Expediting Civil Litigation:

A Survey of Commonwealth Jurisdiction

Commonwealth Secretariat

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Prepared for the Commonwealth Secretariat

by

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C O N T E N T S

INTRODUCTION

Terms of reference

1.1 The Commonwealth Law Ministers in August 1977

> "expressed their grave concern about increasing delays in the administration of justice - a problem faced by almost all Commonwealth jurisdictions. They agreed that it was one which called for positive and urgent action; and pledged themselves to providing remedies which in no way jeopardised the quality of justice and which respected the fundamental rights of all persons under the law."

1.2 After initiating action regarding criminal procedure, the Director of the Legal Division of the Commonwealth Secretariat wrote to correspondents around the Commonwealth, inviting them to report on any action that had been taken in their countries in recent years to expedite civil court business. In September 1981, he wrote on similar lines to Bar Councils and Law Societies, in the hope that they would not only add information but also present it from a different angle.

1.3 This paper is a collation of the information that has been sent in, with some additional information and some comments: it is not the result of original research.

1.4 Correspondents were asked about action that has been taken. Some confined themselves to giving that information and it has been incorporated here. Others described the systems in use in their countries and some reported the recommendations of commissions and other advisory bodies. The major recommendations have been mentioned in this paper but not, generally, descriptions of systems that have been in use for any considerable time.

1.5 It follows from the nature of the inquiry that some countries have reported as innovations or experiments practices that have been in use in other countries for a long time and which were therefore not mentioned by the correspondents in those countries. The space devoted to any particular subject tends to be determined by the number of correspondents who referred to it, rather than to its importance in the overall scheme of procedure. The result is a collection of notes rather than a systematic study.

1.6 Matters of detail and matters that are likely to be significant only in the country where they arise have not been included. In particular, no mention is made of procedure under French or Roman-Dutch law.

1.7 No mention is made of procedure in jury trials, as there are today so few in civil cases.

1.8 Although the cost of litigation is closely related to the expeditious disposal of business, it is outside the scope of the present exercise.

1.9 The terms of reference are limited to the administration of justice by the established courts and no attempt has been made to deal with subjects such as conciliation, arbitration (except as a function of the courts) or the use of extra-judicial tribunals.

1.10 This paper parallels a similar survey of measures taken to expedite criminal proceedings, prepared by Ms Judith A. Osborne of the Centre of Criminology, University of Toronto and published by the Commonwealth Secretariat under the title, "Delay in the Administration of Criminal Justice: Commonwealth Developments and Experience".

The meaning of delay

2.1 References to delays in the administration of justice mean, of course, excessive or unreasonable delays. No-one could reasonably expect to be able to walk into a court and have a grievance righted immediately, even in the most trivial matter. At the very least, the other party must be given notice and must have the opportunity to present his case. Court time is expensive and must be carefully scheduled. A lawyer has more than one client

but can only attend to one matter at a time. There are uncontrollable factors, such as sickness, which may afflict judges, counsel, solicitors and witnesses.

2.2 The litigant, whether his claim be large or small, feels aggrieved if, having taken all appropriate steps, he fails to obtain a remedy within what he considers a reasonable time.

2.3 It is impossible to prescribe what is a reasonable time. Cases, even within the same general categories, vary in the time they need for preparation and hearing. It is possible, and necessary, to fix time limits within which the steps of a proceeding are to be taken but the system must be sufficiently flexible to allow those limits to be extended. Courts are usually reluctant to extend time but will nearly always allow more time rather than risk a possible injustice.

2.4 In extreme cases, as in India today, it is obvious that the delay in the courts is excessive. A heavy backlog of cases indicates that something is wrong if, but only if, they are cases in which the parties are ready and desirous of going to trial. The mere fact that the number of cases instituted is greater than the number of cases decided does not of itself mean that the work of the courts is in arrear. General public dissatisfaction is probably the clearest indication.

The extent of delay

3.1 There is a widespread belief in the Commonwealth that civil litigation takes too long and a consciousness on the part of all those concerned of the need to make the processes of civil litigation more acceptable to the public by reducing delays and cost.

3.2 From the comments that have been received, it would seem that the position may not be quite as serious as is generally supposed. Excessive delay is not universal: some countries report that they have no unreasonable delay and in others complaints relate only to particular courts or particular jurisdictions.

3.3 In England, neither the Bar nor the Law Society in answer to a questionnaire from the Royal Commission on Legal Services accepted that delays in litigation are as bad as is popularly supposed. The Bar argued that litigation is more drawn out, lengthy and expensive in other countries and they drew attention to the difficulty of striking a balance between the speed and cheapness of the process and the quality of the result.[1] This comparison with other countries was accepted by the Commission, who said[2] that there was -

> "no evidence that proceedings here take longer than abroad."

3.4 The Law Society in their reply had stated that they were endeavouring to obtain statistics and other information relating to the speed and cost of litigation in other countries. They maintained[3] that the vast majority of contested cases are dealt with reasonably quickly, although they accepted that criticism is justified in relation to some full scale trials.

3.5 The Commission summed this up by saying that, while speed is sometimes difficult to achieve and is not always desirable,

> "it is generally agreed, both within the legal profession and outside it, that legal proceedings of all kinds generally take longer than they should."[4]

3.6 In London, according to the Bar,[5] the average time in the High Court from the issue of a writ to trial was about 26 months in 1975: a case for which a fixed date was not required might be tried within five or six weeks of being set down; if a fixed date was required, the interval was not likely to be less than nine months, and outside London it would normally be more than a year. Short cases in the Chancery Division could usually be heard within four months, but longer cases were unlikely to come on within 18 months. It was, however, stressed that really urgent cases could be brought on and disposed of very quickly.

3.7 The Review Body on the Chancery Division of the High Court reporting in 1981 (the Oliver Report)[6] considered what should be the target period within which the Chancery Division ought to be able to offer a fixed date for hearing. They observed that counsel, solicitors and witnesses often prefer a date well ahead and will sometimes decline an earlier date. They regarded the current waiting period of 13 or 14 months from setting down to hearing as wholly unacceptable, but they thought anything less than four or five

months would probably cause difficulties for one or other party. They thought a date should normally be offered within six, or at most eight months. This is in relation to the heaviest cases.

3.8 There are no delays in the High Court of Australia and a reform of procedure in the Federal Court appears to have achieved its purpose. Under the former system, based on the issue of writs, cases rarely came on for hearing within 12 months. Now, with a system based on a simple form of application, followed by an early listing for directions, cases are usually disposed of within six or eight months.

3.9 Manitoba has no backlog of cases and it is reported that "there is no delay problem in connection with civil cases, insofar as the systems are concerned. Parties and lawyers do occasion delay in specific cases, for one reason or another, but this is not a great problem."

3.10 Similarly from Ontario it is reported that, while they cannot afford to be complacent, the impression given by Bench and Bar is that the situation is reasonably satisfactory, with the one exception of the family law caseload. There appears to have been a marked improvement since 1971, when delays were very serious and when the rules of procedure were amended. The Law Reform Commission, reporting in 1973, thought that a reasonable target for the disposal of a case was one year from the issue and service of the writ[7] and that the maximum time between setting down and disposal should be six months.[8]

3.11 In South Australia, the Law Society commissioned a market research report to ascertain the knowledge of and attitudes to the legal profession of persons living in Adelaide. One proposition on which opinions were sought was that lawyers "take too long to do things". Of the persons interviewed, 16% were strongly in agreement, 51% agreed, 15% disagreed, 1% strongly disagreed and 17% were not sure. These opinions, of course, related to all activities of the profession, including criminal work and non-contentious business.

3.12 The Law Society commented that "whilst those charged with the administration of justice.... should be alert to the unsatisfactory state resulting from a severe backlog of cases,.... often the problem is overstated."

3.13 The waiting period of trials as at May 1982 has been given as three months for small claims, 10 to 11 months in the District Court and seven months in the Supreme Court. These figures were taken at a time when adjustments of jurisdiction had been made but before their full impact had been felt. The position is regarded neither as grave nor wholly satisfactory.

3.14 From Zimbabwe comes the comment that the country "does not suffer from unusual delays compared with other countries." There are no delays in the court of appeal. According to the Bar Council, the average High Court case might be expected to take between 4 to 10 months from the issue of the summons to completion.

3.15 The enormous increase in the population of Hong Kong and its economic prosperity has resulted in a big increase in civil litigation but the structure of courts has been adapted and the number of judges increased to meet the need. In 1981, the time taken in the High Court from setting down to hearing was four to six weeks or, in the special list (cases involving witnesses from abroad, etc.) three months. The corresponding periods in the district court were two months and four months.

3.16 In New South Wales, cases in the Common Law Division are usually fixed for trial three to six months ahead, and if they are not reached a fresh date has to be arranged, again three to six months ahead. Personal injury cases are exceptional and it is usually over two years before any attempt is made to bring them to trial. Commercial list cases are dealt with more promptly than other litigation. In the Equity Division, short cases can be brought on in a month or two, but the longer cases require about a year. There are said to be many causes of delay and New South Wales is described as "the most litigious State in the Commonwealth."

3.17 The Isle of Man is another territory that has recently experienced prosperity, and this has created problems that are regarded as only temporary.

3.18 Tasmania, too, has suffered from temporary factors making for delay and the increasing volume of legally aided criminal matters has imposed a strain on the system and raised doubts as to the ultimate answer. No figures are available for the time a case

normally takes in the Supreme Court before it is ready for trial, but from that point until the hearing may be anything from 6 to 12 months or even more.

3.19 From Alberta come references to "a continuing problem."

3.20 In New Zealand, the Royal Commission on the Courts[9] recorded that they had heard complaints that the civil business of the Supreme Court was badly in arrears. Criticism had particularly been directed towards the Administrative Division. The Law Society are on record as saying that in some parts of New Zealand the delay in obtaining fixtures was unacceptable, although they added that it was generally possible to obtain a hearing for a case of real urgency.[10]

3.21 The statistics produced by the Royal Commission show that a very great improvement followed the introduction of the accident compensation legislation.[11] This was largely because it resulted in fewer proceedings being begun, but not entirely so as there was an increase in other kinds of action. It is everywhere accepted that personal injury cases by their very nature take longer to come to trial than other actions and their elimination, therefore, improved the average.

3.22 By 1976, 75% of cases were being set down within six months of the issue of the writ, and almost all within a year, and nearly 80% of these were heard within three months of setting down. This represents an enormous improvement on the figures of two years previously. The Royal Commission gave much of the credit for these figures to the long hours worked by the judges.

3.23 A recent comment is "We have been by no means free of problems.... and we cannot pretend to have found all the answers."

3.24 In Malawi, complaints appear to be limited to delays in the processes of execution. The position is satisfactory in Fiji except for matrimonial matters and there are no complaints from the small jurisdictions of Guernsey, Kiribati or Tuvalu. In the Solomon Islands a restructuring of the courts system is under consideration; this is likely to slow down proceedings, but that is regarded as an acceptable price for involving local laymen in the judicial process.

3.25 There is dissatisfaction in Kenya, where delays in the High Court have been aggravated by numerous election petitions; in Switzerland, where much of the blame is laid on the practitioners; and in Guyana, where administrative weakness in the judiciary and the magistracy is considered the main, but not the only, cause of delay.

3.26 Delays are very serious in Québec. It is said that even an urgent one day case may be pending for seven months between the certificate of readiness and the hearing, while a two day case may have to wait as long as 68 months.

3.27 Worst of all seems to be India, where, according to press reports, arrears have reached "alarming proportions", with cases in the Supreme Court coming up for hearing ten years after they were filed. It is said that over a quarter of a million cases are pending in the High Courts. The Law Commission of India in their 77th Report[12] thought there should be a target of one year for the disposal of cases but by the time they issued their 79th Report[13] they had decided that two years would be a more realistic period as regards original civil suits in the High Courts and they recognised that even that would be difficult to achieve.

3.28 British Columbia is attempting to co-ordinate the various interested bodies throughout Canada in establishing a uniform statistical procedure under the auspices of the Canadian Judicial Council.

3.29 It is difficult to access the value of statistics. Many people would share the opinion of the Law Society of Manitoba that they "are usually misleading." In small jurisdictions they are of little or no value, because they are so liable to be distorted by a few extraordinary cases. In larger jurisdictions, periods of delay tend to average out but to be of any real value, they should be broken down by categories of case and by stages in the proceedings.

3.30 Statistics will certainly expose a particularly bad state of affairs but that should be obvious without the need for statistics. They cannot prove that cases are taking too long to complete, because how long a case should take will always depend on its own particular facts. It is suggested that the value of statistics lies in showing trends, whether cases generally are coming to trial and being decided more quickly or more slowly.

1. JURISDICTION

Restructuring of courst and adjustments of jurisdiction

4.1 Although it means going back earlier than the period in respect of which correspondents were asked to report, it is impossible to begin this section without reference, first, to the fact that in 1968 jurisdiction in divorce was extended in England to the county courts and it became obligatory to commence proceedings in those courts, and, secondly, to the report of the Royal Commission on Assizes and Quarter Sessions (the Beeching Commission) published in 1969.[14]

4.2 The Beeching Report led to a complete restructuring of the courts of England and Wales, with the object of providing a simpler system. The changes mainly affected the criminal courts but on the civil side the result was a three tier structure for ordinary civil matters, consisting of the County Courts, the High Courts and the Court of Appeal, with magistrates' courts exercising considerable jurisdiction in family matters.

4.3 One of the possibilities considered by the Beeching Commission was -

> "the establishment of a single civil court of wide jurisdiction and uniform procedure in which the only important variable would be the powers of the judge."

They also considered a more modest suggestion that all civil proceedings might be started in common form. They concluded, with some reluctance, that they could not give effect to either proposal, because a partial or total assimilation of the Rules of the Supreme Court and the County Court Rules would be needed, for which the Commission was ill-qualified as a body and which would seriously have delayed their report. More recently, the new County Court Rules 1981 have gone some way towards assimilation with the Rules of the Supreme Court.

4.4 In the same year that the Beeching Commission was reporting, British Columbia enacted legislation[15] to increase the number of Supreme Court judges from 16 to 34 and to repeal the County Courts Act. This was, in effect, the same as merging the County, District and Supreme Courts. This raised a constitutional issue, because it called for amendment of the federal Judges Act and no such amendment has been enacted.

4.5 The possibility of such a merger received full and detailed consideration by the Ontario Law Reform Commission.[16] They did not recommend merger for several reasons but essentially because they feared that it would dilute the quality of justice at the highest level. There was also the constitutional difficulty of the Judges Act.

4.6 In one respect, merger would have been easier in Ontario than in most countries, because there the rules of practice were basically the same for the Supreme Court and the County Courts.

4.7 Merger was achieved in New Brunswick in 1978, when the whole structure of the judiciary was reformed.[17] The Supreme Court and the County Court were merged and two new courts established, a Court of Appeal and a Court of Queen's Bench. The latter is a court of unlimited jurisdiction, civil and criminal, divided into a Trial Division and a Family Division. There is also a Small Claims Court[18] and an experimental Unified Family Court.[19]

4.8 In the same year, the question of merger was considered in relation to New Zealand by the Royal Commission.[20] The Commission concluded that the disadvantages inherent in a merger of the courts outweighed the advantages but they did strongly support integrated administration and, whenever possible, common procedures.

4.9 The financial limits on the jurisdiction of subordinate courts has everywhere been increased. In England the latest increase took the jurisdiction of the county courts from £2,000 to £5,000 in actions founded in contract or tort and in certain other actions, and from £15,000 to £30,000 in the equity jurisdiction.[21]

4.10 Following the report of the Royal Commission, there was a considerable reconstruction of the courts of New Zealand. The Supreme Court was reconstituted as the High Court,[22] which was relieved of much of the criminal and most of the family work previously performed by the Supreme Court. The magistrates' courts were reconstituted as District Courts[23] with greatly enhanced jurisdiction (their financial limit was raised from NZ$3,000 to NZ$12,000) and they have been given a Family Court division.[24] These changes will relieve the High Court of a considerable amount of work.

4.11 In New South Wales, the Supreme Court was reconstituted in 1970[25] and for the convenient despatch of business was divided into a Court of Appeal and a court of six divisions, Common Law, Equity, Admiralty, Divorce, Protective and Probate. Within the Common Law division, there is a commercial list. The limit of the District Court has been raised to A$100,000, with unlimited jurisdiction in personal injury cases.

4.12 In Western Australia, a District Court was established in 1969[26] and the policy has been gradually to build up its jurisdiction as the community and the legal profession became accustomed to it. Its jurisdiction was enlarged from A$6,000 to A$10,000 in 1972.[27] There was a general review of the distribution of jurisdiction between courts in 1976, which resulted in the enlargement of the jurisdiction of the District Court to A$20,000 and that of the Local Courts to A$3,000;[28] and again in 1981, which resulted in the enlargement of the District Court to A$50,000 and that of the Local Courts to A$6,000.[29] The 1981 increase in the jurisdiction of the Local Courts was slightly more than was necessary to adjust for the fall in the value of money; the more substantial increase in the jurisdiction of the District Court was the implementation of policy.

4.13 Gibraltar increased the jurisdiction of the Court of First Instance (the equivalent of a County Court) in 1979[30] from £300 to £1,000.

4.14 In Victoria, the Magistrates' Courts were given civil jurisdiction in 1973[31] subject to a financial limit of A$200, but this figure was increased to A$1,000 in 1978[32] and to A$3,000 in 1979.[33]

4.15 In South Australia, the ordinary civil jurisdiction of District Courts when presided over by judges was increased from A$8,000 to A$20,000 in 1974 and to A$60,000 in 1982.[34]

4.16 In Malawi, the civil jurisdiction of the magistrates was increased in 1980,[35] as regards Resident Magistrates from K.800 to K.2,500; as regards Magistrates First Grade from K.800 to K.1,500; and as regards Magistrates Second Grade from K.300 to K.750.

