COURTS, LAWYERS, AND THE ATTAINMENT OF JUSTICE*

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I am indeed honoured that those administering the affairs of the Faculty of Law of the University of Tasmania should have asked me to inaugurate an annual lecture, to be called the Turner Memorial Lecture, upon some topic of interest to lawyers and to the public. That it is a public lecture precludes the mere technical treatment of some legal problem or relationship and calls for a discussion of a wider kind. The law, however, is basic to our civilised life and, apart from an evergreen interest in its romantic side and in the colourful stories told of its personalities, a large section of our people maintain a healthy curiosity with respect to its substance and an unobtrusive vigilance as to its current operation. Legal "shop" is said to be entertaining to a wide section of the public however much the lawyer's wife might tire of the recital of forensic exploits and the cynical interpretation of the facts and circumstances of the case.

Prompted by a realisation of this public interest, I have chosen for this lecture the title "Courts, Lawyers, and the Attainment of Justice." My immediate purpose in doing so was to afford an opportunity to discuss some practical considerations associated with the despatch of the business of the Courts, particularly, though not exclusively, the trial of actions and the place of the legal profession in relation thereto.

The Courts have lost ground to an alarming extent to the administrative tribunal. The tendency of the legislator is to create new lay tribunals to deal with matters which truly involve the determination of rights and in a measure their enforcement. The decisions of these tribunals affect the citizen in his property and in his person more and more. The Courts themselves have to some extent abdicated in favour of these tribunals. Too often it is said by a Court that some subject matter is more suited for determination by a lay tribunal. And over the years the supreme control of the administrative tribunal has been abandoned by use of the cliche that their jurisdiction is to go wrong as well as to go right. There is lately, however, a healthier use of the prerogative writ of certiorari to quash as a means of supervising these tribunals, at least to the extent of preventing an excess of jurisdiction or a denial of what we are pleased

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to call natural justice. But it is none the less true that, as someone has said, there is an erosion of the Courts, with the rich silt settling in the lowland areas of the administrative tribunal.

Of course, there are many factors which have contributed to this tendency. But one of them, I think, is the view that Court processes are slow and inefficient, and that by their nature they are unsuited to the quick dispatch of business of the kind which is committed to the administrative tribunal.

There is, to my mind, no justice in the opinion that intrinsically the process of a Court is unsuited to the resolution of many of the matters which are now sent to administrative tribunals for decision. Indeed, if such tribunals do their work in a manner calculated to do right to the citizen, they adopt the techniques of the Court. The Boards of Review on Taxation operate in the same manner as Courts, however much we may be assured by the decisions that they do not perform judicial functions in the constitutional sense. That they do their work any better than an efficient Court could do, I take leave to question.

Now all would agree that the tendency to increase the areas occupied by the administrative tribunals should be checked, and if possible reversed. Or, if all would not agree, at least all lawyers should agree, not in the interest of their own profession, but in the interest of the citizens whose rights and liberties so often depend for protection upon the efforts of the lawyer.

That the Courts can be tardy and inefficient cannot be denied. Can we not step up that efficiency and retrieve some of the lost ground? It is to that thought that I would take your attention tonight.

Let us first look at the present situation:

In a developing country such as this, and with the virile and independent populace which we have, resort to the Courts for the determination of rights is a matter of course, and not a step only to be taken if completely unavoidable and in the rarest circumstances. That I think is the general bent of our people. The arrival of the New Australian from Continental countries will probably accentuate this tendency. His background is likely to result in an insistence on rights, and perhaps on their more precise observance. Also, there is today a greater awareness of rights and of the availability of Courts to enforce them. Increased complexity in human relationships and the increasing occasions when rights may be infringed, or duties neglected, further add to the volume of litigation. The realisation of this has caused more people to insure against risks which may result in litigation—thus bringing into the field sufficient money power to exhaust the available remedies or the available defences.

The Courts have therefore to handle an ever increasing volume of business. Already we have become accustomed to a backlog of work in the Courts, necessitating at times a very considerable delay between the occurrence of some incident and the ultimate determination of the rights

and obligations of the parties affected by it. No doubt in times of economic stress or recession the list of business is temporarily mastered and the arrears overtaken. And, apart from identifiable economic causes, there are cyclic variations in the volume of the business of the Court which I cannot pretend to understand. But I think it rather more usual for a backlog to exist, and for it to be increasing in dimension. The extent of the backlog varies from State to State, due partly to the greater complexity of life in one State as compared with another; partly to the level of disposable income differing in the different States; and perhaps partly to the differing temper of the citizens in the various States—more sedate in one than in another—more sporting in one than in another. But, whatever the ultimate explanation, it is presently true that in New South Wales the backlog is very considerable. In the case of the trial of an action at common law, the time which elapses between the setting down of a cause for trial and the hearing may range up to two and a half years, and cannot be expected to be much less than two. Suits in Equity are heard much sooner than this after their setting down, though there have been occasional surges where considerable delay has been involved.

Are there available steps which can be taken to improve our manner of trial, and improve the technique of the Court, so as to obtain not merely a quicker but a more satisfactory resolution of those differences which come, and which could come, before the Courts?

I propose, therefore, to ask your attention for a short time whilst I speak of the work of the Court and the work of the lawyer in the ultimate attainment of justice.

But, first, to what do I refer when I speak here of justice?

