SOUTHEY MEMORIAL LECTURE 1986

Appeal and Review in Comparative Law: Similarities, Differences and Purposes.*

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[Professor Jolowicz examines the differences between the proceduces of review and appeal. He argues that review of a decision is for a public purpose — that is, to ensure courts do not exceed their power — and that an appeal is for private purpose — to ensure an individual gets justice in a particular case. This lecture traces the common law development of review before the Judicature Act 1873-5 and examines the impurities which infiltrated the equitable appeal procedure when it was applied in common law jury trials. The problems of the overlap between review and appeal are considered in the context of Britain, the United States and the Constitutional systems. The author calls for more strictly observed delineations between review and appeal. By fusing the two procedures, whether it be for reasons of efficiency or because of a desire to be seen as an humanitarian and flexible agency, the courts are thwarting the prime aim of each procedure which results in delays and high costs.]

In their daily practising lives lawyers and even judges are engaged in the operation of a machine — the machine of what, for want of a better word, we call 'justice'. The institutions of the law, the rules of procedure, even the law itself, are there — they are given — and there is a job to be done. They do not, and for practical purposes for most of the time they should not, worry themselves with what that job really is or with questions about its role in society. From time to time, however, it is essential that lawyers should pause to reflect not only on how their machine may be improved but also on its whys and wherefores. In this lecture I want to invite you to do that with regard to certain component parts of the lawyers' machine, namely the procedures of 'appeal' and 'review', both of which are available only after a decision at first instance. What I shall say is directed mainly to civil cases in which a final first instance judgment has been given, but I believe that much of it applies equally to interlocutory appeals and, perhaps, to appeals in criminal cases. Two preliminary remarks are, however necessary at the outset:—

1. We are living in a period of procedural reform and attention is concentrated on the costs and delays of civil litigation. I do not complain about that, but this is by no means the first time that the attempt has been made to grapple with those twin evils and it will not be the last. Nevertheless, I have the uncomfortable feeling that, at least in England, we are in danger of concentrating to excess on the nuts and bolts — we see the problems too much as mere technical problems capable of elimination by adjustments to our existing machine — and as a result we have lost sight of, we do not even ask, what it is all about. We do not know what it is we want to do more quickly and more cheaply. It is taken for

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granted that we know that, but I respectfully doubt that we do; what we take for granted is the philosophy of the Judicature Acts of 1873-1875[1], and it is time for the fundamentals of that legislation to be debated afresh.
2. When we speak of the 'machine of justice' we speak metaphorically: our subject is not really a machine at all but a human institution whose character changes not only when the legislature intervenes but in the course of its everyday operation. These changes, being gradual, often pass unnoticed by those in day to day contact with the institution, but they undoubtedly occur, and as the institutions change so too do the functions they perform. Unless we are content to rest on statements so vague as to be meaningless, such as that it serves the administration of justice or the administration of the law, we need from time to time to consider what our machine of justice or a given component of it is actually doing and what we want it to do. I hope that what I have to say will pull out some of the questions that need discussion, questions to which, I think, a society must give some answers before it goes too far with purely technical reform.

Let me now turn to my subject matter.

Appeal and Review

The title of this lecture uses the words 'appeal' and 'review'. Each refers to a form of procedure which may be instituted only after an original decision has been made and, save exceptionally, neither can be instituted save by a party to the decision who is adversely affected by it. Both forms of procedure therefore afford to that person an opportunity to avoid or delay implementation of the decision, but there, if each is considered in what I will call its 'pure' form, the similarity between them ends.

Appeal.

In its 'pure' form, the appeal brings the entire litigation, or so much of it as is covered by the appeal, before the appellate jurisdiction for a new decision. As French law[2] puts it, the case "devolves" on the court of appeal which must then come to its own decision on the facts as well as the law. It must itself decide the question at issue in the light of the evidence available to it, including evidence that may not, for whatever reason, have been available

[1] See Jolowicz, '"General ideas" and the reform of civil procedure' (1983) 3 *Legal Studies* 295.
[2] See the 'new' code of civil procedure' (hereafter 'n.c.p.c.') art. 561, 562. This code was promulgated in 1975 as a consolidation of a number of reforms carried out between 1971 and 1973.

at first instance, and it has exactly the same powers for fact finding as the court below.[3] The only restriction is that it must be the same case as was decided at first instance for otherwise it would not be an appeal but itself a proceeding at first instance. In practice this means little more than that no new claims can be admitted on appeal. In other words, a 'pure' appeal is truly *novum judicium.*

Review.

'Review' differs from this in two most important respects. First, a court of review has no power to substitute its own decision for that of the court below; if for any reason it does not affirm the original decision it can only quash it and remit the case elsewhere for a fresh decision. Secondly a court of review is strictly limited in the range of matters it can take into account. Usually it can take account of alleged errors in procedure in the court below and usually it can take account of alleged errors of substantive law, though sometimes its scope is more restricted than that. What it cannot do is reconsider findings of fact; still less can it review the evidence. If it finds error which falls within its purview it must quash the decision, however trivial the error; if it finds no such error it must affirm. Nothing else is possible.

It is part of my purpose to show that each of these procedures in its 'pure' form is designed to serve a different purpose: the 'review' — which appears much earlier than the appeal in the development of a legal system — serves primarily the 'public' interest in upholding and protecting the legal order itself. The appeal, on the other hand, serves the 'private' interests of the parties to the litigation in the actual outcome of their case. It is, however, relatively rare today to find either appeal or review in a 'pure' condition. Each has tended to acquire some of the characteristics of the other, and the consequent 'impurity' of each has caused us to lose sight of the different objectives which they are intended to achieve. The problem is, of course, exacerbated in the English speaking countries by our indiscriminate use of the word 'appeal' itself, and by the fact that for any one case only one kind of procedure is normally available. In England, for example, although a case may progress from first instance to the Court of Appeal and from the Court of Appeal to the House of Lords, the procedure of both these higher courts is called an appeal and indeed, though it is an impure kind of appeal it is certainly closer to a pure appeal than to a pure review. In countries whose legal systemsfollow the European continental model, on the other hand, while a case may equally come before three levels of the judicial hierarchy, the second stage only is called an appeal; the third is known as 'cassation' and the procedure is supposed to be of review not of appeal.