4.17 Ontario initiated in 1979,[36] as a pilot project, a Provincial Court (Civil Division) for the judicial district of York. This court is operated by the judges and staff of the Small Claims Courts and has jurisdiction in respect of claims between C$1,000 and C$3,000. It was considered that such claims are not true small claims and that if the jurisdiction of the Small Claims Courts were extended to C$3,000, the character of those courts would change. At the same time, it was felt that the intermediate claims called for a simplified procedure, similar to that of the Small Claims Courts. The project was aimed at reducing both costs and delays, as well as making the courts more accessible to the public. The court was set up for a trial period of five years: it has proved a success and it is expected that its life will be extended for a further five years and that similar courts will be set up in other urban centres.

4.18 In New South Wales, it is proposed to increase the jurisdiction of the District Court from A$20,000 to A$100,000 and that of the Magistrates' Courts from A$3,000 to A$5,000. It is intended progressively to transfer all personal injury cases from the Supreme Court to the District Court.

4.19 In Hong Kong, the jurisdiction of the District Court is presently limited to HK$20,000 but it is proposed to double that figure. The court also hears landlord and tenant disputes, workers' compensation claims and undefended divorces: it is proposed to enlarge this jurisdiction to include all matrimonial proceedings, including defended divorces.

4.20 In Tasmania, it is proposed to relieve the burden on the Supreme Court by increasing the jurisdiction of the Court of Requests, at the same time creating a Small Claims Court to take over the minor cases.

4.21 It is a curious feature of some of the Indian High Courts that they only have jurisdiction above a financial limit: Rs.50,000 for Bombay, Calcutta, Delhi, Himachal

Pradesh and Madras and Rs.20,000 for Jammu and Kashmir. The Law Commission of India endorsed a proposal that the limit be raised to Rs.100,000.[37]

4.22 The merger of all civil courts is an attractive idea because it appears so simple, but in practice there would almost certainly be difficulties arising out of procedural needs. The advantages of a single court would largely disappear if the procedure varied according to the jurisdiction and powers of the judge. This is not, of course, an argument against administrative integration, which can be achieved without any merger of the courts themselves.

4.23 The idea of an uniform basic procedure appears more practicable. All civil proceedings whatever the court might be initiated by a simple, standard, document and the main steps to be taken could be the same. Within such a framework, the higher courts could have fuller rules of procedure to meet the more complex problems they have to decide, particularly as regards interlocutory matters.

4.24 Such a measure of standardisation would make their work easier for legal practitioners; would enable executive and clerical officers to be transferred from one court to another; and would make possible the promotion from one court to another of judges who have shown special, appropriate, aptitude.

4.25 The structure of courts would seem to be a matter for each country to determine, according to its own particular circumstances but most countries seem to favour a basic three tier structure.

4.26 Assuming such a structure of courts, it would seem essential for the sharing of the judicial workload between them to be reviewed at regular intervals.

4.27 There are three reasons for this. First, it is desirable that the volume of work going to the highest courts be limited, because of their responsibility for overseeing the growth and development of the law and because of their constitutional role. They must not be overburdened with work that can be dealt with effectively at a lower level.

4.28 Secondly, changing social attitudes may affect the level of court which cases of a particular kind should be dealt. The outstanding example of this is divorce. In England, there was a time when a private Act of Parliament was required. When the courts were given power to grant decrees, the matter was considered of such gravity that jurisdiction was reserved to the High Court. Now, in almost all countries of the Commonwealth, divorce is granted much more readily and consequently it has become a matter for subordinate courts. Québec is even considering divorce by consent.

4.29 With this must be linked the question how far a branch of the law can be brought entirely within the jurisdiction of a particular court. For example, the changed attitude towards matrimonial causes has made possible the family court at subordinate level. This was impossible when divorce was exclusively a High Court matter. There is also a tendency to cut across the rigid financial demarcation of jurisdiction, which is illogical though convenient, as, for example, in the jurisdiction conferred on the District Court in Western Australia as regards personal injury cases (see para.9.6). These are matters which each country must determine according to its circumstances: there can be no general rules.

4.30 Finally, any fall in the value of money means that the financial limits of subordinate courts have to be adjusted. This has been a particular feature of the last decade. Generally, the aim has been to restore in real terms the jurisdiction which the lower courts previously enjoyed, but usually the increases have fallen short of achieving even that target. The raising of such limits usually follows long after a fall in the value of money. It is not desirable to change the limits of jurisdiction too often, as this makes for uncertainty, but it is desirable that such changes as are necessary be made promptly and in a period of continuing inflation there is no reason why changes should not, within reason, anticipate future levels. If the jurisdiction of the subordinate courts is kept reasonably constant in real terms, a progressive increase in the burden on the superior courts can be averted.

The use of masters and registrars

5.1 The burden on the judges of the superior courts has, in some jurisdictions, been relieved not only by transferring work to other courts but also by giving greater powers to masters and registrars.

5.2 In England, a working party was set up under Lord Scarman in 1978 to examine ways and means of relieving pressure on the Court of Appeal Civil Division, where there had been a heavy increase in the volume of work. The aim was to achieve procedural improvements, without lowering the standard of justice and without any substantial increase in the number of Lords Justices of Appeal. The conclusion reached was that there was a need for a lawyer who would exercise judicial as well as administrative responsibilities during the pre-appeal period. It was recommended that he should supervise the appellate process from the entry of an appeal to the hearing. He would control the listing of appeals, in consultation with the Master of the Rolls and other Heads of Division, assessing the weight and complexity of each appeal. He would be responsible for seeing that all relevant documents were available and legible and that the judges have a proper opportunity to study their papers before the hearing. He would hear interlocutory applications, subject to a right of appeal to a single Lord Justice, and he would have power to refer the more complex matters to a single Lord Justice for final disposal. He would also assist appellants appearing in person to prepare their papers. These proposals were approved and the new post of Registrar was created by the Supreme Court Act 1981.[38]

5.3 The Review Body on the Chancery Division (the Oliver Report)[39] made several recommendations regarding the work of the masters. Perhaps the most important, a repetition of an earlier recommendation by the Harman Committee,[40] was that the right of adjournment from the master to the judge should be replaced by a right of appeal to a judge in chambers, as in Queen's Bench. The Review Body believed that the right of adjournment "is a positive incitement to recalcitrant litigants to play for time by requesting adjournments even in perfectly hopeless cases." This recommendation has very recently been implemented.

5.4 Proposals similar to those of the Scarman working party were made in 1977 by the Attorney General's Committee on the Appellate Jurisdiction of the Supreme Court of Ontario (the Kelly Committee), as part of a scheme for reorganising the Court of Appeal Office. It was suggested that a chief legal officer with the status of a master should, under the guidance of a judge, gradually take over all the interlocutory work, in addition to screening the notices of appeal and presiding at pre-appeal conferences. These proposals have not been implemented.

5.5 In New South Wales, the jurisdiction of the masters has been widened and additional appointments have been made. Masters now have complete jurisdiction to hear actions for personal injuries arising out of motor vehicle accidents. Registrars, too, have been given wider powers, particularly in relation to settlements and to interlocutory applications. The changes appear to have had good results in relieving the pressure of judges' time, but it is too early for a complete assessment.

5.6 In Western Australia, the jurisdiction of the master was greatly enlarged in 1979.[41] He may now exercise all powers and functions of a judge in chambers, except proceedings relating to the liberty of a subject, injunctions, appointments of receivers, reviews of taxation of costs and matters relating to the construction of statutes and documents. This has given the master considerably more work but has left the chamber judge more time to take on the short cause list.

5.7 In the same year, the Family Court Act was amended[42] to provide for the appointment of the registrar as a stipendiary magistrate, so as to enable him to relieve the judges by exercising the court's summary jurisdiction.

5.8 In Queensland, two masters have recently been appointed to the Supreme Court,[43] with duties which include callovers and certain chamber applications, as well as giving judgment in certain trials where liability is not in issue. This has given the judges more time for disposing of contentious business.

5.9 Until 1974 the registrar of the High Court of Malawi was professionally unqualified and all chamber applications had to be taken by the judges. Since then, the registrars have been legally qualified and have done the work that is done in England by masters and registrars.

5.10 Similarly, in the Solomon Islands, where the Chief Justice is the only resident judge, the rules of the High Court were amended in 1980 to give the registrar, who is professionally qualified, wide powers to deal with matters prior and subsequent to trial.

5.11 In Cyprus, a judicial officer has been specially designated by the Supreme Court to assess compensation, so as to expedite the trial of cases relating to compulsory acquisition and requisition.

5.12 The Royal Commission on the Courts of New Zealand recommended the creation of the office of master, with initially two in Auckland and one in Wellington,[44] but this awaits the new Code of Civil Procedure, on which work is not yet complete.

5.13 In Kenya, a proposal was put forward[45] that judges should be relieved of most routine chamber applications, including summonses for directions, consent orders and the examination of debtors, by the appointment of a master to take over those duties, but the proposal was not adopted.

Specialisation and flexibility

6.1 Specialisation may take the form of divisions or sections within a court; the allocation of categories of cases to judges with particular experience of the relevant branches of the law; or the setting up of separate courts to deal with specific subjects.

6.2 In England, the High Court was created by the fusion of what had been separate courts and so it was convenient for administrative reasons for there to be Divisions within the new court. Where the Chancery Division was concerned, there were, again for historical reasons, groups of judges within the Division. These have recently been abolished,[46] following the recommendations of the Oliver Report, although some specialisation lingers on. There is certainly more flexibility.

6.3 In New Zealand, an Administrative Division of the Supreme Court was created in 1968[47] to hear such prerogative writ applications as are referred to it by the Chief Justice and appeals from the many administrative tribunals. The establishment of a separate Administrative Court had been suggested but the idea was rejected. The Royal Commission, reporting in 1978, favoured the retention of the Division and expressed the opinion that, while all judges of the Supreme Court should retain their jurisdiction to grant prerogative writs, it was preferable for such cases to be directed to the Administrative Division. The Commission also favoured appeals in family matters going to judges with an aptitude for such work and who should specialise in it. Generally, the Commission, while finding the subject a particularly difficult one, regarded a move towards specialisation as inevitable and, within limits, desirable, but they stressed that over-specialisation is not advantageous. They did not favour the creation of further Divisions but only the allocation of cases on an administrative basis to make the best use of judicial expertise.[48]

6.4 In Ontario, a Divisional Court was set up within the Supreme Court in 1972[49] and the Williston Committee, reporting in 1980, recommended that it should be preserved.[50] They suggested that the Supreme Court should be divided into a Court of Appeal and a High Court, and that within the High Court there should be a Divisional Court, which would deal with applications for judicial review and most appeals, except those from the High Court and the County Courts. As this specialised work called for continuity but was likely to be unpopular, it was proposed that judges should be assigned to it for periods of not less than a year.

6.5 The Law Reform Commission of Queensland in 1982[51] invited opinions on the question whether a separate Court of Appeal should be constituted. They pointed out that such a change would enable judges of appeal to concentrate exclusively on appellate work, and free other judges from it, with consequent benefit to the conduct of the work; and also the opposing argument, that such specialisation of functions was not desirable and that the number of judges and the volume of work did not warrant the change. The Commission did not include any provision for a separate Court of Appeal in the draft legislation they prepared, so it is clear that they did not favour it.

6.6 The Commission also sought opinions on whether or not divisions should be established within the Supreme Court. They pointed out that where a court is composed of a large number of judges and where legal work has traditionally been handled by judges and practitioners who have specialised in the jurisdiction of a particular division, there are good grounds based on administrative efficiency and expertise for preserving such divisions but that where the number of judges is relatively small, greater flexibility might outweigh the advantages which accrue from specialisation.

6.7 The Law Commission of India in 1979 expressed the view[52] that it is the function of the Chief Justice when constituting benches to take into account the special aptitudes of the individual judges, both to make the best use of the talents of the judges and to save time because a judge experienced in a particular branch of the law will dispose of cases more quickly than one unfamiliar with the subject.

6.8 The matter came up particularly over the question whether there should be a central tax court, a subject on which conflicting opinions had been expressed by committees appointed to consider it. The Commission came down against the creation of such a court but they did favour the constitution of special tax benches, to be selected from amongst those with special knowledge and experience in tax matters, to sit continuously until all arrears had been disposed of.[53]

6.9 At the subordinate level, the Legal Action Group in England advocated the establishment of special courts, such as family courts, small claims courts and landlord and tenant courts. Apart from the matter of small claims, the Senate of the Inns of Court opposed the suggestion,[54] considering that a proliferation of tribunals, procedures and appellate systems, administering increasingly specialist fields of law, would increase rather than reduce confusion in the mind of the lay litigant. The Senate thought that the County Courts and, in family matters, the magistrates' courts, are the proper forum for local disputes of civil character and that where improvements are necessary, they should be within the existing system.

6.10 The advantages that result from the assignment of judges to the class of case with which they are most familiar are obvious: they know the law with which they are dealing and the latest authorities on it, without need for research, and they know the current levels of damages or compensation. The disadvantages of rigid specialisation are, however, great.

6.11 In the first place, the nature of the work coming before a court is never constant. The number of cases of a particular category may rise or fall suddenly and unpredictably. If there is specialisation among the judges, some will be more busy than others and the work load cannot be spread; to do so, except in an emergency, would be to defeat the object of specialisation. Also, a judge who specialises is likely to be less adaptable in practice than one who is used to a wide variety of work.

6.12 Secondly, the judge who is always dealing with the same kind of case is likely to become set in a routine; he is in danger of becoming bored; his familiarity with the subject means that he has no occasion to take a fresh look at it, and so the law he administers ceases to grow or to change with the changing patterns of other branches of the law.

6.13 It would appear that specialisation is not generally popular with judges.

Commercial lists and commercial courts

7.1 In England, a commercial list has existed since 1895 and it became known as the Commercial Court long before it was given that title by statute in 1970.[55] It is, therefore, outside the scope of this paper but must be mentioned because its practice has been followed in New South Wales and considered in New Zealand.

7.2 In New South Wales, as in England, the judge taking the Commercial List personally conducts the directions hearings and superintends the preparation of the litigation. He may order or refuse interrogatories and discovery. He insists upon prompt timetables for interlocutory steps and sometimes suggests a separate trial of particular issues. There are said to be mixed views on the benefits of this close superintendence but it is acknowledged that cases in the Commercial List are disposed of more promptly than other litigation.

7.3 In Queensland, also, there is a commercial list and not a separate court or division. It has expeditious procedures for determining commercial disputes.

7.4 In New Zealand, the Royal Commission,[56] while not recommending the creation of a Commercial Court or even a separate Division of the Supreme Court, remarked that the English Commercial Court has worked so well that some special procedure for commercial cases, possibly including the appointment of official referees, would be advantageous.

Family divisions and family courts

8.1 Western Australia established a Family Court in 1976.[57] It exercises both federal and non-federal jurisdiction in matters of divorce, maintenance and custody of children, guardianship and property disputes between married persons.

8.2 In 1976, Ontario set up,[58] as an experiment, a Unified Family Court for a single district, the Judicial District of Hamilton-Wentworth. It was to be presided over by a judge or junior judge of a county court, who would also be a local judge of the Supreme Court and might also be authorised to exercise the jurisdiction of a judge of a provincial court (family division). The court was given wide jurisdiction in matrimonial matters and matters concerning children, including criminal jurisdiction for dealing with juvenile delinquents. There are provisions for the establishment of a detention and observation home, to be operated as part of the court, and for the appointment of probation officers. Informally, the experiment is judged to be a success: a professional evaluation study has been undertaken, but its report is not yet available.

8.3 New Brunswick in 1978, created a Family Division of the Supreme Court,[59] and also set up experimentally a Unified Family Court for the Judicial District of Fredericton. It has enormously wide jurisdiction in all aspects of or impinging on family life, civil and criminal. The court is staffed by personnel from various disciplines, including lawyers, social workers, psychologists, psychiatrists, counsellors and others, and wholly new procedures are said to have been introduced to fit the functions and the spirit of the court. It will clearly be a long time before an experiment of so radical a nature can be seen in its true perspective.

8.4 The Royal Commission considered the establishment of a Family Court for New Zealand both necessary and desirable.[60] They recommended that it should take the form of a Family Division of the District Courts and should take over original jurisdiction in all family matters.[61] It would be manned by specialist judges (although they should not deal only with family cases) with support services provided by social workers and others, and its proceedings would be characterised by informality. These recommendations were accepted and implemented by legislation in 1980.[62] It should perhaps be added that this was not an entirely new departure, as the Domestic Proceedings Act 1968[63] had required the specific appointment of magistrates to exercise the domestic jurisdiction of the court, so creating a class of specialist magistrates.

8.5 Manitoba has a Family Division of the Provincial Judges Court, set up in 1972[64] and early in 1981 a Family Law Chambers court was instituted, which entails a judge being assigned each week to hear matters under any law relating to matrimonial causes, separation, alimony, maintenance, custody of and access to children, disposition and division of marital property and questions between spouses as to the title to property.

8.6 Legislative provision for Children's Courts has been made in Swaziland but it has not yet been implemented.

Personal injury cases

8.1 Personal injury cases present particular problems. The injured person must institute proceedings to avoid finding his claim barred by limitation but in the majority of cases neither side wishes an early trial because it is unsatisfactory to assess damages, on a lump sum basis, until the injured person's condition has stabilised. This results in a protracted interlocutory period in circumstances where a speedy process is desirable to resolve the anxieties and possibly hardship suffered by the plaintiff. At the same time, uncertainty as to the prognosis discourages attempts to settle. And these protracted cases appear to form the majority of those that go to trial.[65]

9.2 No-fault schemes for compensation for industrial injuries have, of course, been operating for many years and Saskatchewan began such a scheme in respect of road injuries in 1946. This was followed by other provinces of Canada, of which the latest is Québec,[66] where it is reported that in consequence "thousands of claims" did not have to go to court for a decision where the fault lay. These Canadian schemes do not exclude the right to sue for damages in tort.