No matter how organised politically, mankind seems always to retain the idea that there is a justice which transcends the mere application of promulgated rules of conduct, whether they be promulgated by a despot or by a duly elected authority in a democratic state—some justice which is above and beyond the law of the land. However elaborate the political framework may be in an endeavour to secure that the promulgated rule represents the views—and, indeed, the current views—of the majority of the citizens, there still lurks the idea that the current will of the majority perfectly applied may yet result in injustice; in some invasion or infraction of what are conceived to be inalienable and fundamental rights in the individual. That is to say, there are rights supposed to be beyond the reach even of a democratic majority. So that even a proper and precise application of such a rule of conduct which accords with the views of the majority may yet be thought to be unfair, unnatural, or unjust.

It is not my purpose to explore the many bases upon which this ultimate reservation of the human mind has been sought to be placed, nor the limits within which it is sought to be confined, nor the theories upon which it has been sought to be intruded into the positive laws of the community from time to time.

I call attention to this idea of justice because I am minded to say that, however efficient in other respects our curial processes are, justice in that

large sense must never be left out of our calculations and, indeed, ought to be our ultimate goal. For it is surely basic to the stability and political health of the community that its citizens should firmly believe that their sense of fairness and right, which is after all their measure of justice, will be satisfied by the decisions of the Courts, and that this belief is fully justified by the performance of the Courts themselves.

So persistent is the desire of the common man in our communities for the fulfilment of his sense of fairplay and what he calls "common justice," that he is apt to overlook the fact that, however proud the title "Royal Courts of Justice" may be, they are really Courts of Law administering positive rules, either made by a legislative authority or fixed by course of decisions completed in earlier days. Theoretically Courts do not make the rule, nor are they concerned to attain abstract justice. For the greater part, it is the task of the Legislature to see that the gap between what the common man regards as fair and right and the positive rule of law to be administered by the Courts is minimised. But, of course, with differing political philosophies in the community and in government, the gap can never be closed. The common law, springing as it does so largely from contemporary views and dealing mostly with age-old relationships, panders to the common man's sense of right. Its adoption of the criteria of the reasonable man is no mean concession to this notion. Consequently, where the Court's function in the particular matter is the application of a doctrine of common law untrammelled by statute, the tendency may be to decide the matter in line with the current views; at least with the views of the generation in which the Judge was nurtured. Individual idiosyncrasies may sometimes make the Judge's appreciation of that view more conservative, or sometimes more liberal; but basically his decision will probably stem from the influence of the community upon his mind not only through his training but from the fact that he lives in it, and in a sense it lives through him.

The rule is likely to be declared as of this day and generation, unless factors in the background of the matter or the personality of the Court either cause it to lag by at least half a generation behind the present, or, indeed, cause it to reach forward half a generation beyond it.

I have said, in passing, that the Courts are basically Courts of Law; that they apply a positive rule to ascertained circumstances; and that they neither make the rule nor sit to find and declare absolute justice. Whilst the ordinary citizen is apt to lose sight of this fact and too readily compare the verdict of a Court with his concept of fair play and of right, it would be foolish to imagine that there do not exist within the framework of the Courts as Courts of Law mechanisms which can on the one hand permit a degree of legislation, and on the other hand afford opportunity for doing justice in the larger sense of the word. Where mere common law considerations are involved, there may be a precise and compelling precedent; or, as is more often the case, there may be an absence of a precise precedent, though much from which, by the exercise of a mere logical process, a sufficient extension of the existing rule could

be made to cover the circumstances to be judged. But, in any case, precedent is rarely so precise, and rarely so expressed, as to leave no room for discussion and difference of opinion as to what in truth was intended to be decided. Herein lies an opportunity—and fortunately, I think, at times utilised—to bring the precedent up-to-date and to decide the matter in conformity with current views, and to express it in the current idiom. This in a real though not in a theoretical or formal sense is a form of legislation: and an opportunity to approximate the law to the current notion of justice.

The assertion that the common law is not a logical code which may be reasoned deductively does not do other than recognise that the Court, where common law considerations alone are involved, does make rules of conduct, and does in a very real sense legislate. That in theory the Court is said merely to declare the law as it always was and has been but thinly disguises the fact that, on occasions where precedent is not precise and compelling, it truly makes it.

Again, the statutes of the Parliament and the regulations of subordinate legislative authorities are the creatures of such bodies and derive their force from the standing and authority of those bodies. But, of necessity, statutes and regulations must be expressed in language. It is inevitable that language at times cannot be so devised as to embrace and cater for situations which could not reasonably have been foreseen; nor, indeed, can language always be expected to provide a precise and exhaustive expression of what is being sought to be done in known and anticipated circumstances. Added to this is the circumstance that the expression itself is so often the result of more hands than one, the result of an endeavour to compromise differences by verbal formulae which even when devised are recognised to be ambiguous or incomplete. Indeed, that vagueness or incompleteness is often itself a designed part of the political or administrative compromise out of which the formulae arise.

The task of interpretation of the statute or regulation is assigned to the Court. Here the rule is plain enough. Plain and unambiguous words must be given their ordinary meaning. Or, if there be an artificial meaning assigned to them by the statute or regulation, either expressly or impliedly, they must be given that meaning. But whether the words are plain and unambiguous is not itself a question which always admits of an unambiguous answer.