During the last hundred years or so, the continental procedures of appeals and cassation have developed impurities, but in France, whose legal system

[3] N.c.p.c., art. 910 which does little more than refer back to the procedures of first instance.

set the pattern for so many others, this has happened only quite recently. The system instituted after the Revolution had both appeal and cassation in relatively pure form and a clear idea of what each was intended to achieve. I can best explain the drift of my argument by starting with that.

I begin with an idea that has come to be accepted as a general principle in France, namely that every litigant is entitled to a *'double degrê de juridiction'.* There is a large number of courts of appeal organised on a regional basis and with only limited exceptions for small cases the losing party at first instance can take his case to the appropriate court of appeal for that court to consider the case afresh on fact as well as law. As things now stand, the new code of civil procedure of 1975 specifies that 'the appeal brings before the appellate jurisdiction the questions that have been decided in order that they may be decided afresh in fact and in law.'[4]

After decision on appeal, or after the first instance decision where no appeal is available, the case may go to the court of cassation. That court is not, and is not described as a court of appeal. It was, indeed, originally created in 1790 as a means for controlling the judges and preventing them from trespassing on the prerogatives of the legislature: decisions which went beyond the strict confines of the written law must be annulled. A decision could, therefore, be challenged before the court of cassation only for what is called 'violation of law', and if a violation of law is made out the decision must be quashed. The court of cassation takes the facts as found below and can never receive evidence or proofs.

The strictly limited role of cassation is emphasised not just by the rule that the court cannot itself pronounce a final decision in any case but also by the fact that if it quashes a decision and remits it elsewhere for a new decision — normally to another court of appeal known as the court of *'renvoi'* — that court is free to decide as it sees fit; it may disregard anything that the court of cassation may have said even about the application of the law to the facts. From that second decision the case may again go to the court of cassation, and again the decision may be quashed. The court of cassation, as it was originally created, not only had no power of decision but also had no power to direct another court how it should decide.

That, of course, contains within itself the possiblity of indefinite oscillation between the court of cassation and a succession of courts of appeal, but so determined were the French to keep the court of cassation as a pure court of review that the first solution adopted was to give the last word to the second court of *renvoi,* that is to the court to which the case was remitted following a second cassation. In 1837, however, common sense prevailed over principle. Since then the position has been that if after a first cassation by a Chamber of the court the court of *renvoi* adheres to the decision originally given, then, on second cassation the case goes to the Full Court — now known as the

[4] N.c.p.c., art. 561.

Assemblée plénaire[5] — and if the decision is again quashed for the same reasons, then the court to which the case is remitted — the second court of *renvoi* — is bound by the rulings on law of the Full Court.

Difference of Function.

It is clear from this that in France the court of cassation and the courts of appeal are seen as having quite different functions and that the principal function of the former is not to safeguard the private interests of the parties to the litigation in hand: it is to serve the public interest in the legal order and especially, in modern conditions, in the clarification and development of the law and in the maintenance of procedural regularity in the lower courts. This view of the court's role is confirmed by the legal provision that if neither party exercises his right to take the case to the court of cassation the *'ministère public'* — a public authority — may do so 'in the interest of the law' , [6] and by the statutory definition of the court's role: it is to 'censure' the non-conformity of a decision with the rules of law.[7] Italian legislation, as it happens, is even clearer on this point: the court of cassation in that country 'assures the exact observance and the uniform interpretation of the law, the unity of the national law... '[8] It is true that little use is made in practice of the power to take a case to the court of cassation 'in the interest of the law', so that the court depends on individual initiative to perform its public function, but one of the most famous Italian procedural scholars had no doubt about the significance of that: 'the state has found it convenient to make use of the initiative of the individual, putting it to the service of society; and taking advantage of the tendency of the individual to protect his own interests has recognised that by giving the losing party the possibility of obtaining the annulment of the decision against him by drawing attention to errors of law, procures that the court of cassation will correct those errors on the State's behalf'.[9]

I shall return to this shortly to show how impurities have affected the continental appeal and cassation, especially the latter, with consequent loss of clarity of purpose and even worse, but first let us look at the common law.

'Review' in England.

So far as English common law is concerned, though it had and still has a procedure which is properly classified as a procedure of review in what was the old prerogative writ of certiorari (which is now contained within the

[5] The *Assemblée plénaire* is presided over by the *'premier président'* of the court and consists of the presidents, the senior members and two other members of each of the six Chambers of the court: *Code de l'organisation judiciaire* art. L. 121-6.
[6] Law of 3 July 1967, art. 17. See also n.c.p.c., art. 618-1.
[7] N.c.p.c., art. 604.
[8] R.D. of 30 January 1941, n. 11, 150.
[9] Calamandrei, *La Cassazione Civile,* II, Cap. 6, no. 64, in Piero Calamandrei, *Opere Giuridiche,* a cura di Mauro Cappelletti, VII (Naples, 1976) 133.

modern 'application for judicial review'[10]), that procedure never applied to the decisions of the regular civil courts. In the past, as now, only one kind of procedure could be invoked after the decision at first instance, but until the Judicature Acts of 1873-1875 came into force, that procedure was of review, not appeal.