9.3 In Australia, Victoria[67] and Tasmania[68] operate no-fault schemes in respect of motor vehicle accidents and of the latter, it is said that personal injury litigation has fallen by about 80%. It is pleasing to read that there were no adverse consequences as regards the cost of personal injury motor insurance. Under these schemes, the right to take action in tort remains, but a claim in tort can relate only to loss not covered by the no-fault scheme.

9.4 New Zealand in 1972[69] set out to reduce the number of, and eventually to eliminate, personal injury cases. A compensation scheme was set up for earners, which is contributory, and for persons injured or killed in motor vehicle accidents, which is paid for by a levy on motor vehicles. The Act provided that no action should lie for damages in respect of

injury or death if at the time of the accident the injured or deceased person had or was deemed to have cover under the Act. The following year, an amendment excluded, with very limited exceptions, any action not brought under the Act.[70] This resulted in a substantial reduction in the number of cases brought in the High Court. Since 1978, the phasing out of all personal injury cases from the courts has been completed and in such cases no claim can now be brought for damages at common law.

9.5 These and other schemes were considered by the Pearson Commission in 1978. Many of their observations are irrelevant to the present inquiry. They commented that in New Zealand "the no-fault benefits are not at a level which fully replaces tort in every case." They mentioned also the possible weakening of incentive on the part of manufacturers to guard against the production of defective goods. They recommended the introduction of a no-fault scheme for road injuries but not to the exclusion of the remedy in tort. They did not recommend the extension of the no-fault principle into other spheres at least for the present. Their recommendation for the introduction of a limited scheme has not been implemented.

9.6 Western Australia has now relieved the Supreme Court of all personal injury cases arising out of motor vehicle accidents, with unlimited jurisdiction conferred on the District Court.[71]

9.7 In New South Wales, it is proposed progressively to transfer all personal injury cases from the Supreme Court to the District Court. At the same time, the New South Wales Law Reform Commission has been asked to examine the advantages and disadvantages of no-fault insurance. New South Wales has a peculiar problem: it is reported that a major cause of delay is the reluctance of many medical practitioners to become involved in litigation, with the result that most such cases have to wait on the convenience of the few practitioners who are willing to appear.

Small claims

10.1 In England, the problem of small claims has been under consideration since 1970. The problem was simply this: the costs of a formal trial had become out of all proportion to the amounts in issue. Even if a successful plaintiff were awarded his costs, the solicitors' charges that he would have to pay often meant that it was not worth while to pursue a valid claim, and, of course, there was always the risk of losing and having to pay both his own and the defendant's costs. At the same time, the solicitor's charges that seemed heavy to the party were inadequate recompense in the eyes of the solicitor for the time he would have to give to the case, and so solicitors were not anxious to take on the prosecution of small claims.

10.2 The present system, contained in the County Court Rules as amended in 1981, provides for the automatic reference to arbitration of claims involving £500 or less, although the reference may be rescinded in certain exceptional cases, including cases where there are difficult questions of law and where there are allegations of fraud. Claims in excess of £500 may be referred to arbitration on the application of one of the parties. The arbitrator is usually the Registrar. The hearing is informal and may be dealt with on documentary evidence alone; where oral evidence is taken, it is not limited by the strict rules as to admissibility that apply in court proceedings. A party may be represented by a solicitor but, where the reference is automatic, it will be at his own expense, as solicitors' charges are not allowed.

10.3 The reduction of delay was not the purpose of these changes but in fact the informal procedure, usually with only the arbitrator and the parties present, has enabled claims to be determined very much quicker than was possible with a formal trial. At the same time, it must be said that the provision which precludes orders for costs has been criticised on the ground that it operates unjustly: it is said that it favours debtors by making it not worth while for creditors to pursue just claims.

10.4 In Scotland, a type of small claims arbitration within the Sheriff Court is the subject of current experiment and there is a new procedure to deal with actions for sums up to £1,000, a limit which may be raised by subordinate legislation.

10.5 Ontario has a long history of small claims courts, going back to 1792. Instituted as the Court of Requests, it became known as the Division Courts and since 1970 as the Small Claims Courts. The Williston Committee, in relation to these courts, considered the schemes for compulsory arbitration that had been operated in the United States for more than ten years, in some states for sums well in excess of what is ordinarily regarded as

a "small claim". The Committee was not satisfied that the claims made for these schemes had been substantiated. They confined themselves to recommending that the results of these schemes be watched closely with a view to their introduction into Ontario on an experimental basis, if they are proved to have been as successful as has been claimed.[72]

10.6 In Québec, there is a Small Claims Court to deal with claims of C$500 and under and in New Brunswick one with jurisdiction up to C$750. The procedure in New Brunswick is quite informal and the rules of evidence do not apply. The hearing is before the clerk or master, who delivers a report to the judge containing his findings on the matters in dispute, his recommendations and his notes of evidence. The judge may remit the proceedings for clarification or further evidence. Subject to this, he files directions for judgment with the clerk, who endorses a note of it on the summons. This constitutes the entry of judgment.

10.7 Tasmania is currently considering the creation of a Small Claims Court, from which solicitors would be barred.

10.8 In South Australia, the problem of small claims has been met, not by setting up any new court or tribunal, but by amending the law to give the existing courts greater freedom of action when dealing with claims not exceeding A$500.[73] The strict rules of evidence cease to apply; counsel have no automatic right of appearance and the parties generally appear in person. These changes have considerably reduced the time spent hearing and determining such cases. There are also special listing arrangements.[74]

10.9 A Small Claims Tribunal was established in Western Australia in 1974. The tribunal consists of a referee, from whose decision there is no appeal or right of review. The tribunal hears claims arising out of contracts and tenancy bonds brought by "consumers" (a term which includes tenants) involving sums of less than A$1,000. The Law Reform Commission of Western Australia in 1979 recommended its abolition and the creation of a special division of the Local Court, to be known as the "Small Debts Division", to adjudicate small disputed claims for debts or liquidated demands, available not only to consumers but also to traders and others, with a simple procedure similar to that of the Small Claims Tribunal. The present idea is to have no interlocutory proceedings but to list a case for trial immediately the defendant has given notice of his intention to defend. It will probably be necessary to give the clerk or designated magistrate power to seek further information of his own motion if he thinks it necessary. The recommendation has not yet been implemented.

10.10 In New Zealand, a pilot scheme for small claims tribunals was set up in 1977 in three areas.[75] Each such tribunal is a division of a magistrate's court. The jurisdiction of the tribunals is limited to claims not exceeding NZ$500 and legal representation before the tribunals is prohibited. The primary function of these tribunals is "to attempt to bring the parties to a dispute to an agreed settlement". The experiment proved very successful. The scheme was extended to two further areas in 1979-1980 and a further four tribunals are being established in the Auckland area. It seems likely that the whole country will soon be covered.

10.11 Western Australia is not the only jurisdiction to have had a court or tribunal created for the protection of a particular section of the community. In principle, it seems to run contrary to the rule of law that there should be any court or tribunal that serves the interests of consumers but not of suppliers or of tenants but not of landlords. Although financial limits are not entirely satisfactory, a financial limit which applies to all litigants seems preferable to a jurisdiction limited to favour a particular class of litigant.

2. PROCEDURE

Control of proceedings by the court

11.1 The common law approach was well described by the Ontario Law Reform Commission[76] -

> "Traditionally, a controversy between individuals has been regarded as their own business, even after a court action has been commenced. Subject to an occasional 'purging' of the list, the judges and those responsible for court administration traditionally have assumed a passive role even up to the day of trial unless moved at the instance of one of the parties or their counsel. Rules as to time limitation have been set in operation only if a non-delinquent party chooses to invoke them. Where both counsel agree that a case should not proceed, the commonly held view among lawyers is that the court should have no right to force the matter on for trial or other disposition."

11.2 The Commission regarded this approach as one of the major contributing factors to delays in the court system. They recommended, by a majority, that the time from the commencement of the proceedings until they are ready for trial should be left, as at present, in the hands of the parties and their legal advisers but they unanimously considered that the court should exercise supervision of the proceedings from the time when the case is ready for trial to the time when it is reached.

11.3 Opinions on this subject are sharply divided. In England, the Senate of the Inns of Court and the Bar, referring to proposals for more direct and robust court intervention, expressed the opinion that such radical changes were neither necessary nor correct in principle.[77]

11.4 Within the limited sphere of personal injury cases, the Personal Injuries Litigation Procedure Working Party[78] proposed that if within 18 months after the issue of the writ the action had not been set down for trial, the plaintiff's solicitor should be required to report to the court the stage which the proceedings had reached. After that period, it was proposed, the Court should have power, upon consideration of the report or otherwise, to issue a Court summons for the purpose of giving directions.

11.5 The Report of the Review Body on the Chancery Division of the High Court (the Oliver Report)[79] favoured a similar measure of court control in relation to all Chancery matters and thought the procedure and the time limit should be as similar as possible to those in Queen's Bench. Time should run from the beginning of the proceeding.

11.6 The Review Body appreciated that practitioners might argue that they knew better than the court where the interests of their clients lay and accepted that this is a legitimate argument. They thought the implementation of the proposal would call for tact and discretion. They concluded -

> "In most cases, we believe, the appropriate form of intervention by the court will not be to dissect the prior handling of a case or to give precise instructions as to the next step to be taken, but rather by calling for a report on the state of the litigation to nudge the parties and their advisers into taking the appropriate next step."

11.7 While in one respect the traditional English system left the control of proceedings in the hands of the parties, on the other, the court retained a technical control in that at each stage the parties had to seek orders. The Personal Injuries Litigation Procedure Working Party that reported in 1979[80] pointed out that this procedure has been changing over the years, with steps that formerly needed orders now being governed by rule. They endorsed a recommendation made by the Winn Committee in 1968, that the summons for directions should be abandoned and that provision should be made by rule for automatic directions without summons and without order. These would come into operation on the close of the pleadings. They recommended extending the time for discovery of documents from 14 to 28 days, recognising that the time now prescribed is inadequate, but in other respects the change would enable an action to proceed more speedily. It would, incidentally, permit medical reports to be exchanged at an earlier stage, a subject which has been of concern in several countries.

11.8 The foregoing remarks do not, of course, apply to the Commercial Court, where the judge takes the practice direction and generally watches the progress of cases to ensure that they do not lose momentum.

11.9 In Ontario, the Williston Committee recommended[81] that where an action has not been terminated within one year of the filing of the statement of defence, the court should have power to fix a deadline within which the case must be set down for trial or be dismissed for want of prosecution. Once the action had been on the list for a year, the registrar would send the parties notice of a hearing date for fixing the deadline.

Discovery and other interlocutory matters

12.1 The English practice regarding discovery has been criticised on the ground that each side is kept in the dark as to the nature and strength of the other's case up to the trial, one result of which is that time is wasted at the trial on peripheral issues that could have been cleared away at an earlier stage. It has been suggested that all evidence should be disclosed in the pleadings, including the names of all witnesses, so that counsel would be fully conversant with all aspects of the case. Such radical suggestions are unlikely to find favour.[81a]

12.2 In Canada, much attention has been concentrated on discovery. The Law Society of Manitoba attribute much of the success of their courts, Queen's Bench and County Courts, to their process of discovery, which was revised in 1974. In particular, rule 285 provides that -

> "any party to any action may, without order, be orally examined before trial touching the matters in question, by any party adverse in interest."

The examination by a plaintiff may take place at any time after the statement of defence of the party to be examined has been delivered or after the time for delivery has expired and the examination by a defendant, at any time after he has delivered his statement of defence.

12.3 In Ontario, the Williston Committee concerned itself with the question whether the right to discovery should be extended to non-party witnesses. They thought this was often desirable in order to ascertain the facts prior to trial but they also appreciated that such examinations lead to additional costs and delay. They were aware that such a process has been abused in the United States.[82] They recommended a compromise, to permit the examination, with the leave of the court, of any person who was at any relevant time an agent or employee of a party or of any potential witness where the court was satisfied that the applicant had been unable to obtain the relevant information from those he was entitled to examine or from the person sought to be examined.[83]

12.4 These recommendations have not yet been adopted in Ontario but they do form the basis of the new rules of court enacted in New Brunswick in 1981.[84]

12.5 It may be added for completeness that the Code of Civil Procedure, 1882, of India contains provision for the examination of the parties by the court prior to and as part of the framing of the issues. It incidentally helps the parties to know where they stand and what is the case they have to meet, and so conduces towards settlements.

12.6 In some jurisdictions, lists or affidavits of documents have to be produced as a matter of course and in some only on request. The Williston Committee recommended eliminating the necessity to serve a notice to produce and instead requiring the automatic delivery of affidavits of documents and requiring parties to take those documents to the examination for discovery and to the trial of the action without the need for any notice.

12.7 By an amendment to the Rules of the Supreme Court of Western Australia, enacted in 1978, the court was given power to limit the number of expert witnesses who might be called at a trial and also to direct the exchange of medical reports in actions for personal injuries and also reports from other expert witnesses or the substance of their evidence. The first of these powers was, obviously, to enable the court to expedite hearings and the second was intended to preclude the danger of an adjournment having to be granted to enable evidence to be considered, cross-examination prepared or rebutting evidence called.

12.8 The requirement that medical reports be exchanged in personal injury cases is now a common feature in most jurisdictions.

12.9 In Queensland, a practice direction issued a few years ago required solicitors in personal injury actions to file and exchange medical reports and other documents to be relied on before the action is set down for trial, but a report from the Law Society states that new material is all too often produced shortly before the hearing and frequently admitted in evidence, so defeating the purpose of the direction.

12.10 The Law Commission of India, in its 77th Report,[85] recommended that matters of a formal nature should be proved by affidavit rather than by oral evidence.

12.11 The use of affidavit evidence, where it is not likely to be challenged, is also being encouraged in New South Wales. More use of interrogatories and notices to admit is also being encouraged progressively by amendments to the rules of procedure.

12.12 In Belize, the law has been amended to allow the reports of medical officers to be accepted in evidence where cross-examination is not required.

12.13 In Ontario, the Williston Committee recommended a simplified procedure for the determination, prior to trial, of any question of law that might dispose of the action, shorten the trial or result in a substantial saving of costs.

12.14 The rules of procedure in New Zealand presently allow a question of law to be decided before trial but the courts have held that this provision is only available where the question, if answered one way, would be decisive of the whole case. It is understood that the new draft code will give the court a wide discretion to deal, prior to trial, with any question or issue, whether of fact or law or both, and whether or not a decision might be decisive of the case as a whole.

Time limits: extensions and adjournments

13.1 The present position in England where the enforcement of time limits is concerned is summed up in the report of the Personal Injuries Litigation Procedure Working Party (the Cantley Report)[86] -

> "Under the adversary system the Court does not strike out a claim or defence save at the instance of the opposing party.... The function of court control is to prevent delay by neglect and oversight; but if the parties are brought before the Court and both insist on further delay, then in our view it is no function of the Court either to compel them to litigate or to strike out one or other party against the wishes of the other."

The Working Party did not favour any change.

13.2 The Royal Commission on Legal Services (the Benson Commission) issued a questionnaire, in answer to which the Bar agreed that time limits could be more rigorously enforced. The Bar remarked[87] -

> "Unfortunately, rigid compliance with the time limits set by the Rules of the Supreme Court is possible only in the simplest cases: it is impossible in the vast majority of contested actions. As no solicitor can afford to be unyielding in the matter of extending time unless he is confident that he himself can conform with the time limits established over the Rules, there is a tendency for each side to grant extensions of time to the other - sometimes to the benefit more of the lawyers than of their clients. If possible, more realistic time limits should be established, and they should be more rigorously enforced. Large extensions of time should only be granted if the Court is satisfied either that all clients concerned genuinely agree or that the necessary work cannot be done otherwise."

13.3 The Benson Commission considered the passage from the Cantley Report quoted above and added[87a] -

> "We do not think this goes far enough. There is need for a determined effort to evolve a simplified scheme for litigation that will contain sanctions for non-compliance.... We have no doubt that standards must be improved and that advice and exhortation alone will be inadequate for that purpose unless backed by sanctions."

13.4 The Oliver Report considered the reasons why, in the public interest, delays are unacceptable. They said[88] -

> "... we accept... that in practice there is a too frequent tendency on the part of some professional advisers to accept delays (for instance by agreeing to

adjournments and the extension of time) as a matter of business convenience rather than because it is in their client's interest. It would, we think, be wholly reasonable that where the court is asked to sanction delay by extending time or granting adjournments it should be entitled to satisfy itself that the application is one which is expressly authorised by the client."

It would at least ensure that parties did not have to pay the costs of adjournments agreed without their knowledge and even possibly against their wishes.

13.5 The Senate of the Inns of Court and the Bar of England accept that the courts should adopt a stricter attitude towards applications for adjournment, while the Law Society stress the importance, when an adjournment is granted, of the court fixing the next hearing date. At present too often hearings are adjourned generally with liberty to restore.

13.6 The Law Society also drew attention to the fact that it is sometimes the duty of a solicitor to delay proceedings when he believes that a "cooling-off period" is desirable, to make possible negotiations for a settlement.

13.7 In a paper prepared by the London Common Law Bar Association for the Law Society in September 1980, it was argued that consent applications for extension of time commonly arise because the time limits are unrealistically short.

13.8 From Western Australia comes the comment that counsel are usually ready to accommodate one another as regards adjournments.

13.9 In Alberta, rules were introduced in 1976 providing that no adjournment should be allowed by a judge by reason only of the consent of the parties and that if two adjournments had been granted, any subsequent adjournment would result in the action being removed from the trial list, to be re-entered only with the leave of the court.