If the expression either be actually ambiguous, or be thought by the Court to be ambiguous, the door is opened to an indefinable and imprecise degree for the consideration of the question of the policy which is discerned, or thought to be discerned, behind the statute or regulation. No doubt the rule is that any relevant policy be discerned in and by the statute or regulation itself read against the background of the situation in which it was passed or made. But, however much the mind may endeavour to confine the enquiry by such a circumscribing rule, in truth the policy of the statute or regulation is as often as not found from a much more widely ranging panorama than that which the mere words of the

statute or regulation itself affords. Here, then, is scope for accommodating the promulgated rule of the legislator to what is commonly understood to be right and fair. The ambiguity is so often resolved by denying to the legislator an intent which does not accord with that sense of right which the court entertains in the circumstances. If the court is in tune with the times, that sense of right is likely to be the accepted view of the contemporary community.

But there is one further avenue which I ought to mention, however briefly. I refer to the many discretions which statutes and regulations give to the Courts. They range over a vast field, and they call for the exercise of great wisdom and great judgment. Often the statute or regulation circumscribes the exercise of the discretion by its own policy, or even by its own express limitations. But, broadly speaking, and without any attempt at more precise analysis, it may be said that these discretions afford an opportunity for the Court to do right as distinct from merely giving judgment on "the bond."

In all these areas there is some opportunity for Courts to legislate, to make the rule of conduct as distinct from merely applying the rule decided or promulgated by others. Great reliance is necessarily placed not merely on the knowledge and wisdom of those who compose the Bench, but on their integrity and their unremitting application and care. This last is not by any means the least of the virtues to be expected of those who compose Courts.

It is from the legal profession that these men must come: for we cannot contemplate with any equanimity the formation of Courts where unqualified laymen shall be the Judges. The personality, training, background and standards of those who form the Courts is of paramount importance when the degree to which they may legislate is considered. As I have said, they are drawn from the legal profession, and the Courts of tomorrow can be no better than the legal profession of today. Its training needs to be broad based, ranging far beyond the mere knowledge of the law itself; its experience should give it scope for developing judgment and wisdom. Its work calls for a great deal of knowledge, for a great breadth and wide horizon of human experience, and a very sensitive appreciation of the mood of the times. Mere legalism does not do. History, philosophy, political economy, and economics, all must be brought to bear if any attempt is made to be just in the sense I have mentioned; in the sense of expressing and satisfying the notion of fairness and right. To improve the efficiency of the Courts, a basic step is to improve the training of the lawyer. In these days when the clamour is for technicians in material and scientific matters, it is likely to be hard to obtain the necessary funds and the attention of those who control them to sponsor or implement this training: but we must not lose any opportunity to press that point of view.

Having said so much — may I hasten to enter a caveat against any possible misunderstanding of what I have said.

It is part of the genius of our people that they can administer a system of law which permits of illogicality—and much of it is illogical—and of so much trust and confidence in our fellow men who may be fulfilling the functions of the Court for the time being. But it would be straining that genius much too far for it to be conceded for one moment that certainty, and particularly the ability to foresee and foretell a result, should be completely forfeited in the search for this wider justice of which I have spoken, and to do so by relying on the Court's own sense of right and justice. I do not think it can be contested for one moment that by far the better course is that the Courts should, as far as they possibly can, confine themselves to the precise and full application of the known and the promulgated rules of conduct to the circumstances of the case.

Those situations where some degree of legislation is proper, and those occasions when it is right to pander to the fullest to the common man's passion for what he thinks to be just, are really few. They ought to be the great exceptions which demonstrate the strength of our legal system, and its ability in the general run of cases to achieve a fair and right solution by the application of the known or promulgated rule. Any other view—a view which reintroduced the Chancellor's foot—must result in a government of men, rather than a government of laws.

I have so far sought to make two points. Firstly, that Courts are Courts of Law, whose predominant function is to ascertain and apply the known or promulgated rule of conduct to the ascertained circumstances of the parties before it. And, secondly, that there are occasions when there is an opportunity for the Court to legislate, and perhaps fewer occasions when it is proper for the Courts to take advantage of that opportunity in an endeavour to do justice in the sense I have mentioned.

I turn now to the more usual function of the Court—that of applying the known or promulgated rule to the ascertained facts. That they be just in the exercise of that function requires a proper application of the law and an expeditious hearing and decision of the controversies before them. The task of applying the known or promulgated rule to the ascertained facts is by the very expression twofold: First, to ascertain the facts and circumstances fully and with precision. Secondly, to ascertain the relevant rule—the relevant law—to know it with precision.

Our traditional method of performing these two functions is to assign each to a different tribunal or element in the Court itself: to the Judge the question of law, and to the Jury the ascertainment of fact. But today we have moved towards the trial of fact by the Judge alone, and we have blurred to some extent the sharp line which was formerly more readily seen between the two provinces of fact and law. This has been done in the desire, it is said, for expedition and for certainty; and also, it is said, for the more exact and sensible ascertainment of the facts. Into those assertions it is not my concern to go. What I want to say must be applicable both to those places where facts are still determined by Juries, as well as to those places where they are determined by the Judge himself. Our method of ascertaining the facts is by the production of witnesses and

documents, and for the accuracy and veracity of witnesses and the authenticity of documents to be determined by a process of examination and cross-examination; all followed by a discussion between counsel and the tribunal of fact, Judge or Jury as the case may be, as to the relative weight of the evidence, as to its meaning, and as to the inferences which ought to be drawn from it. Our method of ascertaining and determining the relevant rule of conduct is by oral submission of counsel to, and discussion with, the Judge; he being assisted by reference to what are said to be the relevant legislative provisions and authorities.