In the earliest period the only possibility was the writ of attaint whereby the unsuccessful litigant challenged the decision against him by charging the jury with fraud. [11] The proceedings were brought against the members of the jury themselves, and if successful the verdict was set aside and the jurors punished. The writ of attaint was in due course supplemented and later superseded by the writ of error which survived in the English common law until 1875. Curiously it survives, though in a very impure form, in the United States to this day. [12]

The writ of attaint amounted to an attack on the jury, and this seems to be typical of early forms of proceedings subsequent to first instance. Maitland tells us that 'the idea of a complaint against a judgment which is not an accusation against the judge is not easily formed,' [13] an observation which appears to be true for France as well, for there, until the 17th century, the judge of first instance was a necessary party to any subsequent proceedings. [14] That this should be so is, I believe, sufficient demonstration of the 'public' purpose intended to be served by the writ of attaint, at least if we start from the generally accepted hypothesis that what we now call civil litigation came into existence when society felt the need and had the power to seek to replace violence as the principal method of dispute settlement by a system of state operated adjudication. On that hypothesis it is a prime requirement that the members of a society generally have confidence in the adjudicators and their methods. To use the example of attaint, it is one thing to expect people to accept the verdict of a jury as final; it is quite another thing to insist that this shall be so even if the jurors give a dishonest verdict. Is it not significant that success in the writ of attaint led to the punishment of the jurors as well as to the annulment of their verdict?

The purpose served by the writ of attaint was thus primarily a public purpose, that of maintaining confidence in the legal system, though it depended for its operation on private initiative, and the same is true for the writ of error in its early days. The meticulous examination of the record for error and the disregard of questions of fact seem to demonstrate its concern rather for the public interest in the administration of the law and, later, in the substance of the law itself, than for the interests of the individual parties to

[10] Supreme Court Act 1981, s. 31; R.S.C., O. 53.
[11] *E.g.* Holdsworth, *A History of English Law* (ed. 7, London 1976) I, 337-347.
[12] *Infra*, text at n. 24.
[13] Pollock and Maitland, *History of English law before the Time of Edward I* II (2nd ed. 1898), 668.
[14] Esmein, *Histoire du droit français* (4th ed. 1901) 428, citing Pothier, *Traite de procedure civile,* nos. 352,353.

litigation in the outcome of their cases. It is quite common today for the procedure of the writ of error to be described as 'inadequate', on the one hand because a decision had to be set aside for error however trivial[15] and, on the other hand, because the procedure allowed for no challenge to the correctness of the substance of the decision itself. [16] It is true that from time to time in the history of the writ of error certain devices were introduced to alleviate some of its technicalities, [17] which suggests that the procedure was not free from criticism at the time, but nevertheless the view that the procedure was 'inadequate' seems beside the point; it may indeed have been inadequate as a procedure of appeal, which seems to be what the modern criticism intends;[18] but the procedure was not, nor was it intended to be, a procedure of appeal. Until 1875 the appeal was unknown in England outside the courts of equity.

The modern English appeal.

A simple reading of the legislation as it has stood since 1875 might suggest that abolition of the writ of error was accompanied by the introduction of a 'pure' appeal. For the Court of Appeal it is stated that the appeal shall be 'by way of rehearing'[19] and it is enacted that the Court of Appeal 'shall have all the authority and jurisdiction of the court or tribunal from which the appeal was bought'.[20] As for the House of Lords, the Appellate Jurisdiction Act 1876, which gave its modern form to the House as an appellate court and which is still in force, simply states that the House must 'determine what of right, and according to the law and custom of the realm, ought to be done in the subject matter of the appeal'.[21] The reality is not quite that, and the English appeal is certainly 'impure' in at least one important respect.

It is usually, and no doubt rightly, said that the Judicature Acts introduced into the newly established court of combined jurisdiction in law and equity the appeal that had previously existed in the courts of equity. Equity, however, had never made use of the jury nor, indeed, of the common law mode of trial at which, in principle, all evidence is given in the form of oral testimony. The equitable appeal was 'pure' — it consisted of a genuine rehearing of the case — but such a rehearing is not practicable after a trial in the common law style, especially if the trial was by jury as was still the norm in the latter part of the 19th century for cases at common law. Even now, when the civil jury has for all practical purposes disappeared, oral evidence, which is still

[15] For a late example, see *Househill Coal and Iron Co. v. Neilson* (1843) 9 Cl. & Fin. 788. Modern American procedure requires that the error be 'prejudicial', but this is not without its difficulties. See *e.g.* Traynor, *The Riddle of Harmless Error* (1970).
[16] *E.g.* Holdsworth, *op. cit.* n. 11, 214, 223.
[17] For example the statutes of Jeofails and the use of Bills of Exceptions. See *e.g.* Holdsworth *op. cit., supra* n. 11, 223, 224.
[18] Plucknett, for example, actually deals with the writ of error under the heading 'Appellate Proceedings': *A Concise History of the Common Law* (5th ed. 1956) 387.
[19] R.S.C., O. 59, r. 3.
[20] Supreme Court Act 1981, s. 15.
[21] Appellate Jurisdiction Act 1876, s. 4.

the preferred mode of proof of the common law, is given at a trial, and a true rehearing would thus require that the witnesses give their evidence over again in the Court of Appeal. This, of course, does not happen.

If there actually has been a jury trial, then, whatever the legislation may say, an 'appeal' is not feasible if the principle is to be maintained that questions of fact must be decided by the jury. If the appellate court finds that it cannot affirm the judgment which followed the verdict of the jury it can only order a new trial before another jury, which is tantamount to the annulment of the original judgment, and that is one of the main hallmarks of the review. There is nothing surprising in the refusal of the Court of Appeal and, for that matter, of the House of Lords, in the years after 1875 to consider questions of fact. Eventually, however, it came to be acknowledged that the Court of Appeal is a tribunal of fact[22] and, although it still declines to disturb the judge's findings if and to the extent that they depend upon his assessment of the credibility of witnesses, in reliance on the transcript of the evidence given below and on the documentary evidence, if any, it will now give its own decision on such questions of fact as the quality of conduct or whether a given inference can properly be drawn.[23]

'Review' in the U.S.