13.10 In India, an Act of 1977[89] amended the Code of Civil Procedure to prevent unnecessary adjournments. Among stringent provisions is one that -

"no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party."

The fact that a pleader is engaged in another court is not to be a ground of adjournment, nor is illness unless the court is satisfied that another pleader could not have been engaged in time. Moreover, where a witness is present but a party or his pleader is not present, or the pleader is not ready to examine or cross-examine the witness, the court may record the statement of the witness and dispense with the examination or cross-examination. The Law Commission of India has also deprecated adjournments between the conclusion of the evidence and the arguments of counsel.[90]

13.11 In Malta, a Bill was published in 1981 which provided, among other matters, that where a case has been set down for hearing and subsequently adjourned to an unspecified date or otherwise suspended and more than three months have elapsed, the Registrar is to include it in a list of suspended causes to be posted at the entrance to the court house. Such cases are to be deemed to have been deserted unless certain specific requirements are met within one month, a period which may be extended once only and then for not longer than two months.

13.12 In the Northwest Territories of Canada there has been a tightening of the procedural rules and greater insistence on the observation of time limits. For example, if no reply to the statement of defence is filed within ten days, the plaintiff is deemed to have joined issue with the statement and the pleadings are automatically noted closed. The rules also provide for both parties filing statements as to documents within ten days of the close of the pleadings. If either side fails to comply, the other side can move for dismissal for want of prosecution, or move to have the statement of defence struck out, as the case may be.

13.13 In the Isle of Man, the delay in the hearing of civil claims has been much reduced by a more rigorous insistence by the court that pleadings be delivered within the time prescribed by rules of court.

13.14 In New Zealand, on the other hand, sanctions against breaches of the rules prescribing time limits are rarely invoked.[91]

Setting down for hearing

14.1 The Beeching Commission recommended that solicitors should be required to certify that their cases were ready for trial at the time they were set down, subject only to obtaining final medical reports, where appropriate. Subsequently, the certificate of readiness was introduced in England, in 1971, but only for cases which were to be tried outside London.

14.2 The Cantley Report, published in 1979, referred to this and remarked of the practice that "it has not proved an unmixed blessing."[92] They did not feel in a position to recommend its abolition, although they said they would prefer to see it abolished. They thought it was often a cause of delay -

> "Setting down may start a round of negotiations. When these reach a stalemate the plaintiff files a Certificate of Readiness, having given the necessary 7 days notice to his opponent. This starts another round of negotiations and when the case is put into the warned list there is an application to take it out because negotiations are still proceeding."

Assuming that the certificate of readiness was to be retained, the Working Party thought it needed to be strengthened by provision for a court summons, with power to order an action to be struck out if, after it has been set down, a certificate of readiness is not filed within a stated time.

14.3 Ontario adopted the certificate of readiness in 1971[93] but it is omitted from the draft rules of procedure prepared by the Williston committee. These merely stipulate that an action is to be deemed to be ready for trial without the necessity for serving a certificate, and all other parties would be deemed to be ready for trial 60 days thereafter.

14.4 Alberta enacted a rule in 1976 making a certificate of readiness a prerequisite before an action could be set down for trial and cases are entered on the ready list strictly in the order in which the certificates were filed.

14.5 Manitoba introduced a certificate of readiness in the Court of Queen's Bench in 1979. It is for the lawyer with conduct of the case to file the certificate as soon as the case is ready for trial. If counsel are not prepared to sign, an appointment is made to appear before the prothonotary, who will set a trial date or terms of reference to bring the matter before the court. This applies to all civil and matrimonial matters, except uncontested divorces, for which Mondays are set aside, and certain family matters. The system is proving satisfactory.

14.6 Québec has a "certificate d'etat"[94] but in its present form, according to the de Grandpré committee, it is almost useless. The committee thought it should play a major role in their proposed procedure, and should always be accompanied by the answers to interrogatories and all essential documents, including reports of experts intended to be called.

14.7 Queensland recently introduced the practice of requiring the filing of a certificate of readiness for trial with a view to reducing delay by doing away with the necessity for a summons for directions. At first it was found to work reasonably well, but the Court Practice and Procedure Committee of the Law Society feel that it will have little effect where there are already delays from other causes.

14.8 New South Wales does not require a certificate of readiness, but proceedings are not given a date for trial in the Common Law Division of the Supreme Court until an officer of the court, usually the Prothonotary or his deputy or in complex cases a Master, has examined the court papers, conducted a directions hearing and satisfied himself that the case is actually ready to be tried.

14.9 In the Court of Appeal for England, the listing arrangements are being revised. Between the extremes of the very urgent appeal that must be heard almost at once, thus precluding substantial notice, and the exceptionally heavy case which requires long notice of a more or less fixed date, it is hoped to devise "a system of long-range forecasting, coupled slightly later with a more or less precise indication of the date for the hearing."[95] This will be worked out in conjunction with the profession and tested by experiment.

14.10 Some additional flexibility will be gained by keeping a list for the Civil Division as a whole, not, as in the past, separate lists for the courts.

14.11 Western Australia introduced a new method of listing cases in 1972. It is known as the "Rolling List." Very briefly, the system is this. A cause is entered for hearing and after seven days, if a summons to countermand the entry has not been issued or if issued has been dismissed, the List Clerk includes it in a list of cases for hearing in the subsequent month and numbers each cause consecutively. The list is called over by the Master about 14 days before the commencement of each monthly sitting, when causes that have been settled are struck out or listed for consent judgments; cases to be adjourned by consent are adjourned to a later list or struck out; and, as regards the remaining cases, a day is specified for each, so far as is practicable, before which the case will not be heard. A cause which is not reached during the month for which it is listed is given priority in the next month's list. Cases which are estimated to take more than four days or where there are exceptional circumstances, such as witnesses from outside the State, may be given firm dates for hearing, but these are the only exceptions. When the Rolling List was first introduced, it was not favoured by the legal profession, who thought it would cause inconvenience and who were doubtful if it would work. It has, however, proved to be satisfactory and is now regarded as an integral part of the system.

14.12 Almost all the civil courts of New South Wales use a "call-over" system and wherever multi-judge sittings are held, some form of "swinging list" system is used. Experiments are still proceeding to find ways of minimising the inconvenience caused when cases are not reached. Contested matrimonial cases are not placed on the regular ready list, but on a special ready list for which a judge is made available in the third week of each month. Generally, it is considered desirable for counsel to know two months in advance the dates when their cases will be heard. The system is, however, flexible and the clerk will always try to accommodate counsel, provided it would not mean ousting a case already listed.

14.13 New Zealand introduced a ready list in 1972. Dates for the hearing of civil cases in the High Court, whether before a jury or before a judge alone, are determined following either the filing of a praecipe to set down or an application to have the case entered on the ready list. Under both procedures the parties have to certify that the matter is ready for hearing and give an indication of the time it is likely to take. From the two lists, Registrars allot fixtures immediately prior to the commencement of the High Court sittings.

14.14 In the larger District Courts, a special fixtures system has been introduced for civil cases, with a clerk responsible for allocating hearing dates. The aim is to fix a hearing within 12 weeks of the application for special fixture. A speeding up of hearings has been achieved.

14.15 A new procedure for setting down for trial was introduced in the County Court of Winnipeg in 1980. Previously, a trial date could only be obtained by notice of motion. Now, a party may obtain a reserve trial date from the Trial Co-ordinator, either by telephone or by personal attendance. If all parties are in agreement on the reserve trial date, the filing of a Consent to Trial Date form will fix that date. If the parties are not in agreement, the party who obtained the reserve trial date must, within ten days, serve on the other party a Notice of Trial and Readiness form. The onus is then on the other party to apply by motion to a judge to set aside the reserve trial date, fix another date for trial or otherwise dispose of the matter. The system is supervised by a judge, who is designated the Supervising Judge.

14.16 Up to 1981 in The Bahamas an application for a hearing date had to be made to the clerk to a judge. Apart from the obvious objection that this allowed a party to choose the judge he preferred, it also led to an unfair distribution of work. Now, there is a clerk of the lists, to whom all applications for hearing dates must be made.

14.17 In South Australia an enquiry is currently under way to find means of expediting the business of all the courts. There have already been experiments to discover the best way of listing cases under the Small Claims Jurisdiction and those under the Limited Jurisdiction and experimenting has not ceased. At the moment, there is a small claims week in the first week of each odd month, when all the magistrates concentrate on small claims work, and some additional weeks. The remaining seven out of eight weeks are devoted to limited jurisdiction work. There are informal arrangements for weekly and daily callovers so that particular matters can be allocated even on the morning of the trial day. The essence of the system is flexibility.

14.18 In many parts of the Commonwealth, there is regular over-booking of the hearing list. This has long been practised informally in England and in Scotland. Manitoba also follows an over-booking system: if there are expected to be four judges available on a

certain date, the Trial Co-ordinator will fix five or six trial dates. This has worked out remarkably well, hardly ever causing an adjournment and making the maximum use of judicial time.

14.19 In Queensland, a practice direction issued by the Chief Justice, expressly directs the judge presiding at a callover to set down for hearing on each sitting day more trials than there are judges available.

14.20 In Singapore, over-booking is known as "notional fixing". This takes place quarterly in the High Court, when, if there are seven judges available, cases will be fixed for nine. This enables trials to take place earlier, because otherwise some of these cases would have to wait over until the next quarterly fixing. In spite of this over-booking, an average of about three days a week still become available because of the large number of cases that are settled. To fill these days, a Thursday mention is held by the Registrar, and urgent matters, such as applications for injunctions, are also dealt with then. At the quarterly fixings, the Registrar normally commences with cases that require more than a day (referred to as the Ordinary Cause List) and the remainder are grouped in fives, each group allotted to a week (the Short Cause List). It is these Short Cause cases that come up at the Thursday mention. The reasoning behind the system is that it is comparatively easy to "slot-in" one day cases into gaps as they occur in the list as fixed. Outside this system, there is a list of pending uncontested divorce petitions and these are put up for hearing on short notice (normally 48 hours), when days become available during the course of a week.

14.21 In the district courts and magistrates' courts there is a system of "double-fixing", that is to say, two cases are fixed for each hearing day. So many cases are settled or adjourned for other reasons that most of the cases are disposed of on the appointed days, only about 5% having to be adjourned.

14.22 Another method used in the subordinate courts is known as the "filter method." More cases are fixed for one court (called the Filter Court) than any court could possibly deal with. The other courts liaise closely with the filter court, which passes its excess cases to those courts able to take them. The filter court also adjusts the burden between the other courts by arranging for those that are over-burdened to send cases to courts that are free. It is realised that this causes some inconvenience to counsel but it does achieve the fullest use of judicial time and ensures that cases come to trial as soon as possible.

14.23 In the magistrates' courts of the Australian Capital Territories, civil and criminal matters used to be included in one mixed list: in the last year, a separate civil list has been instituted, with a magistrate sitting for two weeks at a time in charge of it. The list is overbooked by 60% but usually sufficient cases are settled to enable the list to be cleared. There is a daily call over of the civil list by the deputy clerk of the court, who makes notations of orders to be made by consent and these are later signed by the magistrate. This keeps the sittings of the court free from routine or formal matter. These changes are reported to have speeded up proceedings considerably.

14.24 By way of contrast, there is no deliberate overbooking in New South Wales and cases are booked on the basis of the number of judges expected to be available, yet in the opinion of the Bar Association the court is far too often over-optimistic, so that cases are frequently not reached and then have to be given another date, three to six months thereafter.

The pre-trial conference and the mini-trial

15.1 British Columbia appears to have been the first country of the Commonwealth to provide by rule for pre-trial conferences[96] but the procedure was optional and it appears that it was rarely invoked. This has been changed and the current rule empowers the court at any time to direct that a conference be held. Recently, the Chief Justice has required a conference in all cases that are likely to take more than four days, and the judge who presides at the conference is required to forward his evaluation of the case to the Chief Justice and his trial co-ordinator. It is believed that this has had the effect of shortening the time taken by trials.

15.2 A judge who presides at a pre-trial conference is not seized of the action, which may be tried by him or by any other judge.

15.3 The business of the conference, according to the rules, is to consider -

(a) the simplification of the issues,

(b) the necessity or desirability of amendments to pleadings,

(c) the possibility of obtaining admissions which might facilitate the trial,

(d) the quantum of damages,

(e) fixing a date for the trial, and

(f) any other matters that may aid in the disposition of the action or the attainment of justice.

This has become almost a standard form in all jurisdictions that have adopted the pre-trial conference, but they do appear to have differed in the significance they have given to the last of the considerations.

15.4 Alberta included provision for conferences in its 1968 Rules of Court but again it was optional and again was little used, although it was said to have proved of value in several complex cases. As in British Columbia, the judge who took the conference was neither deemed seized with the proceeding nor prohibited from hearing the trial.

15.3 Nova Scotia introduced a rule in 1968 authorising a conference at the request of either party or of the judge. The Chief Justice is reported to have said[97] that conferences were held in 20% of cases, in two thirds of these at the request of counsel and in one third at the request of the judge. The conference normally took place before the judge who had been assigned to try the case. The Chief Justice said that it was not uncommon for the subject of settlement to be raised, when the judge would normally suggest that the parties might wish him to leave. Only if they wished him to remain would he do so. Generally, judges did not play an active role in canvassing the possibility of settlement, although judges did not all see their role in the same light. Here, again, the judges were convinced that the conferences led to shorter trials.

15.6 In 1969, Ontario began experimenting, at the instance of the Advocates' Society, with the pre-trial conference as a means of expediting trials. The scheme was a voluntary one and as some counsel declined to participate, it failed to develop. This may have been partly because it was regarded as an Americanism.

15.7 The Ontario Law Reform Commission, in their Report on the Administration of Ontario Courts, 1973,[98] expressed the opinion that a controlled experiment was worth considering, but they did not feel able to recommend it. The alternative was the introduction of rules making conferences mandatory. They felt that the initiative for this should come from the judiciary and the profession. They did recommend that if the system were introduced, a conference should not be conducted by the judge who would preside at the trial.

15.8 The experimental use of the system appears to have begun again in 1976[99] and it was formalised in the Supreme Court Rules of Practice. The relevant rule appears to have been based on the 1961 precedent from British Columbia but, following the Law Reform Commission's recommendation, it departs from that precedent by stipulating that -

> "The judge who conducts a pre-trial conference in any action, cause or matter shall be deemed not to be seized of such action, cause or matter and shall not thereafter try or hear such action, cause or matter."

This provision is, however, qualified by a later subrule stating that -

> "Nothing in this rule shall prevent a judge before whom a case has been called for trial from holding such a conference either before or during the trial without disqualifying himself from trying the action."

15.9 The Williston Committee in June 1980 commented that the rule -

> "already has had a very dramatic effect in increasing pre-trial settlements."

They only suggested the minor amendment, that where a judge before whom a proceeding had been called for trial holds such a conference, it should not, without the consent of all parties, discuss the discharge of the jury, the settlement of liability, or the quantum of damages: in other words, a conference at that stage would be more of the nature of a summons for directions.

15.10 Today, the possibility of settlement is regarded in Toronto as the most important consideration where pre-trial conferences are concerned. It is considered -

"undoubtedly the best thing that has happened to the litigation process in many many years."[100]

It is thought to result in a high degree of settlement at an earlier stage than might be achieved without pre-trial, if settlement would be achieved at all.

15.11 In the circumstances, it is not surprising that the Provincial Court (Civil Division) Project,[101] the purpose of which was the development of simplified procedures and of methods of making civil remedies more accessible and reducing delays, empowered the court to convene a pre-trial conference for resolving or narrowing the issues, of its own motion or at the request of a party.[102]

15.12 It is now proposed to introduce a comparable pre-appeal conference. There is a similar proposal under consideration in British Columbia.

15.13 There is no formal pre-trial conference procedure in Manitoba, but such conferences do take place by agreement between counsel and the judge and they are apparently fruitful.

15.14 There has been much experimentation with pre-trial conferences in New South Wales, both in the Supreme Court and in the District Court. The conclusion that has been reached is that while pre-trial systems can be "an intolerable nuisance and a further delaying factor" if allowed to become too complex or too prescribed, they can, if conducted with the right degree of formality and with the right blend of common sense and experience, be very effective. Pre-trial conferences in New South Wales are conducted before registrars and, in addition to settling matters preliminary to trial, they are proving very useful both in clearing "dead wood" from the lists and in bringing about early settlements.

15.15 There is a procedure very akin to the pre-trial conference in the Court of Petty Sessions of the Australian Capital Territories, where the parties, prior to hearing, come before the clerk to define the areas in dispute. This leads to most matters being settled without hearing, although that is not the purpose of the conference. This, and other administrative changes, has reduced the average time between the lodging and the hearing of a small claim from 16 weeks in 1979 to 6 weeks at the present time.

15.16 There is no pre-trial procedure in New Zealand but it is thought to be desirable and a draft Code that has been prepared contains a proposed rule that at the request of all parties a judge may at any time before trial convene a conference of solicitors or counsel for the purpose of negotiating a settlement of the proceedings or of any issue. The new Code has not yet been finalised. It has been suggested that at some later stage the court may be given power to call a compulsory settlement conference.[103]

15.17 In England, the pre-trial conference was mentioned before the Review Body on the Chancery Division (the Oliver Report)[104] but they did not feel that the evidence before them was sufficiently explicit to enable them to do more than make a general recommendation that the feasibility of introducing some such procedure in the Division should receive urgent consideration. It should be noted that the Review Body was thinking of the introduction of the pre-trial conference for use in appropriate cases, not as a matter of course in all cases.