These are excellent methods and need little fundamental change. They fail, at times, to produce the satisfying results of which they are capable, and to do so expeditiously, because the matter to be decided has not itself been resolved and made certain, or because there has been insufficient preparation of the case for hearing or discussion. These are the points at which some attack can, and I think must, be made in an endeavour to improve the efficacy of the curial process. Procedures which may lead to the better ascertainment and definition of the matter in controversy, and to its more rapid and efficient resolution, ought to be carefully examined with a view to their adoption. For it is basic to the administration of the law that differences of parties should be resolved with expedition as well as with as much certainty as is humanly possible. Justice delayed, it is said, is justice denied—and that is always true. Inefficient or incomplete resolution of controversies leads also to a feeling that justice has not been forthcoming. Yet the case must be argued and heard in a calm atmosphere where, no matter how efficient the Judge and Counsel, an almost leisurely pace must be adopted. No man can feel justly treated whose case has been rushed through. The great and pressing problem, I think, is to find the time to deal in the proper fashion with the great volume of litigation which has and is yet to come upon us; to do so with expedition and yet in so leisurely a fashion that justice will both be done and appear to be done.

The matter to be examined by the Court at the hearing, the matter in controversy (whether it be of law or of fact), is to be deduced from the assertion of one side, and the denial of the other; in short, by pleadings which have taken place before the hearing. We have provided a number of procedures whereby a party may guard himself against surprise (always an enemy of justice), and may save himself the trouble and expense of proof of facts and circumstances which are not really in dispute.

But we have not exercised any supervision of the pleadings, nor any compulsion to use these mechanisms to avoid surprise and for the elimination of unnecessary proof.

Self interest of the party and the obvious advantages of these procedures, plus the fact that party and party costs are recoverable against an unsuccessful litigant, have been thought sufficient to ensure that the issue will be well defined and that the case will be fully prepared by the time of the hearing. But such reliance has failed to take account of at least two

factors. One is the sporting instinct of our people which in a battle of tactics is apt to lead them to take a chance and enjoy the race. The other is, I am ashamed to say, the lethargy of the legal profession itself in the preliminary stages of a litigation.

We have heretofore been content to allow the party to set down his cause for hearing so soon as his pleadings are complete. Whether or not he is at that stage ready for trial has been left to his own concern. Whether or not he has pursued the various steps which are necessary to put him in a position to try the case have equally been left to his own discretion. And, where the Advocate's side of the profession is divided from that of the Solicitor, there has been no attempt to see that the Advocate has been fully instructed in sufficient time before the actual trial begins. Those of us who have spent some of our days in the trial of causes, and afterwards in the presentation of appeals before Courts of Appeal, are daily impressed with the fact that too little is known of the case at its inception, and that its real understanding on many occasions comes to Advocate and Judge alike too late for a satisfying job of work to be done.

This is the more disappointing because I think there is in this country today a greater desire to be right—and to be precisely right—in the result of a case than may have always obtained. There is, I think, a desire to examine the facts and the law more carefully and more thoroughly than heretofore. The traditional English habit of mind, with its very proper and effective sense of compromise, has at times rather tended in the direction of taking a broad cross-section of a matter and doing what is sometimes well described, and at other times but euphemistically described, as "substantial justice." But, where a Court or a profession is of a mind to make a more precise examination, and to effect a fuller and more exact resolution of the differences of the parties, there is this constant regret that a real understanding of the case has come too late, and that earlier a better examination of its facts and a more searching perusal of the relevant law ought to have been made.

The failure of the parties to digest and sort the facts of the case and to clarify the issue at an early stage is, it seems to me, one of the large factors in the length of the trial of actions. Even where the pleadings have been settled in good faith and with skill, it is often found that they have been settled with an insufficient knowledge of the facts of the case. Consequently a common experience is to find the pleadings readjusted at least once and sometimes more than once during the hearing itself. Indeed, at times there is a tendency to amend them at the conclusion of the case in order to accommodate them to the facts which have by that time been proved. Thus a goodly part of the time of the hearing is absorbed in an endeavour to ascertain what really is the basic difference between the parties. Also, so often a point remains in difference on the pleadings until during the hearing irrefragable evidence with respect to it causes it to disappear from the case. Time lost in one case is time

denied to some other case; ultimately avoidable delay stands between the litigant and his relief, and justice is in truth denied. The result is both delay and inefficiency.

To my mind one advance towards the remedy is fairly plain. Steps must be taken to ensure, firstly, that the statement of the matter in difference (the total pleadings of the parties) does represent the matter actually in difference, and, secondly, that the parties have really explored their cases so as to be ready to try them efficiently, and that this work has been properly done before the hearing begins.

To achieve these results, I think the Court can no longer remain passive relying merely on the self interest of the parties. Active steps involving the participation and co-operation of the Court are required. It may be said that the case is the party's own business and that he pays for his own dilatoriness and failure to use the available procedures. But the Court's time is not for him alone. It is public time and cannot be frittered away inefficiently by one litigant, even if he does pay for the privilege.

However, before exploring what may be done, the cost of litigation must be borne in mind. It is of necessity an expensive affair. It is to my mind but doctrinaire folly to imagine that it can be cheapened so as to bring it into the daily commodity class. To attempt to cheapen it beyond the point where those engaged in it obtain that reward which will ensure competence and efficiency, is to destroy its utility to the litigant. At that point it ceases to satisfy the citizen and merely rankles his sense of justice.