Having arrived at this position, the English appeal bears a striking resemblance to the contemporary procedure of the Courts of Appeals of the United States of America, notwithstanding that that procedure, though now also called an 'appeal' is not a replacement of the writ of error but a development of it. It continues to be stressed in the United States that what is in question is not an appeal but 'a review concerning whether prejudicial error occurred.'[24] The concept of the 'record' which is examined in a Court of Appeals is, however, enormously wider than the formal document originally known to English law and can consist of a complete transcript of everything that occurred at the trial including the oral evidence of witnesses, but still, if the trial was by jury the Court can only affirm or annul. On the other hand, where, as is increasingly common, the trial has been by judge alone, the judge's decision on a question of fact may nowadays be altered in the Court of Appeals, provided that the judge's decision did not rest on his assessment of the relative credibility of witnesses whose examination and cross-examination he has observed.[25]

[22] *E.g. Powell v. Streatham Manor Nursing Home* [1935] A.C. 256.
[23] See especially *Watt v. Thomas* [1947] A.C. 484; *Benmax v. Austin Motor Co.* [1955] A.C.370. There is still a reluctance to interfere with the trial judge's exercise of a discretion, but appellate courts undoubtedly have power to do so. See *e.g. Birkett v. James* [1978] A.C. 297, 317, *per* Lord Diplock; *Ward v. James* [1966] 1 Q.B. 273.
[24] James and Hazard, *Civil Procedure* (2nd ed. 1977) no. 13-8.
[25] The trial judge is required to state separately his findings of fact and his conclusions of law: F.R.C.P., Rule 52 (a).

In this respect, at least, the 'impurity' of the English appeal and of the American 'review' have brought them to a similar position, which may tell us something about the limits which the common law style of proceedings at first instance imposes on the procedure of appeal, but of more immediate interest is that despite protestations to the contrary, the expansion of the notion of the record and the power to consider a judge's findings of fact have given to the American Courts of Appeals a substantial jurisdiction on questions of fact.

Cassation.

The growth of impurity is even more evident in the continental procedure of cassation than in the Courts of Appeals of the United States. Although theoretically not allowed to take under consideration questions of fact, by a variety of devices courts of cassation have come to do so on a large scale. The 'qualification' of the facts, for example is routinely considered to be a question of law,[26] but even more significantly, it is now widely held that in the motivation of its decision the lower court must provide an adequate exposition of the facts on which its decision is based so as to enable the court of cassation to satisfy itself that the judgments of that court are valid.[27] The result has been that the theory that the court of cassation is not concerned with the facts is almost totally disregarded in practice: it has been said for the West German *Bundesgerichtshof* that it has become a *Tatsacheninstanz*[28] and it has been said of the French court of cassation that the lower court controls only the content of the dossier in the case: with its contents the court of cassation can do as it likes.[29]

It is not only in the willingness of courts of cassation to entertain questions of fact that the impurity of modern cassation can be seen; more and more courts of cassation have adandoned that hallmark of review that a court of review either affirms or quashes but does not replace a decision. This has in fact for long been within the power of the Spanish Court,[30] but most significantly it has now become possible even in France not only for the *Assemblée Pléniaire* but even for an ordinary Chamber of the court of cassation to replace a defective decision with a decision of its own provided that this can be done without further investigation into the facts.[31]

[26] In England the same question has been specifically held to be a question of fact: *Qualcast (Wolverhampton) Ltd v. Haynes* [1959] A.C. 743.
[27] This is now statutory in some countries such as Italy (cpc, art. 360 5), but in France it still depends upon the *jurisprudence* of the court of cassation itself. In other words, the court took it upon itself to adopt it.
[28] Gilles, 'Die Berufung in Zivilsachen und die zivilgerichtliche Instanzordnung' in Gilles (ed.) *Humane Justiz* (1977) 147, 156.
[29] Mazeaud, Mazeaud et Chabas, *Traite theorique et pratique de la responsabilite civile,* III (6th ed. 1978) 473.
[30] LEC, art. 1745.
[31] In 1967 this power was conferred on the *Assemblee pleniaire* which normally sits only on a second cassation (Law no. 67-523 of 3 July 1967, art. 16). In 1979 the power was extended to the individual Chambers of the court: Law no.79-9 of 3 January 1979; n.c.p.c., art. 627.

Part of the explanation of this has been said, at least for France, to be a 'humane' conception of the supreme court, which cannot take note of an error without putting itself in a position to correct it,[32] and part seems to lie in what is, on the face of things, a sensible measure of economy. If the court of cassation, without needing to call for additional proofs (which it cannot do) can decide not only that the decision below cannot stand but also what the correct outcome of the litigation ought to be, why put the parties and the state to unnecessary expense in remitting the case elsewhere for final judgment?

Be this as it may, in the opinion of many the willingness of continental courts of cassation to consider questions which are essentially of fact has consequences which are little short of catastrophic. The French court of cassation, for example, gets something of the order of 16,000 cases a year,[33] the Italian even more, and it is strenuously and convincingly argued that as a result the court cannot perform its proper role — its 'public' role of clarifying and improving the law.[34] Various devices have been and are being tried to manage this vast number of cases, for example by reducing the number of judges who must sit in any one case, by introducing a kind of screening system, and so on, but it still seems to be the fact that if it looks as if there is something dubious about a decision, if it is felt that it might be wrong, then the court will deal with it whether it thereby contributes anything to the law or not. A remarkable example is given by a distinguished French commentator in a recent article. [35] A mother went to fetch her small daughter from school and gave a lift to another little girl whom she took home. That little girl lived on a farm, and on going into the farmyard the mother was bitten by a dog. The liability of the dog's owner was not in doubt, but the insurers alleged that the plaintiff had, in effect, been guilty of contributory negligence by going into the farmyard. The author comments, 'Can you tell me that it is decent to bring such a question before the highest judges in the land? And can you tell me that either a positive or a negative answer to it can in any way contribute to the clarification or improvement of our law?' What the author does not say, though I believe it to be true, is that a major contributory factor to the monstrous overload of the French court of cassation has been the virtual disappearance in practice of the original idea of the court as serving only a 'public' purpose, albeit by making use of private self- interest. It has become a court concerned with the private interests of the parties in the outcome of their litigation.[36]