15.18 The London Common Law Bar Association, addressing the Law Society,[105] expressed themselves against any pre-trial review, which they thought would prove more time-consuming than the present summons for directions. They were not convinced that any such procedure would greatly reduce delay or greatly advance the time when actions are settled.

15.19 An experimental pre-trial review in matrimonial causes to secure the settlement of financial applications, begun in 1980, was not a success and has been discontinued.

15.20 Elsewhere in the Commonwealth there has been much less interest in the idea of pre-trial conferences. In Zimbabwe, the rules of the High Court used to provide for a pre-trial conference before a judge, but the rule has been changed to provide for the conference to be held by the parties themselves and for the matters agreed to be embodied in a memorandum for production to the court.[106] In default of agreement, an application for directions may be made to a judge. The reason given for the change is that it was hoped to make the occasion less stilted and provide a better atmosphere in which the parties could discuss the issues or attempt a settlement. It should perhaps be added that the attempt to reach a settlement is mentioned neither in the old rule or the new as one of the objects of the conference.

15.21 Botswana introduced a pre-trial conference when new rules of the High Court were promulgated in 1974. This is, however, a very different concept from the conferences of Ontario or British Columbia. In the first place, the object was the clarification of issues, the recording of admissions, production of agreed bundles of documents and such matters; it was not aimed at settlement. Secondly, the conference is not presided over by a judge or official: it is a conference of the attorneys and minutes of it must be produced to the Registrar before a case can be set down for hearing. It is, in fact, a substitute for the summons for directions and its purpose is simply to save time, inconvenience to witnesses and expense.

15.22 In Swaziland also the rules provide for a pre-trial conference leading to an agreed minute, but it has not been found to work satisfactorily because of the failure of practitioners to observe the rule, and the court has had to threaten punitive orders in costs in an attempt to compel compliance.

15.23 The Law Commission of India considered, in its Seventy-seventh Report,[107] whether the pre-trial conference should be introduced into the Indian system. They agreed with the conclusions of an earlier Report, the Fourteenth, that it was unnecessary and undesirable. They did not believe that it would save costs and they feared that a conference might degenerate into a "fishing expedition". They considered that the existing system was satisfactory for the clarification of issues and that there was nothing to prevent a judge from suggesting a compromise. After remarking that judges who try to induce the parties to come to a settlement are liable to be misunderstood but that a competent and experienced judge will have no difficulty in perceiving cases pre-eminently suitable for a compromise, they added -

> "A few tactful words by the Judge at a suitable opportunity, without the appearance of taking a view on either side and without playing an unduly active role, may bring about the desired result."[108]

15.24 The mini-trial is another procedure evolved in British Columbia, in which a judge hears statements from counsel but does not hear evidence. He then gives counsel an indication of what his decision would be, with all consequent recommendations. This procedure, like the pre-trial conference, is intended to narrow the issues and encourage settlements without any coercion.

15.25 The procedural side of the pre-trial conference, the simplification of issues, amendments to pleadings, admissions and fixing the date of hearing, are matters that can be dealt with on a summons for directions. It may be that in some cases these can be settled more satisfactorily at an informal conference but this would not justify the holding of conferences in all cases. As regards the simplification of issues, a note is attached as Appendix VI on the Indian system of framing issues. This is an old procedure but it may be worth consideration in this context.

15.26 When considering the pre-trial conference as an approach to settlement, it should be borne in mind that a settlement is only just if it accords with the rights of the parties. Many settlements are convenient but not just, in the sense that one party is accepting less than his legal entitlement or agreeing to pay more than is strictly due. A plaintiff may need cash and be glad to accept an immediate payment of less than is due, rather than wait, perhaps for years, to recover the full amount. A defendant may be willing to pay something to be free of the anxiety of an impending action. Each party may believe that he would succeed if the matter were to go to trial but be afraid to risk an order for costs if he should fail.

15.27 This prompts the question whether it is proper for a judge, whose duty it is to dispense justice according to law, actively to promote a settlement. It is arguable that where, on the pleadings, it seems likely that neither side will be wholly successful, there is no reason why the judge should not suggest to the parties that they might consider the possibility of settlement. Where, however, it appears at first sight that one side or the other may succeed outright, it would be wrong for the judge even to hint at settlement. The fact that the amount at stake is small in relation to the costs likely to be incurred is a reason for the lawyers to advise their clients that they would be wise to settle; the suggestion should not come from the judge, although he may show sympathy if asked to grant an adjournment to allow negotiation.

15.28 The references to "the judge" in the last paragraph are, of course, to the judge who is to try the case. In the Canadian pre-trial conference, unlike that in some states of America, a judge may preside who will not conduct the trial, and it is argued that this allows him to play a more positive role. It is suggested that this is dangerous.

An ordinary person, with little or no experience of the law, will find it difficult to resist even a mild suggestion from a judge, because he will feel that another judge trying the case will have a similar outlook. And a person who is convinced that he is in the right will doubt the impartiality of the court if a judge suggests that he should compromise.

15.29 This does not mean that the court may not indirectly help to promote a settlement. The clarification of the issues, on which where necessary the court should insist, may help the parties to realise just how wide or how narrow is the gap between them and the process of discovery enables the parties, or their advisors better to assess the prospects of success.

15.30 Where a pre-trial conference does not result in a settlement, a very full discussion of the facts and the law, including the evidence, such as apparently takes place in the United States, serves the purpose of preventing surprise when the issue comes to trial but it does also allow an unscrupulous person to trim his case and may, within limits, give him a second "bite at the cherry."

15.31 One side effect of the pre-trial conference may be mentioned. The Benson Commission pointed out[109] that the fact that a case has required one or more pre-trial conferences should be taken into account in deciding whether the position of the case in the list should be changed to enable counsel originally instructed to appear at the trial. They observed that in such a case, it is particularly important that the barrister with whom the client has conferred should represent him and they suggested that there is a need for guidelines in the matter.

Judgments and orders

16.1 In Ontario, if a judge has not given judgment within six months from the date of reserving judgment, the Chief Justice of the High Court may order a retrial or rehearing of the matter.[110] This provision will be preserved if the Williston report is adopted.

16.2 The Law Reform Commission in 1973[112] recommended that a similar rule should be enacted as regards masters' judgments and that a party should be able to apply for rehearing where a decision has been reserved for more than one month.

16.3 Cyprus in 1965 enacted rules of court empowering a litigant in the Supreme Court to apply for any order that might be appropriate, including an order for rehearing before another judge, if a reserved judgment has not been delivered within six months. This has proved effective, as whenever an application is lodged under the rule, it results in the delivery of the judgment before the application is heard. Lists of reserved judgments in the District Courts have to be sent to the Supreme Court, and there is a duty on the Presidents of the District Courts to intervene where judges reserve judgments for more than three months. Even within these time limits, litigants are encouraged to write to the Chief Registrar of the Supreme Court or the Registrar of a District Court, asking for the delivery of a reserved judgment in cases where delay entails personal hardship.

16.4 In South Australia, the Chief Justice recently addressed the Law Society, inviting members of the profession to write to him, if they thought a judge of the Supreme Court was taking too long over the delivery of a judgment.

16.5 It was reported from Western Australia that there is no method there of requiring judgment to be given if a judge or magistrate is dilatory. Most judgments are delivered within a reasonable time but delays of a year or more have occurred and there was a recent case in which judgment was delivered 41 weeks after trial.

16.6 There are complaints from the Guyana Bar regarding delays both in the delivery of judgments and in the entering of court orders.

16.7 In India, the Code of Civil Procedure[113] provides that where judgment is not pronounced at once, every endeavour should be made to pronounce it within fifteen days. It appears that this requirement is not honoured and the Law Commission of India commented most unfavourably, both in the 77th and the 79th Reports, on the delays that occur. They recommended that, save in exceptional circumstances, a reserved judgment should be pronounced within a week or, at most, a month.[114]

16.8 There were complaints in Belize that magistrates were slow to give their reasons when appeals were lodged following summary trials. The Supreme Court Rules were amended

to impose a time limit and giving a right of recourse to the Supreme Court if the limit were not observed. Apparently the enactment of the rule was enough to achieve the desired effect, and it has not been necessary to invoke it.

16.9 In Manitoba, reserved judgments are usually delivered within two months and there are no complaints. New Zealand and Swaziland have also indicated that they have no problems concerning reserved judgments.

16.10 In England, there were serious delays in the drawing up of formal orders and judgments in the Chancery Division. An order had to be bespoken, a process which involved lodging a statement concerning the parties, a letter of application and all necessary documents and informing all the parties that they were required to lodge such documents as were in their possession. A draft was then prepared and sent to the parties giving them time to object, and if there was no objection the draft was approved. The registrar might require the parties to attend on an appointment to settle the draft. In place of all these, the Oliver report recommended that all orders and judgments, except orders on motions and interlocutory orders by masters, should be drawn up automatically by court staff and a sealed copy sent out by post to the party having carriage of the order or judgment. This reform has recently been effected.

16.11 It is suggested that where there are problems of reserved judgments, a book might be kept in the Registry. It would only need to show the number of each case, the name of the judge and the date when judgment was reserved. As judgments were delivered, they would be struck out of the list. If the Registrar kept an eye on the list, he would notice any judgments that had been outstanding unusually long and remind the judge; also, when hearing lists were being prepared, a few days could be left free for any judge with outstanding judgments.

Execution

17.1 Comparatively little has been said by correspondents about execution, although informal complaints about delays in the process are common.

17.2 In Northern Ireland, a Judgments Enforcement Office was set up in 1970[115] following the recommendations contained in the Report of a Joint Working Party published in 1965. Valuable information concerning the Office was received after this Report was finalised and appears as Appendix VIII.

17.3 In England, a Committee on the Enforcement of Judgments Debts which reported in 1969 (the Payne Committee)[116] recommended sweeping changes, including the setting up of an Enforcement Office, to be attached to the county courts. The recommendation has not been implemented. One of the problems relating to such a change is whether the benefits that might result would be sufficient to justify more bureaucracy and public expenditure. The current trend is, in fact, away from the Payne recommendations, as the larger judgments of the county courts are now enforceable by the parties, as in the High Court. This was introduced to enable interest to accrue on such judgment debts, which presented practical difficulties when the debts were collected by the court.

17.4 Some of the other recommendations of the committee have been implemented, including an important extension of the garnishee proceeding, but these are not relevant to the subject of this paper.

17.5 The subject is a live issue in Scotland at the present time. The Scottish Law Commission issued five consultative memoranda on various aspects of "the law of diligence" and a report is being prepared in the light of the comments that have been received. Diligence is not an executive responsibility of the courts but proceeds on the instructions of the successful party to a sheriff officer, who is a private individual commissioned for executing judgments. The role of the courts is limited to granting specific authority for certain steps and there is no problem of delay so far as the courts are concerned.

17.6 Of Ontario, the Williston committee made the scathing comment that the Province -

> "has become well known as one of the debtors' havens in the English speaking world due largely to the fact that the methods of collecting and enforcing judgments are archaic, expensive and ineffectual."

The Ontario Law Commission was then engaged in a study concerning the enforcement of judgments and the Williston committee thought it best to defer considering possible new rules until the Commission has reported.

17.7 The Law Reform Commission of Queensland considered the subject of execution exhaustively, comparing the Queensland provisions with those of England, New South Wales, South Australia and Victoria, but their recommendations have no direct bearing on the question of delay.

17.8 In South Australia, the existing bailiff system is said to have fallen behind in efficiency and a review of the procedure is currently in progress.

17.9 From Malawi, there are complaints of delay in the execution of writs of fieri facias due to a lack of sufficient assistant sheriffs and bailiffs, particularly in rural areas where these duties are performed by traditional courts officers.

17.10 In India, the Law Commission recorded that delays in the process of execution resulted largely from objections lodged solely to gain time, and they felt that the courts did not devote as much time as they should to matters of execution.[117]

17.11 In Tasmania, various proposals are under discussion, one of which is of particular interest: it is that the State should take a more active role in the collection of judgments, on the one hand, and the advising of judgment debtors in regard to their finances, on the other. While this proposal may be more social than legal in its implications, it is thought that it might relieve the courts by preventing the re-appearance of some debtors.

17.12 In the magistrates' courts of the Australian Capital Territories, a practice has grown up for judgment debtors who have attended the court for oral examination to be examined outside the court by the solicitor for the judgment creditor. This is only done by consent and only when both parties are legally represented, but it does save an appreciable amount of court time.

Taxation of costs

18.1 The last stage in the process of litigation, the rendering and taxation of the bill of costs is all too often extremely protracted.

18.2 The Law Society in England report that because of the complexity of the scales and the labour and expertise involved, it usually takes some months to produce a detailed bill. By the time the bill has been taxed and a certificate issued, six to nine months, sometimes even a year, may have passed since the trial. They recommend a sweeping reform -

> "The multiplicity of archaic and illogical scales of costs should be abolished and replaced by a comprehensive, modern, and fair system of charging."

They argue that if this were done, the preparation of bills and the taxation proceedings could become simple steps easily accomplished, instead of matters of complexity.

18.3 A committee now sitting in New Brunswick to prepare new rules of court is proposing to include one which would have the effect of abolishing taxation in most instances in favour of the trial judge determining the amount of costs as part of his reasons for judgment. A large scale of fees would be provided for his guidance.

Appeals

19.1 The volume of appellate work in the Supreme Court of Ontario grew to an extent that had not been anticipated and the Attorney General therefore appointed a committee (the Kelly Committee) to examine the exercise by the court of its appellate jurisdiction. They reported in 1977,[118] but there were divided opinions on the proposals and no action has been taken on the Report.

19.2 The Report contains one proposal of considerable interest. The Committee recommended the establishment of a Court of Appeal divided into two sections: one, referred to as the Juristic Section, was to hear appeals involving questions of law, the decisions upon which would be of importance to the public generally, or some segment of the public, as on-going expositions of the law, and to exercise a supervisory review power; the other, referred to as the General Section, would have the function expeditiously of hearing and disposing of appeals not involving questions of law of on-going public importance. They recommend that the number of judges on the Juristic side should be restricted and that appeals should only lie to them with leave.

19.3 The Committee also considered the question whether to retain the system of oral argument or to replace it by written briefs, with a very limited time for oral explanation. They came firmly to the conclusion that no time would be saved by the introduction of written briefs, while there would be a real danger that the court would not acquire so comprehensive an appreciation of the issues.

19.4 The matter of oral argument has been considered in other jurisdictions. In England, the working party under Lord Scarman considered that the system of written briefs and limitations upon the time allowed for argument has advantages, but that it was alien to the English tradition of oral presentation and argument and would not necessarily be less expensive. This view has recently been endorsed by the new Master of the Rolls, Lord Justice Donaldson.[119] At the same time, he accepted that some preliminary reading by the judges would save time in court. The Scarman working party had suggested the use of 'perfected grounds of appeal.' The Master of the Rolls suggested as an alternative that the parties might provide the court in advance with a skeleton outline of their respective arguments annotated by reference to the documents and authorities. He thought the best method would be discovered from practice and that it was possible that different methods might suit different types of cases.

19.5 Mention has already been made[120] of the appointment of a registrar to the Civil Division of the Court of Appeal. Among his many duties will be that of seeing that the necessary documents, in logical and legal form, are before the court. He will be the listing officer of the court and he will have judicial functions.

19.6 Another change of importance is that benches will be smaller.[121] Certain classes of appeal will be heard by a bench of two judges instead of three, except in cases of particular difficulty or involving important points of law, and incidental applications will be heard by a single judge sitting in chambers, instead of a bench of two judges.

19.7 It is also proposed to save the time of the court in some cases where written judgments have been prepared, by handing them down instead of reading them.

19.8 The Law Commission of India in 1979[122] recommended that, while the presentation of arguments in civil appeals should continue to be oral, as an experiment the parties should be required to file a concise note of the material facts and all propositions of fact and law that are sought be raised, with specific authorities noted under the appropriate heads.

19.9 The Law Commission also stressed the importance of trial judges maintaining control over the extent of cross-examination, to ensure that if the matter goes to appeal the record is not burdened with irrelevant and unnecessary material.[123]

19.10 In Swaziland practitioners in opposed applications in the High Court are encouraged to file heads of argument, as a way of saving time.

19.11 In Cyprus, the Supreme Constitutional Court Rules were amended in 1975[124] to allow the filing of written addresses in revisional jurisdiction cases. It was already the practice in the District Courts to accept written addresses in certain cases with the consent of both parties.

19.12 In British Columbia, there are proposals for pre-appeal conferences, the dismissal of appeals for delay in bringing on the hearing and for the reduction of the length of the appeal records. In Ontario, also, the introduction of the pre-appeal conference has been recommended.

19.13 Generally, there are few complaints regarding delay in the hearing of appeals, although considerable delay is reported from Zimbabwe and Swaziland in the preparation of appeal records.

19.14 The problem of appeal records of undue length has arisen in several jurisdictions. It was considered in Ontario by the Law Reform Commission. After referring to the rule allowing special directions to save undue expense or delay with the comment that it is rarely invoked, the Commission went on[125] -

> "The result is that appeals are commonly delayed pending receipt from the court reporter of copies of transcripts of the proceedings before the trial court when a full transcript is not required. Costs to the client are increased by the reproduction of certain unnecessary portions of the evidence, and the time of the Court is often wasted in examining evidence that is not relevant to the issues on appeal."

The Commission recommended that an application for directions be required to determine what portion of the evidence and exhibits should be reproduced.

19.15 In Québec, the rules have recently been revised, with the intention of encouraging parties to submit their cases to the Court of Appeal on an agreed statement of facts.[126]

19.16 Where a verbatim record of the proceedings has been kept, the preparation of a full appeal record adds substantially to the cost of the appeal and may, unless there has been immediate transcription, involve considerable delay. Where an appeal is to be argued only on questions of law, there is clearly no need for a full record and a statement of facts should not be difficult to agree. If, however, the appeal is against findings of fact, it is not easy to decide which parts of the evidence can safely be excluded. When the evidence of a witness relates only to a particular issue and the decision on that issue is not subject to appeal, the evidence of that witness can normally safely be omitted. Where, however, the evidence of a witness relates to two or more issues, one of which is subject to appeal, the editing of the record of his evidence may involve more time and expense than reproducing it in full.