On the other hand, in making any suggestions for alterations in procedure, one must have a clear eye upon the costs involved in the alterations. It is the total efficiency of the curial process which must be regarded, and in that total the cost of attaining the result is a real factor.

What steps can then be taken? I want to mention two to you, as matters for consideration. One involves little change in our present system: the other would be a distinct innovation.

The first is a restraint on the ability to set a case down for hearing as a means of compelling a better definition of the issue and a better preparation of the case. As I have mentioned, this can now be done at the close of the pleadings—and indeed must be done or the carriage of the case in that respect passes to the opposing party who may then set it down. My suggestion for consideration is that no setting down be permitted until the mechanisms to ensure that the issue is properly stated have been used, that all undisputed or indisputable facts are admitted, that documents in the possession of the parties have been inspected, and other examinations have taken place.

Most procedural systems provide for the discovery of documents, for the serving of notices to inspect and admit, and of notices to admit facts, for the production of a party for physical examination in connection with injury received and for the production and examination of material objects who quality, character and condition are in dispute. Some systems provide for interrogatories, and most for the giving of particulars. A

proper use of these mechanisms not merely prevents surprise but affords material for the adjustment of pleadings and the reduction of the area of dispute. It seems to me that it would not be in the least unjust, but on the contrary very conducive to a just result, if a case was not allowed to be set down except upon an affidavit by a principal of the legal firm retained in the case that at least 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.

(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. This may seem controversial; but a great source of surprise and of waste of time is to be found in the sudden production of an expert, about whose qualifications and experience no enquiries have been able to be made and whose point of view has not been considered before the time when he orally expresses it in the Court. The point is well enough made if one has in mind the expert in a valuation matter who brings forward sales which are claimed to be comparable but of whose existence the opposition happens to be unaware. In such a case the cross-examination is lengthened and likely to be futile. A real opportunity should be afforded to test the expert and to verify his basic assumptions. Only pre-knowledge of what he desires to say will do this. There would seem to be no reason why such reports should not be exchanged, thus placing each party in a position to interrogate the witness on an informed and considered basis. Also, the mere fact that the report was to be exchanged would tend to make the expert himself more precise and more careful; both the expert and the party are likely to know more of the case because of the impending disclosure to the opposition of the expert's view, whether it be as to damages, or some matter going to the cause of action.

(7) That statements are in hand from all witnesses known to be available. I feel that only too often no statement is taken which can be

> quietly assessed before the cause is set down. The precise recollection of the witness is often not known till the very eve of the hearing. And in systems where Advocate and Attorney divide their functions, it is left to the Advocate to see the witness with but a sketchy outline of what possibly he will say.

If all these steps are taken, I feel the case will be better understood at an early stage. The parties should be required thereafter, when all the information which these processes have yielded is to hand, to reconsider the pleadings and to make any amendments thereto which such a review of the case appears to demand. Such amendments should be as of course, questions of cost and of times receiving separate consideration.

There is left one step which I think would be fruitful. How often is a day of the Court's time wasted by a settlement taking place at the Court door? Every encouragement must be given to the disposal of the case by settlement, but this recurrent disruption of the Court's business could surely be minimised, if not avoided altogether. Delayed and last minute settlements may be due to many causes, but at least a belated realisation of the weakness of the party's own case, or of the strength of that of the opponent, is a frequent one: and the unwillingness of either party to open negotiations is another. So often it is thought to be a sign of weakness and of want of confidence in the prospects of success to make an offer or to write an offer of settlement. No doubt far too much emphasis is placed upon this supposed indication, but none the less it is a view really held by many very competent practitioners. This results in there being no approach for a settlement until perhaps at the Court door, or after the Court has assembled, and then, at times, only because of a remark made from the Bench, or from some chance circumstance which allows one or other of the parties to begin negotiations without apparent loss of face. I think if the parties were required to confer with a view to settlement in every case prior to the setting down of the case for hearing and after they have completed the interlocutory procedures, this element of nervousness in commencing negotiations would disappear. As the conference must take place, neither party would lose face. This would not preclude a settlement at an earlier stage. Thus, I think that the party setting down the case should be required to establish that, after all the interlocutory procedures were concluded and statements of all witnesses in hand and pleadings had been reconsidered and if necessary re-shaped, a conference had taken place, specially appointed for the purpose, in which the prospect of settlement had been bona fide discussed between the representatives of the parties, each of them having authority to dispose of the matter on terms nominated to him by his client, no doubt after discussion with and advice by the representative prior to the appointment. This also would ensure that the parties had not only evaluated their cases, but had crystallized in their minds what precisely they were prepared to accept to resolve them. I do feel that many cases would be disposed of at this stage which now await the Court door for what is considered to be its value in terrorem, or its value in compelling a final decision to be made

by a vaccillating party. Indeed, it may well be that many cases would be settled at that stage which later go on because of the added expense incurred subsequently to the setting down, or merely because, the hearing being imminent, the sporting interest of a party overbears harder and more mundane considerations.

Of course, one realises that there must be no coercion to settle. Few things give less satisfaction than a case which has been unwillingly and grudgingly settled. But to require the possibility of settlement to be explored is quite a different thing.