[32] Mazeaud, Mazeaud et Chabas, *op. cit., supra,* n. 29, 473.
[33] Tunc, 'La cour de cassation en crise' in 30 *Archives de Philosophie du Droit* (1985) 157, 162.
[34] See, e.g. Tunc, *loc. cit. supra.,* n. 33.
[35] *Ibid.*
[36] It is interesting to compare the current edition of a leading French text book with its immediate predecessor. The 19th edition of Vincent, *Procédure Civile* (1978), retains the traditional account of the court of cassation: its role is to achieve unification in the interpretation of the law, it does not examine the facts, it cannot dispose finally of the case. The 20th edition (1981 by Vincent and Guinchard) states that the court does not have as its sole objective the interests of the parties but is concerned with the general interests of society.

Compared to the caseload of the French court of cassation, that of the English House of Lords is almost ludicrously small. It decides only about 50 civil cases a year and, bearing in mind that each stands at the head of the judicial hierarchy, the comparison reveals a paradox. The court of cassation is not nominally a court of appeal and its avowed function is to serve the public interest in the law itself, but its procedure, a procedure of review, has acquired so many of the characteristics of the appeal that its capacity to fulfil its 'public' function is seriously compromised. The House of Lords, on the other hand, is nominally a court of appeal, and its procedure is, at worst, an 'impure' appeal, not a review. Nevertheless, it is impossible realistically to represent its expensive and long drawn out process as aimed primarily at the protection of the private interests of the few litigants whose cases come before it. The business of the House of Lords is with the law itself; its role is to act as the source of the most authoritative precedents known to the law of England and, indeed, of the United Kingdom as a whole. Thanks to its minute case load, it has the time to hear full argument and to reflect before giving judgment that due performance of that role requires.

The French author to whom I have just referred looks enviously at the situation of the House of Lords and even proposes that for the court of cassation to fulfil its proper function its case load should be reduced to a similar level.[37] We should not, however, take much pride in our present situation; it is largely attributable to the great expense and the inordinate amount of time that an appeal to the House of Lords requires. What would our position be if somehow or other the costs and delays were greatly reduced? Would so many litigants rest content with the decision of the Court of Appeal? It seems unlikely. The House is at present able to devote several days to oral argument of an appeal and to ponder its decision carefully only because its procedure is slow and expensive. If it did become cheaper and quicker, either its caseload would increase greatly or we should need to introduce something similar to the petition for a writ of *certiorari* used by the Supreme Court of the United States to limit its case load to cases of public importance.

In the United States the so-called 'appeal' to the Supreme Court has virtually been abolished,[38] and the decision of a federal Court of Appeals will only be considered by the Supreme Court if it grants *certiorari*, which is not a matter of right but 'of sound judicial discretion, and will be granted only where there are special reasons therefor'.[39] In practice this means that *certiorari* will not be granted unless at least four justices consider that the case raises an important question of law. What is more, though the court gets about 4,000

[37] *'Je vais tout de suite avouer mon objectif. A mes yeux, la Cour de cassation ne devrait pas rendre plus de 50 decisions par an ou, puisqu'elle a plusieurs chambres, plus de 50 decisions pour chascune d'entre elles.'* Tunc, *loc. cit., supra* n. 33, 160.

[38] Subject to certain exceptions the Congress has power to restrict the appellate jurisdiction of the Supreme Court: Constitution of the United States, Art. III, s. 2. Pressure of cases has led the Congress to make extensive use of this power.

[39] Supreme Court Rules, Rule 19 (1).

cases and grants *certiorari* in only about 10% of them, it gives fully considered opinions in less than 200; the remainder are disposed of without reasons or with reasons very shortly expressed.[40] That court is, it must be clear, very conscious of the 'public' purpose it exists to fulfil.

Private purpose of appeal.

If the primary purpose of the review procedure is to serve a 'public' purpose and if, at least in the early development of a legal system, that purpose is to maintain public confidence in the system of adjudication itself, then it can be, and it has been, suggested that the institution of appeal is actually counter-productive. A distinguished French legal historian once said that 'to put before a second judge a case which has already been decided by a first, because a mistake may have been made, is deliberately to cast suspicion on the administration of justice; and if the first judge could have made a mistake, why should this not also be true of the second?'[41] Nevertheless, perhaps because of the greater influence of Roman law[42] in France than in England, French law acquired the appeal long before the English common law did so in 1875. Nowadays it is generally agreed that a litigant who has lost at first instance should be entitled to have his case considered a second time at a higher level, and this is justified, for example by the Evershed Committee in 1953 on the ground that 'the legal system of every civilised country recognizes that Judges are fallible and provides machinery for appeal in some form or another . . . It would be palpably wrong to leave the defeated litigant entirely without remedy in all cases, even in those where the judgment against him is demonstrably wrong,[43] or to deny him altogether the chance of appealing from a decision which leaves him smarting under a sense of injustice' . [44]

This places the appeal squarely within the sphere of 'private' purpose, and there is indeed a view, with most respectable support, that existing restrictions on the right of appeal even in small cases ought to be removed. Sir Jack Jocob, for example, has severely criticised the former English rule that appeals from the County Court on questions of fact lay only where more than 200 was at stake: 'it may seem strange that a High Court judge can be reversed on fact, but a county court judge cannot where the amount claimed does not exceed 200. The only justification for this distinction is that finality in small