3. RULES OF COURT

Rules of procedure

20.1 Two countries of the Commonwealth have recently replaced their rules of procedure, The Bahamas and New Brunswick. The rules of The Bahamas,[127] introduced in 1978, are based on the Rules of the Supreme Court of England, which previously applied, but in adapting them, some simplification has been achieved and references have been corrected, which should at least have the effect of saving a little time.

20.2 The new rules of court of New Brunswick[128] were published in November 1981. They owe much to the report of the Williston Committee of Ontario.

20.3 That committee was appointed by the Attorney General of Ontario to conduct -

> "a thorough re-examination of the principles and policies upon which the Rules of Practice are based and an evaluation of individual rules"

with a view to simplifying as much as possible the procedure in civil actions, concentrating on the use of simple language and terminology and, among other purposes, producing more expeditious and less formal procedures.

20.4 The Committee prepared a draft new Judicature Act and new Rules of Civil Procedure. It would be inappropriate here in detail all the changes proposed, but mention should be made of the attempt to modernise the language of the rules, except where the committee felt there was a danger of losing precision; the attempt to abolish the concept of procedural nullities; the replacement of the writ of summons and the appearance by a statement of claim and a statement of defence; and the replacement of the specially endorsed writ by a general summary judgment procedure. It should perhaps be recorded that the writ of summons had already been abolished in Nova Scotia, Manitoba, Alberta and Prince Edward Island. Discovery and hearing dates are dealt with elsewhere.[129] The report has not yet been implemented.

20.5 In England, the form of writ was simplified in 1979[130] and a single composite form was introduced to replace the plurality of forms previously used. The form is expressed in language that is intended to be more easily understood that the archaic style of the old writ. The entry of appearance was abolished and replaced by an acknowledgment of service, in which the defendant is required to indicate whether or not he intends to contest the proceedings.

20.6 At county court level, completely new rules have been enacted in England.[131] They are intended to simplify and modernise the procedure of the courts, and in the process they are assimilated, where appropriate, to the rules of the Supreme Court.

20.7 Prior to that, however, the procedure for undefended divorces had been so simplified that it is possible for the petitioner to present his or her own case. The petition is presented to the county court and the court serves it on the respondent, normally by post, together with a form of acknowledgment of service and notes for guidance. The respondent is asked to complete the form and to state whether it is intended to dispute the divorce or any claim ancillary to it or to make any claim against the petitioner. When the respondent confirms that the divorce will proceed undefended, the petitioner files a request for directions, supported by an affidavit proving the facts in the petition. This is considered by the Registrar and if he is satisfied, he gives a certificate that the facts have been proved and the case is set down in the special procedure list. The pronouncement of the decree nisi is formal, but where there are children, the court must be satisfied before making the decree absolute that the arrangements regarding them are satisfactory. This involves a hearing before a judge in chambers, when the proposed arrangements are closely scrutinised. Other ancillary matters, such as maintenance, may take longer. It is estimated that this simplified procedure saves the time of 12 to 14 circuit judges.

20.8 Recently, a new permanent body, the Supreme Court Procedure Committee, has been set up by the Lord Chief Justice with the approval of the Lord Chancellor. Its objects are to consider and recommend to the Rule Committee reforms in practice and procedure for

saving time and costs and which are considered to be matters of urgency, which should not await the more general review of procedure recommended by the Royal Commission on Legal Services. It will be chaired by a Lord Justice of Appeal and its members will be nominated by the Heads of the three Divisions of the High Court, the Senate, the Law Society, and the Lord Chancellor's Department. It will be served by three permanent sub-committees.

20.9 The Committee is not aiming at sweeping or spectacular changes but rather at minor changes that experience has shown can effect substantial improvements in simplifying the process of litigation and reducing delays.

20.10 In Scotland, an affidavit procedure for divorce causes has been introduced, and further procedural changes are envisaged. Generally, there is a continuous process of procedural reform based on the work of a Rules Council for the Court of Session[132] and a Sheriff Court Rules Council for the Sheriff Courts.[133] In addition, the Scottish Courts Administration try to help local Sheriffs' clerks and where a prescribed procedure seems unduly cumbersome, representations may be made to the Sheriff Court Rules Council to see whether simplification and streamlining can be achieved. The need is felt for simplification of complex procedures but in practice it is found difficult to change procedures of long standing, particularly where legislation is required.

20.11 In New Zealand, a new code of civil procedure has been drafted by a revising committee and is now with Parliamentary counsel. It is not known when it will be published. Incidentally, the Revision Committee of the Rules Committee of the High Court has recommended the introduction of a summary judgment procedure similar to that of England, in place of the existing bill writ procedure.

20.12 In Victoria, a complete review of civil court practice and procedures, jointly sponsored by the Law Foundation and the Law Institute, is in progress. The civil procedure in the magistrates' courts was streamlined in the Magistrates' Courts (Civil Jurisdiction) Act 1979[134] but it is too soon to judge its success.

20.13 In Queensland, a Law Reform Commission is presently engaged in the preparation of a working paper on the Acts which relate to Supreme Court procedure, and is also studying the Rules of the Supreme Court.

20.14 In Fiji, the Judicial Department has begun to review and amend the rules of court both of the Supreme Court and of the magistrates' courts, principally in order to streamline the pre-trial procedure.

20.15 New South Wales in 1970 abolished the distinction between court and chambers,[135] in the belief that "it would simplify matters by eliminating the various difficulties that have been held to exist under the present system". This step was considered by the Law Reform Commission of Queensland but they did not think any substantial difficulties had arisen in that State and they recommended that no change be made.

20.16 The Isle of Man has just introduced changes of procedure,[136] including a new default procedure, with the object of reducing the number of formal appearances by advocates before the court.

20.17 Gibraltar, by practice direction, has eliminated the need for appearances on a summons for directions unless the trial judge otherwise directs, where the solicitors are in a position to file an agreed draft order.

20.18 Hong Kong is proposing to simplify the steps a defendant has to take on being served with a writ.

20.19 The procedure of the local courts is currently under review in Western Australia.

20.20 In some jurisdictions,[137] considerable use is made of practice directions to supplement the rules of procedure, while in others[138] they are not favoured. This is a matter of opinion. No significant change regarding their use has been reported.

Fees of Court

21.1 In England, the Supreme Court Fees Order 1975[139] reduced considerably the number of fees of court payable. The initial fee is intended to be a composite fee payable at the commencement of the proceedings but covering also various interlocutory matters.

21.2 Gibraltar followed the English example when introducing new fees of court in 1979.[140]

21.3 South Australia is proposing to go even further, and to replace the 165 or more individual fees for particular services by one common fee to cover the life of a process.

21.4 The object of these changes is to reduce clerical work, the making out of receipts, the endorsement of documents, and so on, but there is an incidental advantage, in that if the initial fee is higher, it discourages the person who has no intention of going to trial but uses the issue of a writ as a means of applying pressure to enforce a claim.

4. ADMINISTRATION

The separation of administrative from judicial functions

22.1 Probably more attention has been focussed in recent years throughout the Commonwealth on the administration of the courts than on any other aspect of the judicial system.

22.2 In England, the administration of the courts is the responsibility of the Lord Chancellor, who has a dual role as the senior of the judges and as the head of an administrative department.

22.3 The present organisation of the court service was introduced in 1971. It is based on the circuits, with a Circuit Administrator for each, supported by a deputy and other staff. Below the Circuit Administrator, the courts are grouped under Court Administrators. There are Presiding Judges in each circuit, who are the channel of communication with the Lord Chief Justice and the President of the Family Division. They have broad responsibility for the deployment and well-being of all the judges within the circuit and they are expected to maintain a watch on the handling of court business in their circuits, but not to concern themselves with matters of detail. They draw fully on the help and support of Circuit Administrators.

22.4 The lack of proper management in the offices of the Chancery Division received scathing criticism in the Oliver Report.[141] It is understood that the reforms recommended in the Report have largely been effected, but it is too soon to assess their success.

22.5 Canada has a Canadian Judicial Council, the functions of which are to promote efficiency and uniformity, and to improve the quality of judicial service in superior and county courts. The Chief Justice of Canada is its chairman. There is also a Commissioner for Federal Judicial Affairs. He is appointed by the Governor in Council after consultation by the Minister with the Canadian Judicial Council. He acts as deputy of the Minister in matters concerning judges and he has overall responsibility for preparing budgetary submissions for the Federal Court of Canada and the Canadian Judicial Council, and for their administrative arrangements, including staff, premises and equipment.

22.6 In British Columbia it was felt that there was a need for the creation of an administrative service to run the courts, but there was anxiety lest this should detract from the independence of the judiciary. The Chief Justice made his opinion clear: he said that -

> "the judges must run the judiciary. If that takes extra time and effort, so be it."[142]

In the end, a compromise was worked out, with the creation of an office of chief administrator of court services, whose duty it is to direct and supervise facilities, registries and administrative services for the Supreme Court, subject to the direction of the Attorney General and, in matters of judicial administration, to the direction of the Chief Justice. No attempt has been made to define the sphere of judicial administration, but there is a working arrangement and no difficulty is experienced in practice. There is also a joint committee to work out a separate court budget. The overlap of functions is particularly marked where the District Registrars are concerned. They are responsible for the administrative running of the registry and have also such quasi-judicial duties as recommending the quantum of maintenance, taxing lawyers' costs, presiding at debtors' hearings and hearing bankruptcy applications.

22.7 Another key appointment made was that of trial scheduler. He is employed by the Ministry of the Attorney General but works closely with the Chief Justice. "Scheduling trials", which is regarded as a judicial function, includes allocating the days for a trial and assigning the judge to try it.

22.8 An unusual feature of the British Columbia system is that the judges' programme provides for three weeks sitting time and one week for writing judgments, although the latter period may be interrupted for urgent business.

22.9 In Ontario, prior to 1968, county and district courts were administered by the individual counties and districts; in that year, for the first time, the Ministry of the Attorney General assumed provincial responsibility for courts administration.

22.10 In 1970, the Ontario Law Commission were asked by the Minister for Justice and Attorney General to undertake a study of the administration of the courts and where necessary to recommend reforms "for the more convenient, economic and efficient disposal" of the business of the courts. The Commission, who reported in 1973,[143] paid tribute to the ability, fairness and diligence of the judges but they found serious problems of inefficiency and delay in the administration of the courts. They were of the opinion that "the primary role of judges in our court system is to adjudicate, not to administer."[144] They recommended the appointment of a Provincial Director of Court Administration who would have regular consultations with the Chief Justice and Chief Judges of the various courts, but who would report directly to the Attorney General on all administrative aspects of the court system. Under the Provincial Director, there were to be Regional Directors and other officials. To assist the Chief Justice and Chief Judges in their adjudicative functions, it was proposed that they should have highly qualified executive assistants and, to ensure the independence of the judiciary, these were to be appointed by and be responsible only to the Chief Justice and Chief Judges. The distinction between administrative and judicial functions is generally clear, but there are "grey" areas; for example, the scheduling of cases was regarded as administrative but the assigning of judges as judicial.

22.11 These recommendations were generally accepted by the Attorney General and the Government, with some reservations. It was decided to set up a management project in a selected area, the Central West Region, to be run by a Project Management Team. Meanwhile, there had been a great increase in criminal work and so the experiment was applied, and limited, to the criminal courts. The aim was completely to re-schedule all the business of the courts by introducing a case-flow management system. This was not a success, although the team did achieve some of its objectives. In the view of the Government, the failure of the case-flow system was due to -

> "the fundamental management weakness of dividing between the judiciary and the Ministry the overall authority for courts administration."[145]

The conclusion was that -

> "there can be no truly effective reform without the presence of a single authority having power to ultimately determine all issues related to court administration. Without a single authority, there can be no case-flow management: without case-flow management, there is no real court reform. Divided responsibility is unworkable."

22.12 These conclusions are contained in a White Paper issued in October 1976, which proposed the establishment of an Office of Courts Administration, headed by a Director of Courts Administration, to carry out the day-to-day administrative, financial and operational requirements of the courts, but it was recommended that the -

> "ultimate authority and responsibility be conferred upon a Judicial Council composed of the senior judiciary."

The White Paper included a draft Bill to give effect to these proposals, but the Paper was given a very mixed reception, the Bill did not pass into law and the proposed Judicial Council was not set up. (There is a Bench and Bar Council which serves as a forum for discussion of subjects which would have been dealt with by the Judicial Council.)

22.13 The Kelly Committee recommended a reorganisation of the Court of Appeal Office. It was proposed that there should be a functional division at the top, with responsibility for the office divided between a manager of non-legal operations and a chief legal officer. Both would be responsible to the Director, save in respect of duties of a judicial nature. This recommendation has not been implemented and the matter is currently under consideration by a committee chaired by the Associate Chief Justice of Ontario.

22.14 In New Zealand, a Royal Commission which reported in 1978 expressed the view that administration of the courts was the key problem to be solved.[146] They recommended the appointment of a Judicial Commission, to consist of the Chief Justice as Chairman, a Supreme Court Judge, the Chief District Court Judge, the Solicitor General, the Secretary for Justice and two members nominated by the New Zealand Law Society and appointed by the Governor-General. It was proposed that the Commission should exercise unified control over case-flow and day-to-day administration of the courts and should have power to make recommendations for the appointment of judges. There was to be a Chief Court Administrator, with regional court administrators to organise the sittings of the courts after consultation with the list judges. The Chief Court Administrator, who would also be the Secretary of

the Judicial Commission, would ultimately be responsible to the Secretary for Justice, although he would, of course, work closely with the Chief Justice. The regional court administrators would be responsible to the Secretary for Justice through the Chief Court Administrator.[147] The report has not yet been implemented.

22.15 The administration of the courts of The Bahamas has undergone major reform. Formerly, the Supreme Court and the magistrates' courts were entirely separate and even within the Supreme Court itself, there was no court calendar and each judge ran what was almost a separate court, an application for a hearing date being made to the clerk to a particular judge, at the choice of the attorney. In 1977, the magistrates' courts were brought under the administrative control of the Registrar of the Supreme Court and in the following year new rules of court[148] enlarged the powers of the Registrar and the Assistant (now the Deputy) Registrar. In 1981, a Clerk to the List was appointed and all applications for hearing dates must now be made to him.

22.16 In South Australia, the Legal Department was abolished in 1981 and in its place there are now two departments, the Attorney General's Department and the Courts Department. The purpose of the Courts Department is to provide administration for all the courts and tribunals in South Australia. The Department has no judicial functions other than the administrative aspect of supervision of the magistracy. It is responsible to the Attorney General, but with a secondary responsibility to the Chief Justice of the Supreme Court and the Senior Judge of the District Court.

22.17 In Victoria, the despatch of business has been greatly improved by the appointment of a Court Administrator and a Listing Master.

22.18 In the Isle of Man, a great increase in legal work and civil litigation between 1970 and 1976 led to delays and consequently to a review of the procedure of the courts. Some of the reforms, which came into effect on 1 April 1982,[149] were aimed at relieving the Deemsters (the judges of the High Court) of purely administrative functions that can be exercised by administrative staff.

22.19 In Singapore, the court diaries of all subordinate courts have recently been brought under central control to ensure an even distribution of caseloads and the monitoring of congestion.[150]

22.20 Malta appears to be the only country in the Commonwealth where the administration of the courts has been taken entirely away from the judiciary. A recent Act[151] vests the ultimate control of the courts in a Law Courts Commission, consisting of a Chairman, four members and a secretary, all of whom are appointed by the Prime Minister. The Chairman is a person with experience in public affairs. Of the members, two are politicians, one a trade union representative and one an advocate. The judiciary is unrepresented. The Commission has the duty of supervising the workings of the courts and to recommend to the House of Representatives remedies that might lead to the more efficient functioning of the courts. It has the duty also of supervising the professional conduct of lawyers. It is required to report to the Minister of Justice and to the House of Representatives any instances of undue delay and to recommend measures to remedy such delays by reform of the law or its administration.

The complement of judges and other personnel

23.1 The obvious way to meet an increase in the volume of litigation is to increase the number of judges and magistrates, and in most countries of the Commonwealth there have been considerable increases in the last decade. In England the increases have not been great: between 1972 and 1982 the number of High Court judges only rose from 68 to 77 and the number of Lords Justices from 14 to 18. In New Zealand, the High Court judges were increased from 17 to 26 between 1972 and 1979 and the District Court judges from 50 to 68 between 1970 and 1980. In British Columbia, the number of High Court judges rose by 50% between 1972 and 1979. In Hong Kong, the High Court judges were increased from 10 to 15 between 1973 and 1981 and the District Court judges from 11 to 12. Manitoba increased its judiciary by two in the last five years and its strength is considered adequate. Increases were also reported from Alberta, Belize and Botswana.

23.2 In Ontario, the Williston committee recommended an increase in the number of Supreme Court judges from 36 to 44, following an increase from 21 to 36 between 1961 and 1976.

23.3 In India, the Law Commission in its 79th Report recommended temporary measures to deal with heavy arrears and suggested that the permanent establishment of judges should be adjusted to such figure as would result in the number of cases disposed of in a year corresponding approximately with the average number of cases instituted during the previous three years. This does not seem to take account of the large number of cases instituted that never come to trial because they are settled or abandoned.

23.4 From New South Wales it is reported that there are still too few judges in the Common Law Division of the Supreme Court, although additional judicial appointments have been made at all levels. The point has now been reached where further appointments would necessitate the building of additional courts and the question has been posed whether all civil disputes are of sufficient importance to the community to justify the very high cost of appointing more judges and building more courts. There is also a question whether appointees of the right calibre are to be found.

