a further consequence, dissenting judgments are relatively rare. By contrast, the system of written briefs has surely a tendency to lose this composite advantage, to result in separate and independent judgments which severally and cumulatively may have no obvious claim to primacy over the single judgment of the trial judge; and a tendency to produce also a higher percentage of dissenting opinions. There is much greater opportunity, too, for judges concurring in their conclusions to differ in their reasoning—a source of much confusion normally avoided without difficulty under our system. I have in mind one case—not an American case—in which an appellant won in the Supreme Court of his country by a majority of three to two. But he had three distinct grounds of appeal. I will call them, A, B and C. The first judge accepted ground A but thought grounds B and C erroneous: judge number two founded himself on ground B but rejected A and C. Judge number three embraced ground C but would have nothing to do with A and B. The two dissentients of course thought all three grounds wrong, A, B and C. In the result, though the appellant won the day and no doubt went home well satisfied with his fortune, every one of his grounds of appeal was rejected by a majority of four to one. What dark thoughts filled the mind of the unlucky respondent I do not know. But I do know that the judges of the inferior courts were much troubled by the problem: what was the principle which the Supreme Court had laid down for their guidance and instruction?

So much for the second problem. Again I express no concluded view and do no more than inform you of the arguments. You will at least think (I hope) that the reformers today are prepared to be as bold as were their grandfathers in 1873.

Then, third: we have been directed by the terms of reference establishing my Committee to consider the possibility and formulation of a scheme whereby in exceptional cases, or cases involving matters of public interest, appeals to the Court of Appeal or to the House of Lords should be paid for out of the

public purse. In these days of multifarious and highly complex legislation, problems of great difficulty undoubtedly arise upon the construction of the statutes and their application to particular sets of circumstances. It is easy enough to complain of the elaborate terms of modern Acts of Parliament, but I think that less than justice is often done to those hard-worked and highly skilful men, the mute inglorious Parliamentary draftsmen. In these days of high taxation the wiles of human ingenuity are applied in devising methods of circumventing successive Finance Acts. No draftsman, however skilful, can possibly anticipate all the products of this ingenuity or every conceivable set of circumstances. The blame for complexity can, in my judgment, be often laid more fairly at the door of the ingenious tax evaders, than at the door of the draftsman or the legislator. Nevertheless, it is equally true to say that many a man, as things are, may be compelled to litigate in two or even three courts where the problem arises out of the construction of a Statute because, as it turns out, the point involved is one affecting many other cases, or regarded as of general importance. It is particularly in respect of such cases that our terms of reference are intended to apply: and the difficulty, I may tell you, is to formulate in sufficiently precise language the class of case to which the suggestion should relate and to devise the necessary procedure whereby, with due protection to the Treasury—that is to say, to you and to me—advantage may be taken of the suggestion.

And last there is the point to which I have already alluded. Should the right of appeal in High Court cases be limited, like the right of appeal in County Court or revenue cases, to matters of law only? There are, I think, many who take this view, and at first sight it appears undoubtedly anomalous that if the decisions on fact of County Courts should not be liable to review, a different rule should apply to the High Court Judges, who may fairly be supposed to be men certainly not less skilful or experienced than the County Court Judges. Some people, on

the other hand, take the opposite line. They think that it is in principle wrong that the losing litigant in the County Court should have no right to ask for a review of his case if the matter in hand is one of fact. Revenue cases may well be in a class apart for, after all, it is not the duty or the practice of the Crown to put forward tendentious pleas of fact. I think this question a difficult one, but let me say that I think also the apparent anomaly is not entirely real. The problem as regards the County Court is, as I have already said, largely administrative. Although recommendations have already been made for enlarging somewhat the jurisdiction of the County Courts, their cases are and will remain for the most part small cases, and the litigants men and women of small means. It would plainly be most regrettable and would indeed destroy the great virtue of the County Courts if by any proposals that were accepted litigation in the County Courts were made substantially more costly. In spite of all, therefore, you may think that there is a case for leaving things in this respect much as they are, anomaly or no anomaly.