[40] See Griswold in Bellet and Tunc (ed.) *La cour judiciaire suprēme* (1978) 102, 103.
[41] Esmein, *op. cit., supra* n. 14, 257
[42] A true appeal was unknown in the Roman republic but seems to have emerged in the early Empire. See Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law* (3rd ed. 1972) 400.
[43] Note the assumption that a decision may be 'demonstrably wrong' independently of the existence of a procedure whereby its 'wrongness' may be 'demonstrated' to a court. It is not in truth the inherent 'wrongness' of a decision which justifies the right of appeal but the appellant's legitimate desire to demonstrate that 'wrongness' to a court of appeal if he can.
[44] *Final Report of the Committee on Supreme Court Practice and Procedure* 1953, Cmnd 8878, para. 473.

cases is desirable, or at any rate the system cannot afford the expense of such appeals. On the other side, it may be said that the distinction seems to recognise that there may be one law for the rich, and another for the poor, and that a wrong decision may create an injustice in a small case as much as in a large case.'[45] Whether he is more content with the present situation according to which it is in the power of the Lord Chancellor to prescribe classes of cases in which there is no right of appeal from the County Court without leave,[46] I do not know, but as is always true of such a discretion, everything actually turns on the way it is exercised.[47]

Certain restrictions on the right of appeal are commonplace in common law countries and it has also been found necessary on the continent to introduce similar restrictions both by excluding the appeal altogether in cases of less than a certain value[48] and by restricting the right to present new proofs in the court of appeal.[49] These restrictions bear a resemblance to the conditions which exist in English law for the admission of new evidence in the Court of Appeal, namely, in short, that it must be through no fault of the party seeking its introduction that it was not available at first instance,[50] but it appears that the reason for their introduction was largely to discourage the parties from reserving their main effort for the appellate stage.[51] This problem seems to have been particularly acute in Germany but in that country the idea of the appeal as a true *novum judicium* is so deeply engrained that the restrictions introduced are of only very limited effect.[52]

Although our continental friends might not appreciate my saying so, the problems they face with the appeal in their systems are, at the level of general principle, less intractable than those that face the common law. In the first place, because there is no equivalent to the common law trial and because far less weight is placed on oral testimony, it is easier for the procedure of appeal to reproduce that of first instance. In the second and more important place, the 'public' purpose to be served by the continental appeal is still

[45] 'Courts and Methods of Administering Justice' in *The Reform of Civil Procedural Law and other Essays in Civil Procedure* (1982) 37, 57.
[46] County Courts Act 1959, s. 108, as amended by the Supreme Court Act 1981, Sched. 3, para. 14.
[47] Broadly speaking, the present rule is that leave is required if the claim is for an amount not exceeding one half of the relevant limit of the jurisdiction of a County Court: County Court Appeals Order 1981 (S.I. 1981 No. 1749). The disappearance of the distinction between questions of law and questions of fact is noteworthy.
[48] *E.g.*, in France there is no appeal where the amount at stake does not exceed 10,000 francs (approximately A$2,000): *Code de l'organisation judiciaire*, art. R.311-2, Decret no. 81-818 of 1st September 1981. Note that the exclusion of the right of appeal automatically involves the existence of the right to go directly to the Court of cassation from the court of first instance.
[49] This is less the case in France than in some other countries including Austria (ZPO para. 482) and Spain (LEC, art. 862).
[50] R.S.C., O. 59, r. 10(2). See especially *Ladd v. Marshall* [1954] 1 W.L.R. 1489.
[51] In England, at least, the restrictions on the introduction of new evidence are justified by the need to achieve finality in litigation. See *e.g. Brown v. Dean* [1910] A.C. 373, 374, *per* Lord Loreburn L.C.
[52] Gilles, *op. cit.* n. 18, 150, 154. See ZPO para. 528, introduced by the *Vereinsfachungnovelle* of 1976.

relatively insignificant. I do not deny that the availability of an appeal can contribute to the public purpose of maintaining confidence in the system as a whole — I do not altogether agree with the French historian I quoted above — but the attainment of that purpose gives rise to no conflict; the public and the private purposes coincide. But while it is not true that judicial decisions play no part in the development of the law in the continental systems today — *'jurisprudence'* is of great importance — it is only the decisions of the courts of cassation that really matter. The decision of a court of appeal may occasionally make a significant contribution to the law, but if it does so it is, so to speak, by accident. At the appellate level the problems for continental lawyers are related largely if not entirely to maintenance of the balance between the acknowledged right to a *'double degré de juridiction'* on the one hand and the need to economise in the use of resources and to prevent the right of appeal from being employed for purposes of blackmail on the other.

'Public' importance of English appeal.

In common law countries, and certainly in England, these problems also have to be faced, but it is undeniably the fact that the decisions of the Court of Appeal provide essential sources of law which could not be dispensed with unless the caseload of the House of Lords were greatly increased; it would be absurd to pretend that the Court's contributions to the law itself are mere accidental by-products of a procedure whose sole intent is to attend to the private interests of the parties. Unlike their counterparts elsewhere, common law courts of appeal have, and will continue to have, an inescapable public function to perform in the interest of the law itself.

The result of this is conflict and than conflict is, or at least is becoming, acute. On the one hand there is, and rightly, a concern that the right of appeal should be widely enjoyed for the sake of individual justice, and this extends to concern that the right should not be withheld merely because the amount at stake is, by some supposedly objective criterion, small: than an amount which is trivial to some is of great importance to others is no more that trite. Nor does it make sense from the point of view of individual justice to restrict the right of appeal to questions of law or to insist, as is now common in England, that the Court of Appeal will not interfere with the trial judge's exercise of his discretion.[53] There can be few litigants who care overmuch about the reasons why they have failed at first instance; they want to challenge the decision against them because they believe that it was wrong, even unjust, in its result and if their right of appeal means anything it means that they should be entitled to have the whole case reconsidered. On the other hand,

[53] See the important observations of Lord Diplock in *Birkett v. James* [1978] A.C. 297, 317, which make it clear that, on interlocutory questions, an appellate court should exercise only a 'reviewing function' in relation to matters of judicial discretion one purpose of which is to promote consistency of decision. This, within the terms of this lecture, is a 'public' purpose.

if the Court of Appeal is to perform its public function in relation to the law, so extensive a right of appeal is virtually ruled out. To find the proper compromise solution should be one of the first demands on the time of everyone concerned with procedural reform.

