THE WIND OF CHANGE IN THE ADMINISTRATION OF JUSTICE.*

There are two dogmatic statements which we often hear about the administration of justice. One is that British justice is the best system the world has ever devised; the other, that court procedures are outmoded and do not fulfil the needs of contemporary society. I suggest that neither of these assertions is wholly true. I strongly subscribe to Lord Acton's aphorism that "an absolute principle is as absurd as absolute power; and when you perceive a truth, look for the balancing truth."

In Mr. Anthony Sampson's survey of the law in ANATOMY OF BRITAIN is a passage quoted in the AUSTRALIAN LAW JOURNAL of December 1962, in an article which I gather may have prompted your President to invite me to address you on this subject. He says: "The law is the most striking example of a profession which has become trapped in its conservatism and mystique . . . The law, more than any other profession, is imprisoned in its own myths and shibboleths." But at the end of that chapter he says: "Despite their maddening habits, English judges . . . have devised a system of incorruptible justice."

Now it is not my purpose to heap encomiums upon our machinery of justice or to engage as between bench and bar in what Mr. Justice Frankfurter has described as "self-adulatory bombast." And while by all means we should set out to make our court procedures as streamlined and efficient as possible, we must never forget that efficiency may be bought at too high a price. Nothing, in one sense, is more efficient than a jury trial; but Lord Devlin has reminded us in his book on TRIAL BY JURY that

> "Trial by jury is more than an instrument of justice and more than one wheel of the Constitution; it is the lamp which shows that freedom lives."

It is interesting to note that there is little clamour to streamline criminal procedure as distinct from civil procedure. This is no doubt due to a feeling that the traditional procedures of the criminal court are designed to give the accused a fair trial in accordance with our

* *A paper read to the Fourth Legal Convention of the Law Society of Western Australia, held at Bunbury in September 1963.*

notions of justice and that any substantive departure from these procedures might result in injustice. It is perhaps too readily assumed that the streamlining of civil procedure can be carried out without affecting basic principles of justice as between individual litigants. But this is not to say that there is not much that can be done. I think reform must come along two lines:—

(1) The adoption of effective procedures to ascertain *before* trial the real factual and legal issues upon which the case depends. At present a great deal of time is spent during many civil trials in discovering what are the substantial issues in dispute and time is wasted in taking evidence of facts which are not ultimately contested.

(2) A new approach to the rules of evidence.

Civil procedure.

For many years in most jurisdictions there have been procedures available designed to facilitate proof of undisputed facts and save time at the trial. The Evershed Report in England rejected the American compulsory pre-trial procedure but it did recommend optional procedures to attain the same objective. In Tasmania we have adopted some of the Evershed Committee's recommendations and added some of our own. We have also attempted to reduce the amount of paper work. Our principal procedural reforms directed to these ends may be concisely stated as follows:—

(1) A judge may upon application of a party order that all or any of the evidence at a trial may be given by affidavit.

(2) A judge may upon application of a party order that the evidence of a particular fact be given by a statement on oath based on information and belief, production of documents or books or copies, or (in the case of a fact of common knowledge) by production of a newspaper.

(3) Exchange within a reasonable time before trial of plans, photographs, models, and *proofs of all expert witnesses* (including lists of comparable sales in valuation cases).

(4) All claims may be specially endorsed or included in a statement of claim served with the writ. A plaintiff who does not do so will be deprived of the additional costs involved unless good reason is shown.

(5) No formal orders are to be drawn up in interlocutory proceedings unless the judge so directs. An endorsement is made

on the Summons for Directions, Notice, etc., stating concisely the terms of the order, and this is signed by the judge.

(6) In the case of formal *ex parte* applications or non-contested applications, orders may be drawn up accompanied by a memorandum signed by counsel or solicitor and put before a judge (or the Master) for signature without requiring the parties to appear.

Our experience has been that the profession rarely uses the rules designed to facilitate proof. The compulsory procedure of exchange of *all* expert proofs, however, has worked splendidly. It is completely accepted by the profession and it has considerably reduced the area of dispute in medical testimony. But the reason why the optional procedures to facilitate proof have not been used is fundamental. It is something which I believe is a complete obstacle to the attainment of the objective I have suggested. That is the "sporting theory" of litigation—that litigation is a game of tactics in which you must never disclose your hand to your opponent until the last possible minute. The habit of never admitting anything and never telling the other side anything is deeply engrained in the profession. Lawyers still inevitably play at tactics in conducting litigation.