23.5 There have been complaints of too few judges also from Guyana, New Zealand and South Australia.

23.6 This may be the appropriate place to mention that the employment of qualified assistants to appellate judges (a practice in the United States) was considered and rejected in Ontario by the Attorney General's Committee on the Appellate Jurisdiction of the Supreme Court.[152] The Committee did not believe that such appointments would save any appreciable judicial time because the hearing of argument, the making of decisions and the formulating of the reasons for those decisions is judicial work that cannot be delegated. On the other hand, the Committee thought that the practice then in existence of employing law clerks (graduates of law schools recently admitted to practice and engaged for one year) to assist the judges, mainly by legal research, was of advantage, saving the judges' time without encroaching on the decision-making process.

23.7 In Québec, the de Grandpré committee made the employment of qualified legal secretaries, to assist the judges by highlighting the issues of fact and of law raised by each case file, a major factor in the pilot scheme they proposed for clearing the backlog of cases.

23.8 Increasing the number of judges might be described as the easy answer to the problem of delays, but it involves difficulties and disadvantages and there is reason to doubt whether increases in numbers produce better results beyond a certain point. Sometimes it seems that productivity actually falls with increases in personnel. In Québec, where delays were very serious, the de Grandpré committee believed they could be eliminated without any increase in the number of judges, an increase which they believed would be nothing but "l'application de la loi de Parkinson."

23.9 One difficulty is that of finding sufficient additional judges of the right calibre without draining too much talent from the Bar. Cost is also an obvious consideration. This is not just a matter of the salaries and pensions of the judges. A material increase in the number of judges means an increase in the number of masters, registrars and other court officers, building additional court houses, and employing clerks and other subordinate staff, who, in their turn, need offices.

23.10 Ad hoc appointments are useful for extraordinary situations but are not generally favoured as a normal practice. In particular, it is thought that litigants may feel dissatisfied if a High Court case is not dealt with by a High Court judge.[153]

Centralisation and decentralisation

24.1 Very little has been reported on the subject of centralisation and decentralisation. Where New Zealand is concerned, High Court judges are resident in three centres only; in 14 other towns, fixtures have to await the visit of a judge on circuit.[154]

24.2 With the new structure of courts in New Brunswick, the Trial Division is decentralised, with judges resident in Judicial Districts.

24.3 South Australia began the decentralisation of its magistracy in 1975, when three magistrates were posted to major country centres on a residential basis, so expediting business that would otherwise have had to await the visit of a magistrate on circuit.

24.4 Contrary to the general tendency to decentralise, Singapore in 1975 centralised its subordinate courts and The Bahamas in 1977 its magistrates' courts.

Vacations

25.1 In England, the Beeching Commission, while they thought it justifiable for the courts to close for a month, came firmly to the conclusion that -

> "the closure of the High Court for a summer vacation should be made progressively shorter and less complete than it is at present."

25.2 The Bar in 1978[155] were still strongly in favour of retaining the present long vacation. The Law Society think that the vacation should be shortened, certainly to six weeks and perhaps to one month.[156] The London Common Law Bar Association, addressing the Law Society in September 1980, recommended that the business permitted during the vacation should be extended.

25.3 The matter is touched on in the Oliver Report.[157] The Review Body did not think it appropriate,having regard to their terms of reference, to recommend that the Supreme Court should aim at year-round sittings and they did not propose it. They recorded that many, but not all, barristers and solicitors like the present system. Their recommendations were limited to the operation of the Chancery Division during the long vacation. They thought that as a bare minimum one judge should always be available. They suggested also that other judges might be willing to work during the vacation if they were given compensatory leave at other times. They thought that if it became known to barristers and solicitors that cases could be heard earlier and on fixed dates, a sizeable number would seize the opportunity.

25.4 In Ontario, the Law Reform Commission in its Report on the Administration of Ontario Courts[158] found that the complexity of society could no longer support a system whereby all trials of civil actions are precluded during a period which approaches one quarter of every year. They recommended the abolition of the court vacations and their substitution by -

> "a system which takes account of the fact that while many litigants and their counsel will not wish to go to trial during the present vacation periods, others may and do want the services of the courts at these times."

Briefly, what they recommended was that new trials should not ordinarily be begun during the week before Christmas, although trials already begun would continue, and that during July and August civil cases should be heard by agreement or by order of the court on the application of one party. They did not think it would ordinarily be necessary for the Court of Appeal to sit during July or August to hear civil appeals, although the court might be convened if necessary.

Equipment

26.1 The Royal Commission on the Courts of New Zealand recommended[159] that consideration should be given to the use of computers for multiple indexing, jury selection and case scheduling and that there should be a pilot scheme to evaluate sound recording as a possible system of court reporting. As immediate measures, they recommended the purchase of electric typewriters, photocopying machines, sound amplifying systems and continuous stationery for typing evidence and the construction of soundproof boxes to house typists. They also stressed the importance of excluding external noise by the use of double-glazing and of minimising noise within the court by carpeting, acoustic tiles or panels and heavy curtains. These recommendations provide a convenient introduction to the present or projected use in the courts of Commonwealth countries of different forms of equipment.

26.2 In Western Australia, a new computerised listing method will soon be employed by the Local and District Courts and in South Australia an overall study is being conducted into the use of a "computer based system to provide an improved information flow which will enable expedition of Court business." No details are presently available.

26.3 An interesting suggestion from New Zealand[160] is that video-tape might be used for recording the evidence of witnesses taken overseas. So far as is known, this has not yet been tried.

26.4 In England, tape-recording has been in use in the Royal Courts of Justice for 14 years. A single control room regulates the recorders in 31 courts. This minimises the

cost of running the system. It has generally been regarded as satisfactory, but it is interesting to note that the members of the Royal Commission on the Courts of New Zealand "who inspected the installation were not impressed with what they saw."[161] It is not clear why.

26.5 Originally, a daily transcript was made but it was discontinued on the ground of expense. At the present time, transcripts are not made in civil proceedings unless they are required for the purposes of an appeal or are requested by a party, and usually it is only the judgment that is transcribed. The work of transcription is carried out by private businesses, on a tender basis.

26.6 Computers are at present used in the English courts only for such matters as controlling funds in court. They are not used in listing, although this is expected to come, and possibly the monitoring of all pending actions.

26.7 The Review Body on the Chancery Division (the Oliver report) were very concerned about delays in the production of formal orders. They heard suggestions that word-processors might be used with advantage and they actually saw a demonstration of the use of one which contained a bank of drafts. They did not consider that investment in a word-processor was justified at that time but they did think there should be further study to see if the use of such a machine would enable orders to be produced more speedily or more economically. Now that the drafting of orders has been re-organised in accordance with the recommendations of the Review Body, the usefulness of a word-processor is being investigated.

26.8 In the Australian Capital Territories, the use of a computer by the Court of Petty Sessions is being considered, in the hope that it would lead to more productive use of court and registry time. Possible uses are for list management and production of a court list; for case management; and for accounting purposes particularly in connection with part payments.

26.9 Ontario in 1973 was using four systems of recording proceedings: shorthand, stenotype, stenomask and "electronic". "Stenomask" is a system in which a reporter repeats into a microphone everything said in the proceedings with a mask covering his nose and mouth.

26.10 Telex is about to be introduced into the Royal Courts of Justice in London to improve communications generally, and particularly between solicitors and the courts.

26.11 An interesting recommendation of the Williston committee is that the rules should include provision for the hearing of motions by conference telephone where the parties consent. This practice is followed in the United States.

26.12 Photocopying machines have proved their worth everywhere, both in enabling copies to be made quickly and in eliminating the need for anything more than superficial checking. There is one danger that has to be guarded against: the ease of copying encourages solicitors to add documents to the record without proper consideration whether they are really relevant and necessary, or whether extracts would not have sufficed.

26.13 Several countries[162] have referred to their lack of modern reporting facilities or the inadequacy of the facilities they have, and have expressed a wish for a modern system, preferably tape recording. It may therefore be helpful to note some of the advantages and disadvantages of such systems.

26.14 The advantages are obvious. Tape recording provides a complete record of the proceedings, which can be retained as long as it is needed and can be re-played at any time if there is a doubt as to the correctness of a transcript or of a reference in a judgment. It records at the pace of the proceedings, so that there is no need to halt a cross-examination or an address because the speaker is too quick for the judge's pen. Transcriptions can be made by persons trained to do so but who lack the speed for direct court reporting.

26.15 Against that a tape-recording system is expensive to instal and to maintain, although the cost is reduced where, as in London, one control room regulates a large number of courts. It depends on a reliable supply of electricity or the availability of an emergency generator. It requires a court room from which external noise is excluded and in which internal noise and echoes are muffled. These factors make tape-recording unsuitable for some of the smaller jurisdictions.

26.16 Even with the best equipment, transcribing is not easy where witnesses speak badly or turn their heads suddenly from the microphone, or where two people speak at once, and the verbatim record is sometimes less reliable than the judge's notes.

26.17 In most countries competent transcribers seem hard to find, and they are expensive. The ideal of simultaneous transcription is therefore rarely realised. This means that where proceedings have been recorded in full, an appellate court may be looking at a record which is not only fuller but may be significantly different from that on which the trial judge had to rely.

26.18 Contrary to the popular belief, verbatim recording tends to protract hearings. It avoids the interruptions that occur when a judge has to ask counsel to go more slowly. On the other hand, examinations may take longer. Sometimes an involved question is answered by a monosyllable. Everyone in court knows what the witness means but counsel and the judge must consider how the answer will read in the event of an appeal. If on a grammatical reading it might appear ambiguous or the reverse of what was intended, the matter must be cleared up and this may involve lengthy questioning. Obvious slips of the tongue have formally to be corrected for the sake of the record, and so on.

26.19 As regards stenotyping, it is possible to obtain a coding attachment which can be attached to the machine and which will encode the record for feeding into a computer, which produces a transcript. Such equipment is used in the United States, but no report has been received of its use in the Commonwealth or of its reliability, accuracy or cost. Operators would have to be especially trained.

Accommodation

27.1 Little has been said in the reports about accommodation beyond passing references to the fact that lack of court accommodation sometimes precludes the appointment of additional judges and magistrates, while the cost of building and maintaining new courts is one of the economic factors that must impose constraints on the expansion of judicial services.

27.2 British Columbia is considering the feasibility of a double court day: that is, a judge and court staff working one shift and then another judge with another court staff taking over for a second shift. Cases would be scheduled either for the morning or for the afternoon; this would enable two courts to share one court house.

27.3 The evening courts that have been held experimentally in some jurisdictions were intended to meet the convenience of people who were at work during the day: they were not planned as a way of making more use of the available accommodation, but that may be a further argument in their favour.

5. THE LEGAL PROFESSION

28.1 As noted above,[163] there are some jurisdictions where lawyers are not permitted to appear as such in small claims courts,[164] and others where lawyers may appear but where no order may be made for costs.[165] Apart from these, no report has been received of any step taken to change the practices or procedures concerning members of the legal profession, or their privileges, nor has any recommendation been reported for any such change.

28.2 It must be said, however, that the legal profession is frequently blamed for delays. In England, the Senate of the Inns of Court and the Bar, when giving evidence to the Royal Commission on Legal Services[166] accepted that unjustifiable delays may occur on the part of counsel or solicitors that are not attributable to processes of law or court procedure. They divided such delays into two categories: those arising through inexperience, incompetence or inefficiency on the part of the individual practitioner and those arising through pressure of work. The Senate did not believe that inexperience or incompetence was a widespread cause of complaint. Where inefficiency was concerned, it was acknowledged that conferences with counsel sometimes have to be put off and that delays sometimes occur in the return of papers, but it was not thought that this often led to substantial delay in the overall period of litigation. On the second count, it was conceded that pressure of work upon the most able and experienced counsel inevitably leads to some delays, particularly in heavy cases.

28.3 The Law Society, after conceding that some members of the public believe that litigation is unduly protracted, expressed the opinion that such a belief is unfair in relation to litigation as a whole, although fair in relation to some full-scale trials. They thought that the vast majority of contested cases are dealt with reasonably quickly.[167]

28.4 Where Scotland is concerned, the only comment received is that there are indications that the legal professional training in the more complicated civil procedures is not as thorough as it was formerly.

28.5 In New Zealand, there appears to be little criticism of the legal profession, although it is reported that there are occasions when time is available for hearings but cases cannot proceed because counsel are not available. This occurs most often in circuit areas where out of town counsel are involved in courts in other areas.

28.6 Shortage of advocates has been a temporary problem in the Isle of Man, as a result of prosperity and consequently of litigation, but new recruits are coming forward.

28.7 On the other hand, the Bar Association of New South Wales is refreshingly frank in accepting that the profession has to take its share of the blame for delay, particularly in not taking interlocutory steps within the time required by the rules of court.

28.8 The Queensland Law Society expressed the opinion that the fault sometimes lies with lawyers who take on too much business, and sometimes with lawyers who do not strictly abide by the rules governing the filing and service of documents and such matters. They also suggested that the English legal system tends to encourage prolixity.

28.9 Similar admissions come from Western Australia, where it is said that lawyers sometimes take on too much work. Adjournments are frequently sought because lawyers are listed in more than one court, and sometimes because they have not had time to do the necessary preparation for trial.

28.10 The Law Reform Commission of Ontario, in their Report on the Administration of Ontario Courts,[168] examined at length the whole range of professional behaviour but made only a few, minor, suggestions for reform.

28.11 In Québec, the de Grandpré committee were highly critical of the conduct of advocates who place their authorities before the court "en bloc", without having analysed them and extracted what is relevant, and those who blandly declare that they are sure the court is familiar with the current state of the law on the subject in issue.

28.12 The Law Commission of India recorded that there was a tendency in that country to "overprove" allegations and that a great deal of time was wasted in examinations, and particularly cross-examinations, that are unduly prolix.

28.13 In Swaziland, much of the blame for delay, both in the High Court and in the magistrates' courts, is attributed to dilatoriness on the part of the legal practitioners, their reluctance to penalise fellow practitioners for failure to comply with time limits and their tendency to apply for last-minute adjournments, although incompetence on the part of officials and difficulties of communication also contribute to the delays. On occasion, practitioners have been deprived of their fees as a mark of the court's disapproval of their conduct.

28.14 In the Northwest Territories of Canada, a rule has been introduced requiring the statement of documents to be signed by the solicitor and not by the party. This is intended to prevent solicitors putting the blame for any delay on their clients, at what is a critical stage.

28.15 This is comparable with the recommendation in the Oliver report that a court sanctioning an extension of time or granting an adjournment should be entitled to satisfy itself that the application was expressly authorised by the client:[169] this would protect lay clients from lawyers who might accommodate one another in the matter of adjournment, incidentally inflating the bill of costs.

28.16 The courts have power to impose penalties in the form of orders for costs where the conduct of a proceeding has caused prejudice, but such penalties fall on the parties and not on their lawyers. Orders can be made for solicitors to pay costs personally, but in practice such orders are rarely made.

28.17 Courts have power to make separate orders for costs in relation to separate issues but this power is rarely exercised in trial courts; it is arguable that it should be exercised more often, as it is unfair that an unsuccessful party should have to bear the cost of arguments that he did not initiate and that have contributed nothing to the result. In appellate courts, a successful appellant is almost invariably awarded at least part of his costs, although a percentage may be deducted representing the time wasted on unmeritorious grounds of appeal.

28.18 No comment has been made by any correspondent as to the effect of a fused profession on the expeditious disposal of cases, although in answer to a question, a correspondent in Western Australia expressed the opinion that a fused profession does not aggravate delay.

28.19 The question was considered by the Benson Commission, who remarked[170] that -

> "the causes of delay are many and complex. It has not been established that fusion is necessary, or would be sufficient to overcome them."

After very full consideration of the arguments for and against, the Commission concluded, for reasons concerned with efficiency rather than expedition, that it was desirable that the profession should continue to be organised in two branches, barristers and solicitors.

28.20 The Ontario Law Commission in 1973 considered the question from the opposite point of view. Having a fused profession, they considered whether division would lead to greater efficiency but concluded that they saw no good reason for change.[171] They did favour specialisation.

28.21 With a fused profession, some of the time that would have been spend preparing and reading briefs is saved; the delays in the return of papers are avoided and it may be that it is easier for the court to instil some sense of urgency into proceedings that are too long drawn out. On the other hand, the advocate in a fused profession, at least in a small jurisdiction, is less ready to hand over a brief when he has too many engagements because he has a personal relationship with his client that does not ordinarily exist between a barrister and the lay client, so that to hand over a brief may be to lose a client.

6. CONCLUSION

29.1 The last decade has seen much enquiry into the causes of delay and many reforms have been effected, and enquiries are continuing. At Appendix II are listed the reports of commissions and other bodies to which correspondents have referred.

29.2 A comment on commissions generally may not be out of place. Commissions with wide terms of reference to review the civil procedure serve a valuable purpose, particularly in putting all the relevant considerations into perspective, but they do not always yield results. A wide-ranging report with constructive recommendations is bound to contain controversial proposals. It will probably call for the expenditure of public funds. It may include recommendations of principle that need detailed working out before they can be implemented. These and other factors lead to delay and the longer a report remains unimplemented, the less likely it is to be given effect.

29.3 Individual reforms of a minor nature have a much better chance of being implemented, provided they do not require legislative time. For this reason, the creation in England of the Supreme Court Procedure Committee is particularly to be welcomed. Its role is to deal with the particular and the immediate.

29.4 For the future, the Victoria Law Foundation, having decided in principle to set up a Civil Justice Project Committee, appointed two of its research officers to prepare a Preliminary Study. This has now been completed but has not yet been published.