During the last few years, under the energetic direction of the Master of the Rolls,[54] strenuous efforts are being made to cut the costs and the delays of the appellate process. Considerations of space preclude description here of the various novelties that have been introduced such as the creation of the office of Registrar of Civil Appeals[55], the introduction of 'skeleton arguments' prepared by counsel and submitted to the Court before the hearing begins,[56] the increased use of two-judge courts[57] and the increased pressure on the parties to get their tackle in order within the specified time limits.[58]

From the point of view of expediency such measures are justifiable, and they may well assist to protect the interests of litigants that the cases ahead of them should be speedily disposed of. Certainly it is not my intention to argue that they are unjustified in the England of today. It must, however, be said that there are dangers ahead, for these measures put at risk both the 'private' and the 'public' purposes of the appeal. Indeed, the Master of the Rolls himself has been recently reported as saying that 'The Court of Appeal is a safety net against miscarriages of justice, not a second court of trial' , [59] a statement which, if taken at face value, seems to diminish the value of both purposes in the present scheme of things.

The 'Right to Decide'.

There is one more aspect of the difference between appeal and review to which I must draw attention before trying to pull these thoughts together. This derives from the fact that in their pure forms the appeal does and the review does not allow the higher court to involve itself with the facts of the cases that come before it. It is a consequence of this that the choice of a procedure of review rather than appeal operates to preserve the 'right to decide' of the original jurisdiction: even if its decision is quashed, the case is remitted to the jurisdiction from which it came for a fresh decision. So, in the past, when jury trial was the norm, it would have been destructive of the jury's

[54] And following the recommendations of a Working Party under the chairmanship of Lord Scarman.
[55] Supreme Court Act 1981, s. 89 and Schedule 2, Part II. The Registrar acts as a judicial officer of the Court on interlocutory matters. The qualification for appointment is as for Masters of the Supreme Court.
[56] See *Practice Note (Court of Appeal: Skeleton Arguments)* [1983] 1 W.L.R. 1055.
[57] Supreme Court Act 1981, s. 54(4); Court of Appeal (Civil Division) Order 1982, para. 5248. See *National Westminster Bank Plc. v. Morgan* [1985] A.C. 686, 702, *per* Lord Scarman.
[58] See the observations of the Master of the Rolls in *Practice Note (Court of Appeal: New Procedure)* [1982] 1 W.L.R. 1312; the *Supreme Court Practice* (1985 ed.) para. 59/9/7; *C.M.Van Stillevoldt B.V. v. E.L.Carriers Inc.* [1983] 1 W.L.R. 207, 212, *per* Griffiths L.J.
[59] 'Counsel Cross-Examines Sir John Donaldson, Master of the Rolls', *Counsel* (The Journal of the Bar of England and Wales) Vol. I, number 4 (Trinity/Summer 1986) 18, 21.

right to decide, to which great importance was attached, if the writ of error had been replaced by the appeal. Now, however, at least in England where the civil jury has for all practical purposes been abandoned, an order for a new trial is a rarity. Subject to the limitations imposed by the fact that it does not hear witnesses but has only a transcript of what they said at the trial, the Court of Appeal decides questions of fact for itself.

One feature of the disappearance of the jury has been to diminish to vanishing point the distinctive character of the adjudicator at first instance: he is now a judge whose background and training are the same as those of the judges of the Court of Appeal. The same is true of the judges of continental courts of appeal and of cassation, and it is perhaps part of the explanation of the increasing involvement of the latter in the facts of the cases that come before them that they have no reason to suppose that the judges below are any better qualified to decide the questions of fact arising than they are themselves. In other words, when a case progresses up the judicial hierarchy, whether it comes before a court recognised as a court of appeal or as a court of cassation, nothing special is gained by preserving the 'right to decide' that attached in the first place to the court of first instance.

Matters stand differently when the case comes into the ordinary judicial hierarchy only after the decision at first instance has been made outside it, as is the position, for example, when the original decision has been made by a specialist 'administrative' tribunal. If, for example, the legislature has created a tribunal to assess the extent of a claimant's disability for the purpose of calculating the social security payments that should be made to him and has provided that the tribunal should have as a member a medically qualified person, then, if the tribunal's decision is defective, a fresh decision cannot be made by professional judges; the tribunal's 'right to decide' must be preserved by remitting the case for a fresh decision by the tribunal. The retention, in its modernised form of the application for judicial review, of the strict 'review' procedure of the old prerogative 'supervisory' jurisdiction of the court is entirely comprehensible and, indeed, essential. There is, however, an additional reason why the 'right to decide' of first instance courts should be preserved to some extent even where their judges and those of the higher courts have similar training, namely that this makes possible the isolation of particular questions of general importance for decision in those courts, and such isolation is, at least, helpful to the fulfilment of the 'public' purposes of the appeal. It may be unfortunate that this has apparently been lost sight of.

Conclusion

I have tried to draw attention to the distinct nature and purposes of the review and the appeal which are apparent from their original 'pure' forms. In reality, all that they have in common is that neither can be engaged until an original decision has been made and that, subject to limited exceptions, neither can be invoked except by a party to that original decision. Both appeal and review have, however, developed impurities which obscure the essential

differences between them. The impurities which now infect the appeal are, perhaps, largely the result of the need for economy — a true *novum judicium* or rehearing is more expensive than an appeal whose scope is limited in some way. The impurities that affect the continental cassation, on the other hand, have a different explanation; they stem essentially from an unwillingness on the part of the judges to remain within the confines of a procedure of review because of a humanitarian but misplaced desire to do justice to the parties to the cases that come before them. It is not only in the continental systems, however, that there is confusion. The single procedure which we call 'appeal' has, in most common law countries, to do service as both appeal and review and we are as confused as are our continental friends.