I do not believe that we will ever substantially reduce the time and expense of litigation until we reject the "sporting theory" of litigation (or, as the Chief Justice of New South Wales has called it, "trial by ambush") and unreservedly accept the view that "surprise is the enemy of justice" and that we must consequently eliminate the element of surprise in civil actions.

I will be deliberately provocative by saying that what ought to be done is to exchange at least summarized proofs of *all* witnesses before trial and that after they have been exchanged the parties should either amend their pleadings or some simple procedure should be devised for formulating the issues of fact and law to go to trial. I think this new approach is unlikely to evolve from within the profession. There are already procedures whereby a party may guard himself against surprise and save himself the trouble and expense of proof of facts not really in dispute. But there is no procedure whereby the judge can of his own initiative actively supervise the pleadings or compel the parties to use these measures. That of course results from the traditional role of the judge. It was because the Evershed Committee clung to the traditional role of the judge as "holding the ring" that it rejected pre-trial procedure. It was prepared to give a judge some initiative but not a sufficiently robust initiative to enable him to see to it that only

the real disputed facts came to trial and the issues were properly defined.

The traditional role of the judge is nowhere better stated than by Sir Frederick Pollock in THE EXPANSION OF THE COMMON LAW:—

> "The parties before the Court are wholly answerable for the conduct of their own cases. Litigation is a game in which the Court is umpire. It is for the parties to learn the rules and play the game at their peril. The umpire will speak when his judgment is demanded. It is not his business if the players throw away chances. The analogy of field manoeuvres is appropriate. The commander may push forward an unsupported battery into a crushing fire at short range from Blue's unbroken infantry. Nobody will stop him; he will learn his mistake when his guns are put out of action.
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> We may call this basic rule the rule of neutrality. Nothing in our procedure is more characteristic, more settled, or more continuous. If you abolish this rule, the impartiality—or at any rate the belief of citizens in the impartiality—of Judges, goes with it."

Can we any longer afford the rule? Sir Garfield Barwick in an address given in Hobart in 1958[1] said:—

> " I think the Court can no longer remain passive, relying merely on the self-interest of the parties."

I am conscious there are many arguments for and against robust judicial initiative and control over pre-trial proceedings, compulsory conferences, and the rest. But I want to suggest that it may be the only effective way to surmount two obstacles that stand in the path of the objective of pre-trial ascertainment of the real issues; *i.e.*,

(1) the sporting theory of litigation, and

(2) absence of incentive to prepare the case at an early stage.

Sir Garfield Barwick, in the address to which I have referred, put forward a possible compromise. He suggested that before a case is set down for trial there should be an affidavit from a principal in the legal firm retained in the case that the following steps had been taken:—

> (1) That particulars had been obtained from, and given to, the opponent. Rules might make the seeking and giving of particulars obligatory.

1 (1958) 1 U. TASMANIA L. REV. 1.

(2) That discovery and inspection had been had and given; and that further discovery and inspection had been sought if the proffered discovery was considered inadequate. Again the seeking and giving of discovery and inspection might be made both automatic and obligatory without any court order.

(3) That notice to inspect and admit documents and to admit facts had been given and answered. Here, again, the giving and the answering might be made obligatory.

(4) That in appropriate cases the advisability of administering interrogatories had been considered and, if thought advisable, the appropriate interrogatories administered.

(5) That all physical examination of parties, where appropriate, or of physical objects had been had. Here, again, there should be no need for court orders in the general run of cases.

(6) That all reports of experts had been exchanged.

(7) That statements are in hand from all witnesses known to be available.

The Laws of Evidence.

The other line of reform I suggest should be followed is a more realistic approach to the rules of evidence.

Some of our rules of evidence are illogical and rest on accidents of history rather than reason. They were formulated by the courts over a period in which all questions of fact both in the criminal and civil jurisdictions were determined by juries and it was thought desirable that some types of evidence although logically probative should be kept away from a jury.