I have put to you the main points which affect the jurisdiction of the Court of Appeal. There are of course other matters which seem to give scope for improved method—for example, by simplifying what are at present the rather complicated provisions in regard to time for service of notices of appeal in different types of case. But these points are in the main technical, and I do not feel that they would be an interesting topic for discussion this evening. Confining myself as I have to the main questions, you will not assume that I have myself formed any concluded view—or if you think I have, that it will be of any great significance. My Committee consists of twenty-four persons, not only of high standing but also of a most robust and independent turn of mind.

I have come now to the end. Except casually perhaps in one instance you will no doubt have observed that I have assumed the continued existence of the Court of Appeal. I

believe that it has on the whole faithfully performed its function. Certainly the men who have from time to time been its members have included many who have added great lustre to English law—I think of names like Bramwell, Cotton, Fry, Bowen, Jessel, Lindley and Lopes; in more modern times Scrutton, Atkin, Younger, and that most beloved of Chancery judges, Frank Russell. For obvious reasons I stop short at the living, but the names I have mentioned (and I have but picked a few more or less at random) when added to the originals whom I have mentioned, provide a galaxy by no means negligible. Indeed, as Master of the Rolls, I feel most deeply conscious of the great responsibility of one who is placed in the seat that has been occupied by so many greater men.

I have spoken a good deal of the problem of the costs of litigation: and I believe the problem to be one of tremendous importance. We pay—sincerely—our homage to the rule of law. It is a trite saying that all our essential liberties depend in the last resort upon the administration of justice. Never, I believe, had these phrases a greater significance. But the significance will be wholly lost if, for reasons of delay and cost or fear of cost, our Courts and particularly our Supreme Court is placed beyond the reach of the common man—if the man or woman who feels that he or she has a grievance, a just cause to prefer or defend, is deterred from having recourse to the King's Courts by fear of financial ruin.

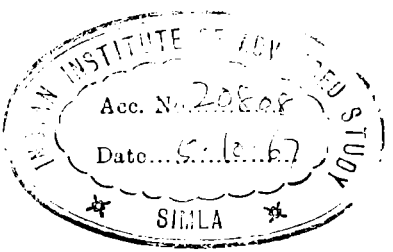
There has grown up during the last generation or two a tendency for Parliament to provide for the determination of questions that may arise between one citizen and another or between a citizen on the one hand and a department of the state on the other, by some officer of the department concerned or some lay tribunal established *ad hoc* for the purpose. You will, I hope, acquit me of making any imputation against the probity or conscientiousness of those who constitute such tribunals or of suggesting that many of such matters are not properly submitted to the arbitrament of ministerial deputies;

for the problems in question may well be administrative problems not capable of being tried by any principle or standard comprehended by the law. But there are, I am afraid, some other instances—questions submitted to statutory tribunals which could and should be tried by the King's Courts according to the ordinary law of the land. The justification for such extra-judicial tribunals may be founded on the delays and costs of the ordinary procedure. But the results in course of time may be calamitous. Not only should the King's Courts be readily accessible to every citizen, but the law of the land should, if it is to command public support and respect, be constantly adapting itself to the moral and social standards of the day. There is, said that great American Judge Cardozo, a constant assumption that 'the natural and spontaneous evolutions of habit fix the limits of right and wrong'. There is no great harm in a system of law being slightly old fashioned for it will thereby by a symbol of stability. But it must not get wholly out of sympathy with the tenets of the age. If to an increasing degree questions arising out of the common experiences of life are taken out of the scope of the jurisdiction of the ordinary Courts, the law will cease to be a living thing, will cease to command the faith and respect of those whom it should serve.

Those who practise the law have behind them great traditions. They glory—and rightly so—in their learning and independence. Other tribunals, however well intentioned, can never be wholly free from persuasions and influences from which the lawyer is exempt. In theory, a decision based on what is thought in all the circumstances to be fair and morally just is well enough. But a return to palm-tree justice is a return in fact to savagery. However easy it may sound to pronounce in favour of moral justification, nothing is in fact more difficult. For who can safely say that he has grasped all the facts and all the circumstances relevant to a moral judgment?

To the younger among you, therefore, to those whose right and duty it will be to run the race and carry the torch aloft, I

commend this solemn reflection. Render unto Caesar the things that are Caesar's, but by all means in your power contrive that all properly triable questions between man and man or between individual citizens and departments of the state be determined in the King's Courts according to the ordinary law of the land and according to the ancient judicial oath, without fear or favour, malice or ill will.



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