In connection with all these requirements a very useful sanction exists in the disposition of the costs of the case when it is finally heard. Parties who make inadequate use of the interlocutory procedures, or who wrongfully refuse admissions, or wrongfully privilege documents, etc., should bear the penalty of costs wasted thereby. No doubt difficulty in segregating such costs may be experienced, but I cannot imagine that such difficulty cannot be overcome with skill, or by the use of approximations fairly based on experience.

I believe that by thus compelling resort to procedures which are now used by all who prepare the case well, and with the co-operation of the legal profession itself—of which I want to speak in a moment—the case would be better understood and its trial would be both more expeditious and more efficient.

To protect the defendant parties, and also to ensure that matters are dealt with while they are fresh, I am inclined to think that the case should be required to be set down within some stated time, unless a Judge should otherwise order, with appropriate consequences if the case is not set down in that time. This would ensure the prompt use of the interlocutory procedures by both parties.

It may be that, with this degree of compulsion, no further supervision of what the parties have done need take place. Or it may prove of assistance to have the case called within a matter of a few weeks from its setting down before a master, drawn from practice at the Bar, who is skilled in pleading and the interlocutory procedures, who would satisfy himself by brief discussion with the parties' representatives that in fact all the possibilities of the interlocutory procedures had been exhausted; that all possible admissions had been made; and that the pleadings did in fact represent what the parties wished to contest at the hearing.

Now, the making of rules is one thing, and their administration is quite another. And in connection with such procedures as I suggest, the legal profession forms no inconsiderable part of the administration. I was very impressed recently with the willingness of the Advocate in some of the jurisdictions in America to co-operate with the Bench in narrowing the issue and disposing of all matters which were not truly in contest. It may be that the interest of the Advocate in the result, in that he may be upon a contingency fee, might well explain, to some extent, his willingness to co-operate. But I do not think it really explains it all. I thought their general relationship with the Court very good. No doubt our traditional

zeal for tactical manoeuvre, and our treatment of a trial as akin to a sporting event, dispose us against such compulsion. But trying cases must be a business and not a mere game of chance.

This brings me to the relationship of the profession to the Courts, and to justice. The profession occupies a most unusual position in the community. We are practised in what is, in very truth, an ancient mystery. The common man who thinks that law is common sense might be right if he watched the consummate lawyer at work in all his deep simplicity and with that ease which conceals the great learning behind the apparent simplicity. But none the less the law is a mystery; and those who have mastered its intricacy have indeed great power in their hands and great responsibility. But, beyond this general responsibility which derives from the possession of knowledge and skill, there is the peculiar relationship which the practising man occupies in relation to his client, on the one hand, and to the Court and his brother professionals, on the other. For he is never merely the alter ego of the client. To him he owes unswerving loyalty. At his disposal must be placed the whole of the resources of mind and all the skill of which the lawyer is possessed. But that he is called an "officer of the Court" is no mere description. It is a recognition of the fact that the lawyer is an indispensable part of the administration of the law and the attainment of justice.

I am not concerned, tonight, to say anything of the lawyer's part in safeguarding the community against the oppression of authority, or the excess of power: that is itself a great function, calling for a vigilant eye and a ready appreciation of the situation. But I am concerned to stress the part which the lawyer plays in seeing that the wheels of the Court run smoothly, and that its processes are efficient. The lawyer who thinks that there is an advantage in obstruction, or in refusal to abbreviate a matter and confine it to essentials, not only does the Court great injustice, but damages his own profession. For, to my mind it is axiomatic that efficiently conducted litigation which is not allowed to range more widely than the real matter in dispute, and which places expedition and certainty before sportsmanship, encourages litigation, and must tend to bring for resolution by law many differences which might not otherwise be litigated but be disposed of by the uneven and unjust compromises of necessity or the unsupervised decision of an administrator. Inefficient drawn-out litigation simply results in the failure of many not only to receive, but even to seek, redress for undoubted wrongs. On the lowest ground, it results in a diminution of available opportunities for the lawyer to serve the community. But, even more importantly, it justifies the charge of inefficiency and encourages the use of administrative tribunals.

The profession is never stronger than when it is able properly to balance these two calls—the obligation to the client and the obligation to the Court and to the administration of the law. It is a difficult balance to maintain; but a strong profession does it. It is then able by its own strength and its own direct intervention to prevent needless waste of time in the idle pursuit of the immaterial and irrelevant and it is able to advance the efficiency of the Court's own processes.

Much more time will have to be spent on the case out of Court, there will have to be more paper work, and the legal profession will have to do this work if the efficiency of the Court is to be improved and delays avoided.

Time does not permit me to mention steps we might take in facilitating expedition of the ascertainment of the relevant law. I must turn to the other possible step which may be taken to accelerate the hearing of a case and which I said would be an innovation:

Is there any advantage for us in the use of what the Americans call the pre-trial conference? This question I do not propose to answer myself, as there are yet many facets of it to be examined; but I feel that the time has arrived when it ought to be considered and answered in relation to our Australian scene whatever views may be held elsewhere. A description of this procedural expedient will, I am sure, be of interest to you. It has been adopted in the American Federal Courts where its use is mandatory, and in those of a number of the States, in some of which it is mandatory and in others optional. Its adoption in America has sprung, I think, largely from the need to find a method of overtaking the mounting arrears of work with which many of the Courts there were, and indeed in some instances still are, faced. But its invention, and indeed its advocacy by many who espouse it, was and is really due to a desire to make a trial of an action more certain, less haphazard and fortuitous, more thorough and efficient.