In particular I believe that the rule against the admission of hearsay evidence needs reconsideration. It is based on the principle that the only admissible direct oral testimony of a witness to an event can be a statement made on oath in the witness box and subject to being tested by cross-examination. The sanction of the oath is of great importance and must be taken to add great weight to the value of direct testimony given under it. But this principle has been pressed to what perhaps is the logical conclusion of excluding (in general) even spontaneous statements made by a witness about something that he saw or heard when it was fresh in his mind. There are limited exceptions to this rule and there has been some statutory reform in the law in civil cases only relating to written statements made at a time when there was no motive for lying. A strong case can be made out for

admitting evidence in both civil and criminal cases of both oral and written statements made by witnesses about something when the matter was fresh in their minds and before there was any motive for bias. I have found in a number of criminal cases that juries do not understand why they are not permitted to know what a witness told the police about something while it was fresh in the mind of the witness. I explain to them that it is because it was not on oath but I suspect they feel that it would assist them to know.

I do not wish to be taken as underestimating the value of sworn testimony given under religious and legal sanctions. But the truth is that short of perjury there is inevitably a great deal of subconscious reconstruction of events before a witness enters the witness box—to say nothing of faulty recollection. I believe that in general statements made by a witness about an event or a conversation before any motive for distortion has arisen ought to be admitted.

The Rt. Hon. Sir Henry Slesser, P.C., in a recent essary on *The Art of Judgment,* has said something which is much in point:—

> "The fundamental determination of fact, which raises the problem of admissibility, cogency, and effect of evidence and of the competence and method of those responsible to hear it is not an an easy one. During the ages a highly artificial system has evolved, and in our time the question cannot be avoided, how far do many of our rules really assist or impede the ascertainment of actual truth? Let us, for a moment, consider the instructive history of the matter. It must be remembered that until the comparatively recent past, juries were almost always employed at common law to determine fact, and that the rules of evidence by which we are now bound were largely devised to prevent them, rather than Judges, being misled by irrelevancies. Many tribunals, however, today have no jury, yet on the whole they and the courts of equity, which never employed the jury system, have adopted the same restrictive rules of evidence, so that now they may be said, with certain specific exceptions, to be almost universal in English jurisprudence."
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> "Insufficient attention, I think, has been so far paid to what may be called the philosophy of evidence. It is clear that its probative force must vary from age to age; evidence as to witchcraft which would have found a ready acceptance in the sixteenth century would probably be disregarded, save among students of black magic, today, while prevailing assumptions, say as to the uniformity of nature, would not in the past always neces-

sarily have been accepted. Thus the cogency of evidence, in a sense, is closely connected with general processes of contemporary reasoning. Nevertheless the law has thought fit to lay down, as a permanent limitation, rigid rules to exclude certain evidential material which normal thought accepts, though in the past, method of proof such as supernatural invocation by ordeal of fire and water, or battle, were accepted as judicial proof where now they would most certainly be rejected. The acceptance of trial by battle in the courts as late as the reign of George III in the case of *Ashford v. Thornton*,[2] needing a statute for its abolition, indicates the juristic vitality of such archaic process."

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COMMENT.

While respectfully agreeing with all that Sir Stanley Burbury has said about the need for reforms in matters of procedure and evidence, so far as the commercial lawyer at any rate is concerned the need for reform in the administration of the law is only one facet of the pressing need for large scale reforms in the whole of our commercial laws, as well as in the judicial and administrative procedures relating to them.

During the past twenty years of unprecedented scientific and technological progress the lawyer, to his chagrin, has had the spectacle of his own field of learning becoming more and more confused and overwhelmed, by outpouring of statutes, regulations, and Court decisions, with no sign of any substantial effort being made to reform, simplify, and codify our laws and procedures to make them more easily understandable and applicable to the circumstances of modern life.

This is particularly true in the field of commercial law, where the anachronistic and confused state of the law, and the consequent inability of the commercial lawyer to advise with speed and certainty on the problems of the business world, have led to the lawyer being largely eliminated as a commercial adviser.

2 (1818) 1 B. & Ald. 457, 106 E.R. 149.