The central question can, I think, be conveniently put in this way. For centuries our legal systems have offered to the litigant a right of recourse against an adverse decision at first instance. That right is, of course, a procedural not a substantive right, and it is a right that is most unlikely to be exercised by a litigant who does not believe that it will be to his personal advantage to exercise it. Why, then, do we confer the right upon him?

It seems fairly clear that in the past the right, such as it was, was conferred with the ulterior purpose of putting private self-interest to the public good. In course of time, however, it came to be felt that a defeated litigant should be able to call upon a higher court to consider quite generally how his case should be decided, and in consequence the appeal developed in continental Europe. Perhaps it would also have developed in the English common law long before 1875 — as it did in Equity — had it not been for the deeply rooted notion that questions of fact must be decided by juries which meant that the jury's 'right to decide' must be preserved.

On the continent, as is shown most clearly by the legal structure set up in France after the Revolution, the two purposes — the public and the private — were separately served by separate procedures in separate jurisdictions. In the common law world, on the other hand, only one form of procedure existed for ordinary civil cases. In the United States that procedure is still theoretically a procedure of review, but it is a review that has become so impure that in cases decided by judge alone it bears a close resemblance to the English appeal by way of 'rehearing'. On the other hand, it must be remembered, the Supreme Court serves almost exclusively the 'public' purpose. In the rest of the common law world, so far as I am aware, the abolition of the writ of error has had the result that the review properly so-called is now reserved for cases which start outside the regular judicial hierarchy. But the appeal which has taken its place is far from pure.

The approach to reform.

In my belief the uncomfortable fact must be faced that just as an impure procedure of review is not well adapted to meet the private interests which are better served by an appeal, so also an impure system of appeal is not well adapted to meet the public interest which is better served by a review. Thus,

for example, a form of procedure designed to raise as explicitly as possible a particular controversial question of law on which counsel and the judges can concentrate their attention undisturbed by outstanding issues of fact and which will result in a judgment or judgments uncluttered by extraneous considerations, is better adapted to the clarification and development of the law than is a full rehearing of the entire case on facts as well as law. But such a procedure, essentially of review, will do nothing for the litigant whose argument is, for example, that the trial judge wrongly adjudged his conduct on a particular occasion to be 'negligent.' Conversely, if, as in France, the court of cassation, the supreme court and 'guardian of the law', occupies much of its time with questions of no general significance, its capacity to perform its proper role is seriously impaired. If we are set on reform, some hard policy choices will have to be made.

In countries such as France where the legal system ostensibly provides two distinct procedures, there is probably a case for trying to remove the impurities that infect them both and especially those that infect cassation. This is likely to be difficult in practice, but it is easy compared with the problem that faces the common law. If, as is probably the case, it is impossible to purify the appeal as we now have it and to add a more or less pure review, then we have to fit our single procedure of appeal into a suitable position somewhere between the pure appeal and the pure review that will best meet both the public and the private purposes without doing avoidable damage to either.

There are probably some people who will say that, over the hundred years or so since the common law dropped the writ of error, that position has been found by an evolutionary process, and they may well be right. But if they are right then this has come about through the combination of all the elements of the present system — the unplanned as well as the planned — and including in particular the present levels of cost and delay. If we do not give very careful thought to what we are doing and what the consequences are likely to be, if without more thought we assume that the present levels of cost and delay are unmitigated evils that must so far as possible be expurgated, the balance that has evolved will be destroyed. A number of litigants will get their appeals heard more quickly and more cheaply but at what cost to the law and the legal order?

This brings me to my last words. It is natural, but it is unfortunate, that when procedural reform is under discussion attention is concentrated on what happens to the people who actually go to litigation. We are impressed, not without reason, with the nature of their ordeal and we are anxious to do what we can to ease their path. We forget that far more people, including all those whose actions are immediately controlled by their, or their advisers', understanding of the law — people who draft and enter into contracts, who make wills, who agree or decline to meet claims, who refrain from making claims and so on — do not go to court. The courts do not exist only to decide those cases that come before them but, as an American writer puts it, also

sends 'signals',[60] especially, but not only, signals to the professionals. Far more important to the daily life of society are the 'decisions' which are made outside the courts, but on the basis of what it is believed a court would decide if asked, than are the decisions actually made by the courts. But without the decisions of the courts, especially the decisions of the higher courts whether we call them courts of appeal or courts of review, the all important extra-judicial decisions could not be made.

In our modern society there is a great deal of litigation in which a plaintiff seeks judgment only because of the defendant's intransigence, the plaintiff's rights being in no doubt, and there is a great deal of litigation in which nothing is in dispute except the facts. In such cases the demands of justice may call for the provision of an appeal,[61] and most people would agree that one appeal is enough. But if in all such cases the defeated litigant can appeal to a Court of Appeal whose decisions are regarded as important sources of law, that Court will be in difficulty in fulfilling either of its roles. On the other hand, if the right of appeal in such cases is restricted, as it commonly is today, with further restrictions in sight for the future, the demands of individual justice cannot be met. The way ahead is difficult and obscure, but a satisfactory way will not be found if we concentrate exclusively on finding ways of reducing the cost and delays of our appellate procedures as they now exist. If we think only of that, things are as likely to get worse as they are to get better.

[60] Galanter, 'Justice in Many Rooms' in *Access to Justice and the Welfare State* (1981) 147.
[61] As was evidently the view of the Evershed Committee, *supra* n. 44.