Before I describe it, I ought to say that it sprang up in a legal system where, broadly speaking, the art of pleading scarce existed, where strict proof in meticulous detail of all manner of formal facts was required, and where no costs as between party and party are ordered. You remember that it is not customary in America for the losing party to be ordered to pay professional costs. The order for costs is limited to Court costs which are of no real significance. The lawyers are permitted to charge a contingency fee which may range up to 50%, or perhaps more, of the amount recovered or saved in a litigation. The party and the lawyer are free to make their own bargain, though an endeavour is made to impose restraint by the appropriate Bar Association. Recently the New York State Court of Appeals disallowed a rule which sought to limit the contingency fee to, I think it was, 30% or 33⅓% of the recovery.

These features are not present in our system and the ability to order costs against the losing party is a very useful sanction against many of the abuses which, I gather, were prevalent in parts of America, where needless time was taken in proof of formal facts and the area of the evidence was widened beyond the matter in dispute.

Two further things I should say before going further. The first is this: that the grounds upon which a document may be privileged from inspection in America are much narrower than they are with us, and indeed in some instances scarce exist. The policy of discovery is really one of cards upon the table. The other is that as part of the process of discovery

in many of their systems a party may demand the production of his opponent, or of his opponent's witnesses, before the trial before a notary public for examination and cross-examination which is reduced into the form of a deposition. Both these things appear strange to us, and it may be that we are not ready for their adoption, if, indeed, at any time we would be prepared to do so. The extensive nature of the discovery and inspection which can be obtained is thought by many American lawyers merely to provide a weapon by which a party with an unmeritorious claim may unjustly induce settlement because the cost and inconvenience of the discovery is so great.

With these preliminaries, let me describe the procedure. After the case has been placed in the calendar it is called before a Judge doing the pre-trial work for the time being and the parties are asked if they are ready for trial. If they are not, some examination is made of the reason why they are not, and some effort made to expedite their preparation. If they say they are ready for trial, they are asked if they are ready for a pre-trial conference. If they say "Yes," then an appointment is made for a date and time for that conference. If they are not, the case is re-listed within a short time within which they are expected to be ready for the conference. In some systems it is mandatory that there be a pre-trial conference in every case. In other systems it is optional. But, if they are ready and—where the matter is an optional one—willing, the rules provide what is to be done. They have to file with the Judge a statement of the salient facts of the case as they maintain them to be, together with the basis from which liability or defence is based—what might be called the "theory" of the case or of the defence as the case may be—and of any admissions or orders of an interlocutory nature which they want.

These statements in some systems are kept confidential to the Judge, and not shown to the opponent. In others they are exchanged. But in all systems the Judge is required to study the two statements and the pleadings of the parties before the date set for the pre-trial conference. Each legal representative is required to come to the conference fully apprised of the case, and in some systems he is required to be armed with authority to settle it.

The manner of conducting a pre-trial conference varies considerably from place to place and from Judge to Judge even within the one system. Many sit formally in open Court, robed; others sit in Court unrobed, informally; others, again, sit in their chambers or in a robing room adjacent to their chambers and endeavour to cultivate as great an atmosphere of informality as is possible, even to the point of allowing the legal representatives to smoke during the session. However, once assembled in whichever forum the particular Judge prefers, the procedure is for the plaintiff's representative to explain the case as he understands it, and thereafter for his opponent to give his understanding of the matter. The Judge enters into discussion with the two parties in an endeavour to understand precisely what is the nature of the case. He examines the pleadings in the light of that discussion and sees whether all the necessary

parties are before the Court, and whether there are unnecessary parties. He then seeks to ascertain whether there are any admissions ("stipulations," as our American cousins call them) which either party desires the other to make. If there are admissions which are made, these are noted. If there are admissions sought which are not made, the Judge enquires whether the existence of the fact not admitted is really in dispute, or whether it is merely a question of putting the other party to proof of its existence. If it is the former, nothing more is done. There is no endeavour to try any disputed fact. The resolution of a fact whose existence is actually in dispute is left for the trial. If, on the other hand, it is not admitted simply because proof of it is required, the Judge may ask the party seeking the admission to proffer what proof he has of the existence of the fact to his opponent, either then or at some subsequent time which is then fixed, so that the representative can be satisfied of the existence of the fact, and thereafter admit its existence. The Judge enquires whether discovery has been had, or whether any further discovery is required; whether any physical examination has been had, or whether any further examinations are required; whether reports of experts have been exchanged; ascertains whether there are any items of damage which are admitted, or of which less than full formal proof is acceptable. He then enquires whether there are any pieces of evidence such as photographs, plans, charts, and the like, which the parties are prepared to have admitted in evidence without any formal proof. If they are, he initials the documents so that they may be tendered at the trial without any further proof. I add that this is a very substantial saving of time in Americans systems where it seems to be customary for a party to have to prove formally that the photograph was taken, developed, printed, etc., before he can tender it in evidence. And so, also, with plans drawn to scale. The proceedings being, as I have said, informal, and being mostly before a Judge who will not ultimately hear the case, some progress is frequently made towards the simplification and definition of the issues and of the actual facts of the case.

At the end of the discussions the Judge usually, in the presence of the two representatives, dictates a statement of the facts of the case and of the legal issues and defences involved, of the admissions made, and of the documents marked as available for tender without formal proof, and of any interlocutory orders he has made. The statement of the facts includes a statement of damage, and of the admissions which are made with respect to it.