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The public image of the lawyer today is a sad reflection on the inferior status which he occupies in the modern intellectual world. In the words of a writer in the English Solicitors Journal, the public has the impression that solicitors are a priesthood practising esoteric rites. Of course this question of the public image of the solicitor has its lighter side too: Somebody once described Mr. Molotov, the former Soviet foreign minister, in this way: "His dark-coloured suit, his bespectacled poker face, his thin hair and small moustache, give a stranger the impression that he is a middle-class professional man—probably a solicitor." On a brighter note, in a recent case in England, a young lady gave this description of a man who had snatched a fur coat from her shoulders in the street: "I had no reason to suspect him. He looked like a solicitor—about 32 and rather handsome. He wore an Anthony Eden hat."

If the man of commerce or industry does swallow his misgivings and have resort to the processes of law, what does he find? To him the courts of law are a quaint archaic survival, where he is a baffled participant in an intricate game, in which the judge and counsel know all the rules and permitted moves, but he does not know any. Then, when he gets the decision, he often finds to his dismay that there is an appeal to the High Court. After waiting for anything up to a year for the Court to come here, he then may have to wait for anything up to another year for the decision.

In the administration of the non-litigious areas of the law, the solicitor's office is the clearing house for the processing of innumerable forms emanating from many different offices and authorities, each having to comply with its own particular whimsies as to format, contents, method of typing, and method of endorsement. No "Organisation and Methods" men have ever scrutinised or designed these forms or procedures.

To the question of what is being done to reform these things in the law, the answer is, precious little. The eyes and minds of the academic lawyers are directed almost wholly to an examination of the minutiae of the past rather than towards the construction of the framework of the future. Reading much of the current literature of the law, one experiences all the sensations of being driven backwards in a motor car on a very dark night, with the headlights blazing on the territory in which you have been, but with no forward light at all to give you any idea of where you are going.

The clock of evolution ran down at the beginning of the present century so far as the codification of the law is concerned, and there is

no sign of it being rewound. What, then, can constructively be done in this situation?

To make any worth-while revision and modernization of our laws and procedures would need the expenditure of a great deal of money, so that thoroughly experienced men could devote their full time to the job. To suggest that legal practitioners, who are in practice themselves, are capable of doing this work on any useful scale, while continuing with their own practice, is analogous to suggesting that the major medical research should be undertaken by general medical practitioners in their spare time. Obviously the progress of medical science could not hope to make any substantial advance under those circumstances, and neither can the law.

The impediments to having any considerable sums of money made available for the task seem at present to be considerable. While billions of pounds are being poured out annually on all sorts of doubtful projects dignified under the title of scientific research, almost nothing is made available for the revising of the laws and procedures governing the property and commercial life of the community.

There is no visible and tangible result from wholesale law reform. Scientific, medical, and technological research produces visible, large-scale rewards for the firms and governments which sponsor it. Although the commercial and business community would be saved an incalculable amount if our laws and procedures were completely revised and codified, the benefits so obtained are too remote to be of any vote-catching or easily seen nature.

It must also be remembered that while the Commonwealth Government largely controls the taxation power in our community, it only has very limited legislative powers; one cannot see any prospect for many years to come of the Commonwealth being sufficiently interested to provide moneys for the States to have some central institute for the reform and codification of their laws. It is true that a tiny step in this direction can be seen in the present consultative machinery that has been set up between the States, over company legislation and other matters which have since been discussed between the States, in which uniformity is thought to be desirable. However, the lack of any central drive makes any progress there of an insignificant nature.

In the matters more directly related to the day to day administration of the law, perhaps our profession needs its own Ombudsman. We sadly need somebody of this character who could exercise some organisational control and supervision over the more inane of the

requisitions, forms, procedures, and regulations of the many Departments with which the practising solicitor has to deal.

Until the very great hurdles in the way of substantial reform of our commercial laws are overcome—until our profession finds its Harry Messel[1] with the crusading zeal that will procure from government, commerce, and industry the substantial moneys needed to found and maintain an institute of law reform—we must reconcile ourselves to the fact that we will have to be content with the minuscule steps to which we have become so used to see being taken in the past, in the direction of reform of our substantive and administrative laws and procedures.

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