If the legal basis for a claim, or for a defence, is not commonplace, but involves some argument and investigation of the law, the Judge will often require that a brief be filed: that is to say, that the parties file with the Court and exchange with each other within a stated time before the trial date written submissions together with the authorities upon which reliance is to be placed. Having done this, the Judge may enquire whether the parties have discussed settlement, or whether it is worth while them doing so now. If they wish him to do so, the Judge lends his good offices. If

the parties say that there is no useful purpose to be gained by discussion, in some systems the matter of settlement is pursued no further. In other systems the question of settlement is given much greater prominence, and at times the Judge actively participates in an endeavour to bring the parties together so as to dispose of the case by settlement. When treated in this way, the basic reason and justification for the procedure is denied and a false emphasis is given. This form is unlikely to commend itself to practitioners. It certainly does not commend itself to me.

The pre-trial statement supersedes the pleadings and is the only part of the pre-trial conference which may be referred to at the hearing. This brief description of the method shows clearly enough that, when skilfully used, it can tend to compel the parties to know their case, and it can provide a means of at the one moment defining the issues between them and of eliminating unnecessary proofs.

It places quite some weight on the Judge, and its results are likely to be affected both by his personality and skill and by the application with which he essays the task of understanding the case.

Its advocates claim great things for it, whilst its critics regard it as a waste of time and as merely a means of increasing expense. Its critics are more vocal in connection with its use in the ordinary running down case. Just the same, in a speech in 1956 dealing with Court congestion, Mr. Justice Brennan, now of the United States Supreme Court, when he was a justice of the New Jersey Superior Court sitting with the late Chief Justice Vanderbilt (who was himself a great reformer of procedure and a champion of this particular procedural device), said this:—

> "It used to be in our State that a sizable segment of the Bar questioned the efficacy of pre-trial procedure in automobile accident cases. They considered it a waste of time because of the supposed simplicity of the legal and factual issues in such cases. To show you how that attitude his changed, I need only tell you that about ten days ago at the annual meeting of our State Bar Association a proposal to make the procedure voluntary in automobile accident cases was soundly defeated."

Also, a plebiscite of the Trial Lawyers International Association of Insurance Counsel in 1953 resulted in a statement:—

> "That there is no doubt that a properly conducted pre-trial hearing with the idea of settlement only a by-product and not a primary aim produces a high percentage of settlements short of actual trial. Calendars are expedited by pre-trial hearings in all types of cases."

As I have said, I do not myself offer any concluded view at this moment about this procedure. It not only calls for a high degree of application and skill on the part of the Judge, but also for a very adult and co-operative legal profession. I mention it as perhaps a slightly different approach to the one I mentioned earlier to the problem of insuring that a case is prepared at an early stage with its issues properly defined.

It may very well be that the first method—that of requiring all the interlocutory procedures to be exhausted and settlement to have been

discussed before a case may be entered for hearing—would be all that was necessary in cases of simple factual and legal issues. On the other hand, in more complicated cases some form of the pre-trial device might insure that the hearing was not delayed or lengthened by a belated endeavour to ascertain the precise issue and to eliminate the unnecessary and immaterial proofs. I am inclined to think that in a complicated case, particularly in commercial causes, a discussion between Counsel and Judge, even with the Judge who is to try the case, at a relatively early stage in the litigation would bear fruit and result in crystallising the issues and would stimulate the parties to understand their cases to a degree which would make the subsequent hearing more efficient.

This brings me to my last thought: I have called your attention to the occasion when justice may transcend the law—the mere application of the rule—and have reminded you of the breadth of training the lawyer needs to wield judicial latitude and discretion. I have reminded you that Courts must make up lost ground and again deal with the matters which most concern the citizen of today—so many of which are relegated to the administrative tribunal. Courts were the form of tribunal adopted to deal with the matters which at their inception most nearly touched the life of the citizen of that day. Today they do not do so. The ground thus progressively lost must be made up.

But the efficiency of the Court's process and the expedition with which it transacts its business is in need of repair. Much could be done. I have touched on one or two possible expedients. Yet perhaps most important of all is the part the legal profession—whether on the Bench or at the Bar table—can play in the demonstration that the Court can efficiently handle the determination of the rights of the citizen. We must begin with the present business and experiment a little with method. That calls for the co-operation and enthusiasm of the profession: even perhaps a change of heart. Integrity and our professional standards are not enough. Efficiency, as this generation demands it, must be our watchword. Thus Court and lawyer do attain justice.

POSTSCRIPT: Since delivery of this lecture, a new scheme has been introduced in New South Wales for bringing matters on to be heard. As announced in the *Australian Law Journal* of 23rd June, 1958, the scheme requires that the solicitors of both parties receive written notice that their case will be listed for mention within thirty days. Where the case comes on to be mentioned the respective solicitors will be required to furnish information as to whether all witnesses are available or have been subpoenaed; whether discovery and inspection have been completed; whether all appropriate particulars have been requested and furnished; whether all mestical examinations, views and other preparatory steps have been taken; whether briefs have been delivered, and any other relevant information as to the nature of the case. Only if the Judge before whom the case is mentioned is satisfied that it is ready to proceed will a date for hearing be given—and as far as possible the case will be heard on the date so fixed.—*Editor.*