29.5 Secondly, a new body called the Australian Institute of Judicial Administration Incorporated has been formed. This is a pan-Australian organisation independent of the Government but with powerful support from the judiciary, the profession and the law schools of the universities. Its governing body will include representatives from all the States and from the Australian Capital Territory. Its first project under the direction of Dr Ross Cranston is to be a detailed investigation to discover what actually causes delays and inefficiency in the Supreme Courts of New South Wales, Victoria and the Australian Capital Territory. This is expected to take about two years.

29.6 It is clear that the problem of delay in civil proceedings is much graver in some jurisdictions than in others. An optimistic note comes from New Zealand, where the Bar Association see no cause for alarm and no need for drastic remedies. They said -

> "The causes of delay are not attributable to the system, the rules or the facilities. What is needed is an adequate number of judges and the co-operation of an able and energetic Bar."

A gloomier note is sounded by the de Grandpré committee who put the very grave delays in the High Court of Québec down in large measure to the disinclination to work in our decadent society.

29.7 It is clear also that there are many causes of delay, some with their roots in the past and some the results of modern developments.

29.8 In almost all the countries of the Commonwealth there appears to have been a great increase in the volume of court work, both civil and criminal. The principal increase has probably been in criminal work but at the High Court level, and sometimes at subordinate levels, courts deal both with civil and criminal matters. In those circumstances, the practice used to be to give absolute priority to the criminal work: today courts tend to accord only a qualified priority, so that the civil work may be kept moving. Even with a qualified priority, however, the effect of a material increase in criminal work may disastrously affect the conduct of civil business. In New Zealand, the Speight committee gave this as a major cause of delay.

29.9 The main reason for the increase in civil litigation is probably a greater awareness by the public of their rights, an awareness brought about largely by legal assistance schemes, citizens advice centres, social workers, trade unions and other organisations, and the press. Legal aid and assistance have also made the courts more accessible to the poor and so contributed to the build up of cases, particularly in matrimonial affairs. Growth in population has led to more litigation in Hong Kong.

The standard of living has been rising in many countries of the Commonwealth, in spite of inflation and recession, and properity always brings litigation. This applies particularly to Alberta, Hong Kong, the Isle of Man and Singapore.

29.10 Growth in litigation has strained the resources of courts that were formerly adequately staffed and has brought crises in places where the number of judges was previously too small or barely sufficient.

29.11 There have been substantial increases in the number of judges in most countries but that is not a process that can continue indefinitely. Such increases necessitate employing more masters, registrars and clerks and building and maintaining court rooms, chambers and offices. It is also difficult to find all the judges desirable without unduly draining the Bar of talent.

29.12 Inflation itself has contributed to delay. The financial limits on the jurisdiction of subordinate courts has been increased but until recently, usually by less than the figure of inflation and usually only after a time lag. This has meant a heavier burden on the superior courts, where backlogs have built up. Not only were the superior courts less able to cope with an increased work load, because of their smaller manpower, but also cases take longer in the superior courts than in the subordinate. Now, this imbalance has largely been rectified but there is a continuing need to watch the levels of jurisdiction.

29.13 There is a general impression that trials take longer than they used, although no-one seems able to offer a satisfactory explanation. Verbatim reporting probably tends to protract hearings. It has been suggested that education is not as good as it was where the more technical aspects of civil procedure are concerned. It has also been suggested that inexperienced counsel tend to argue at length every conceivable point, instead of relying on the best and abandoning the others, and to call more evidence than is necessary - what the Law Commission of India described as a tendency to "overprove" allegations. There is no apparent reason why this should be worse today than in the past.

29.14 Legal aid and assistance contribute to delay in another respect, because time is taken up before litigation is even instituted by administrative work determining eligibility for assistance. In England an attempt is being made to reduce these delays: a pilot scheme will test the possibility of dealing by post with the question of means, while the merits will generally be decided by a single officer, without reference to a committee as at present.

29.15 A cause of delay which goes back into the past is failure to make the best use of judicial time. One aspect of this that has recently been highlighted is the extent to which the time of the judges is taken up with work of an administrative rather than a judicial nature. The modern trend is to employ full-time administrators, with countries only differing as to the extent that such administrators should be responsible to the judiciary or to the executive. The experience of British Columbia has shown that it is possible to have a joint control over the administration of the courts, shared between the Chief Justice, as head of the judiciary, and a Minister or the Attorney General, as head of a ministry, which, with good faith on both sides, can work successfully.

29.16 A substantial saving of judges' time has also been achieved by enlarging the powers of masters and registrars. While the advantages of such delegation for much formal interlocutory work are clear, there are also advantages in the judge having complete control of the proceedings. This is especially apparent in the commercial courts, where the judges take the summonses for directions. This applies also to Administration and Defamation proceedings in New South Wales.

29.17 The third important sphere where action can be taken to make the best use of the judge's time is in the process of listing cases, so as to ensure that when cases drop out of the list, the judge is not left idle. Changes in listing arrangements have been made in many countries, and experiments are proceeding.

29.18 Judicial time is also being saved in the Court of Appeal in England by the use of smaller Benches.

29.19 Making the best use of judges' time does not mean, even if it were possible, so arranging the lists that the judges were constantly sitting in court or in chambers. Apart from the writing of judgments, judges, particularly those of the superior courts, must have time for reading and for thinking.

29.20 It must be realised also that there is always a conflict between the best use of judicial time and the convenience of barristers, solicitors, parties and their witnesses. The emphasis should be on the judicial time but not to the entire disregard of the other parties.

29.21 Judges' time is also lost when they are appointed to chair commissions in non-judicial enquiries or to perform other public duties of an executive or administrative nature. Such appointments are sometimes proper and necessary, but they do disrupt the work of the courts.

29.22 The reports that have been sent in have been concerned mainly with systems and procedures but the importance of people should not be forgotten. No system, however well designed, will be free from delay unless Bench and Bar co-operate to make it work.

29.23 Judges themselves can do much to expedite proceedings, not merely by their personal punctuality and prompt disposal of business, but even more by giving to the proceedings themselves a sense of urgency. A judge can be business-like without sacrificing any of the dignity that should attach to his office and without renouncing the infinite patience that is expected of him.

29.24 Sometimes lawyers are dilatory or neglectful, but it has not been suggested that such cases are common. What is much more common is delay caused by lawyers taking on more business than they can handle effectively. Sometimes, too, lawyers may be responsible for delay through no fault of their own, because ordinary day to day work has to give way to matters of real urgency.

29.25 Lawyers have been criticised also for accommodating each other regarding extensions of time and adjournments. Within reason, such accommodation is no bad thing: it would not serve the interests of justice if lawyers were always alert to take advantage of the difficulties of the other side.

29.26 Another criticism that may be levied at solicitors is that they appear to leave so many matters to the last moment. It has been suggested that applications for extension of time are often due to time limits that are unreasonably short. It would be useless to enlarge those limits unless solicitors are prepared to act as soon as they can, not on the last day.

29.27 Lastly, there are the parties themselves who are often responsible for delay, sometimes inadvertently and sometimes deliberately. It often pays a debtor to procrastinate if he can make more use of the money he owes than he will have to pay in interest. To combat this, legislation has been passed in the Northwest Territories of Canada which will enable a plaintiff to recover interest on a judgment debt at approximately the prime bank rate from the time the cause of action arose until the debt is satisfied.[172]

29.28 The main achievements of the decade are probably the restructuring of courts and the reform of the administration of the courts. So far as procedure is concerned, it has nowhere been suggested that the common law approach to the conduct of trials should be abandoned or that the adversarial system should be replaced by the inquisitorial. Within the framework of the system, however, much consideration has been given to procedural reform, mainly in respect of the interlocutory stage, with attempts to improve the process of discovery and development of the pre-trial conference. The remarkable success of the pre-trial conference in Ontario and British Columbia, both in expediting trials and in encouraging settlements at a comparatively early stage, calls for consideration in any country that is contemplating reform, at least as a procedure to be available for appropriate cases.

29.29 A new approach to judicial administration is to be seen in the institution in several countries of pilot schemes. Such schemes, with judges, lawyers and administrators working together on a basis of trial and error, are more likely to lead to new and better practices than abstract planning, even by people of great ability and experience.

29.30 There does seem to be a real need to simplify bills of costs and the process of taxation. There is need also for consideration to be given to the process of execution, either by the substitution of some different system or by making the present system more efficient.

29.31 It is not easy to assess how much of the blame for delay should be attributed to any particular cause. Delays may have a cumulative effect. A small delay at one stage

of a proceeding may be the cause of a greater delay at a later stage. The delay that the public see is usually the aggregate of several delays.

29.32 It is reasonable to suppose that in any given jurisdiction there will at any time be various causes of delay and therefore several remedies to be sought. The problems of one country will not necessarily be similar to those of another. If delays become a reason for disquiet, it is essential to diagnose their causes. At Appendix V is a set of questions intended to suggest lines which a diagnosis might take. Once the causes have been located, it should not be difficult to devise remedies.

29.33 When considering ways of reducing delays, a reservation is usually added that the quality of justice should not suffer. That is irrational. There is no standard quality of justice. In all countries and under all systems the quality of justice varies and it is hard to see how it could be otherwise. No society can afford, in terms of money or talent, the judiciary that would be necessary for the perfect administration of justice. Each country must do the best it can with the resources available to it. At one end there will be a superior court with a relatively small bench of the quality to make the decisions that shape the law and the strength to protect the citizen against abuses by the government of the day. At the other end, there must be provision for those whose claims are small and call for quick and cheap remedies. For claims below a certain figure, it would seem that the judicial process ceases to be appropriate. At each level, it is necessary to weigh needs and means, with a price to be paid in the quality of justice for each concession to expedition.

29.34 One final remark. There is no question of eliminating delays. The most that can be done is to contain them within the bounds of the tolerable.

ACKNOWLEDGMENTS

In Appendix I is a list of those who were good enough to write reports on delays in the courts of their countries and the recent measures taken to remedy them. I am sincerely grateful to all of them.

I am particularly indebted to two very busy judges, the Master of the Rolls, Lord Justice Donaldson, and Lord Justice Oliver, who spared time to give me their views on some aspects of the problems of delay in civil proceedings.

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FOOTNOTES

1. Submission No.13, 1977, XII para. A.1.1.
2. Para. 22.22
3. Para. XI 1/4/5.2.
4. Para. 22.21.
5. Submission No.13, XII para. A.2.3.
6. 1981 Cmnd. 8205, paras. 56 to 60.
7. Administration of Ontario Courts, 1973, Part I, p.13.
8. Ibid, p.277.
9. 1978, para.226 and Table 20.
10. Reply from New Zealand to the International Bar Association Questionnaire on "Delays in the Administration of Justice", 1978, by J.T. Eichelbaum Q.C. (Eichelbaum).
11. See para.9.4.
12. 77th Report on Delay and Arrears in Trial Courts, 1978, para.1.9.
13. 79th Report on Delay and Arrears in High Courts and other Appellate Courts, 1979, para.1.37(f).
14. 1969 Cmnd. 4153.
15. Supreme Court (Amendment) Act, 1969 (S.B.C. 1969 c.38)
16. Administration of Ontario Courts, 1973, Part I, pp.45-104.
17. An Act to amend the Judicature Act (1978 Chapter 32).
18. See para.10.6.
19. See para. 8.3.
20. Royal Commission on the Courts, 1978, paras.997-1004.
21. County Courts Jurisdiction Order 1981 (S.I. 1981 No.1123).
22. Judicature Amendment Act 1979 (1979 No.124).
23. District Courts Amendment Act 1979 (1979 No.125).
24. Family Courts Act 1980 (1980 No.161).
25. Supreme Court Act 1970.
26. District Court of Western Australia Act, 1969 (No.84 of 1969).
27. District Court of Western Australia Act Amendment Act 1972 (No.40 of 1972).
28. Acts Amendment (Jurisdiction of Courts) Act 1976 (No.69 of 1976).
29. Acts Amendment (Jurisdiction of Courts) Act 1981 (No.118 of 1981).
30. Court of First Instance (Amendment) Ordinance, 1979 (No.1 of 1979).

31. Magistrates' Courts (Jurisdiction) Act 1973 (No.8427), s.9.

32. Magistrates' Courts (Amendment) Act 1978 (No.9152), s.2.

33. Magistrates' Courts (Civil Jurisdiction) Act 1979 (No.9349), s.10.

34. Local and District Criminal Courts Act Amendment Act (No.2), 1974 (No.82 of 1974), s.5.

35. Statute Law (Miscellaneous Amendments) (No.2) Act, 1980 (No.13 of 1980), s.2 and Sch.

36. Provincial Court (Civil Division) Project Act, 1979 (1979 Ch. 67).

37. Law Commission of India: 79th Report on Delay and Arrears in High Courts and other Appellate Courts, 1979, paras.15.5 to 10.

38. 1981 c.54, ss.88 and 89.

39. 1981 Cmnd. 8205.

40. 1960 Cmnd. 967.

41. Acts Amendment (Master, Supreme Court) Act 1979 (No.67 of 1979)

42. Family Court Act Amendment and Acts Repeal Act, 1979 (No.58 of 1979), c.8.

43. Rule of Court made by Order in Council of 6 November 1980.

44. Para. 794.

45. Law Society Committee, First Interim Report.

46. Rules of the Supreme Court (Amendment No.2) 1982 (S.I. 1982 No.1111).

47. Judicature Amendment Act, 1968 (1968 No.18), s.2.

48. Paras. 308 - 317.

49. Judicature Amendment Act, 1970 (No.4) (1970 c.97).

50. Civil Procedure Revision Committee, 1980, pp.10 and 11.

51. Working Paper on a Bill to Consolidate, Amend and Reform the Supreme Court Acts and Ancillary Acts regulating Civil Proceedings in the Supreme Court (Q.L.R.C.W.P.24).

52. 79th Report, paras.7.12 to 7.17.

53. Ibid., para. 17.9.

54. Submission No.17, para.B.4.1.

55. Administration of Justice Act 1970 (1970 c.31) s.3.

56. Royal Commission on the Courts, 1978, para.318.

57. Family Court Act, 1975 (No.106 of 1975) amended by the Family Court Act Amendment and Acts Repeal Act, 1979 (No.58 of 1979).

58. Unified Family Court Act, 1976 (1976 Chap. 85).

59. Family Law Jurisdiction Act 1978.

60. Royal Commission on the Courts, para. 488.

61. Including the work of the Children and Young Persons Court.

62. Family Courts Act 1980 (1980 No.161).

63. 1968 No.62, s.7.

64. Provincial Judges Act (1972 c.61), Part IV.

65. From the English Bar it is reported that most of the cases that go to trial before the High Court are personal injury cases (Answers to the Royal Commission on Legal Services, 1978) and a similar report comes from the New South Wales Bar Association.

66. Automobile Insurance Act (1977 c.68).

67. Motor Accidents Act 1973 (No.8429).

68. Motor Accidents (Liabilities and Compensation) Act 1973 (No.71 of 1973).

69. Accident Compensation Act 1972 (1972 No.43).

70. Accident Compensation Amendment (No.2) 1973 (1973 No.113), s.5.

71. District Court of Western Australia Act Amendment Act, 1972 (No.40 of 1972), s.8.

72. At p.31.

73. Local and District Criminal Courts Act Amendment Act (No.2) 1974 (No.82 of 1974), s.11.

74. See para.14.7.

75. Small Claims Tribunals Act 1976 (1976 No.35).

76. Report on Administration of Ontario Courts, 1973, Part I, p.13.

77. Submission No.17, para.B.2.6.

78. 1979, Cmnd.7476, Section IV.

79. 1981 Cmnd. 8205 paras.136 to 145.

80. 1979 Cmnd. 7476, paras.30 to 36.

81. At p.25.

81a The Law Society has, however, recommended that consideration be given to the exchange of witnesses' statements before trial, as is done with experts' reports.

82. See Appendix VI.

83. At p.22.

84. Regulation 81-174, r.32.

85. At para.6.4.

86. 1979 Cmnd. 7476, para.42(10).

87. Submission No.13, XII, A.5.13.

87a At para.22.26.

88. At para.139.

89. Act 104 of 1976.

90. 77th Report, paras.6.8 and 7.1.

91. Eichelbaum.

92. Para.66.

93. Supreme Court Rules of Practice, r.246.

94. Prescribed by rules of practice made under Art.276 of the Code of Civil Procedure, as amended by 1972 c.70.

95. The Master of the Rolls: Informal Commentary of 4 October 1982.

96. Supreme Court Rules, 1961.

97. Quoted in the Ontario Law Commission Report on the Administration of Ontario Courts, 1973, Volume III at p.110.

98. Volume III, at pp.121-122.

99. See "The Pre-trial Conference in the Supreme Court of Ontario" by R.M.J. Werbicki (Canadian Bar Review, Vol.59, p.485).

100. A. Burke Doran Q.C. in a letter dated 5 February 1982.

101. See para.4.17.

102. Ontario Regulation 470/80, rule 48.

103. Eichelbaum, para.10.

104. 1981 Cmnd. 8205, at paras. 131-135.

105. September, 1980.

106. High Court (General Division) Rules, 1971, o.26,r.182.

107. Chapter 5, paras. 5.13 and Chapter 14,5(26) and (27).

108. Para. 5.15.

109. 1979 Cmnd. 7648, at para.22.38.

110. Supreme Court Rules of Practice, r.401.

111. Draft Judicature Act, clause 37.

112. Part III, at p.10.

113. Order XX, r.1(1).

114. 77th Report, para.7.7; 79th Report, para. 6.27 and 28.

115. Under the Judgments (Enforcement) Act (Northern Ireland) 1969 (1969 c.30 (NI)).

116. 1969 Cmnd. 3909.

117. 77th Report, paras.11.2 and 3.

118. Report of the Attorney-General's Committee on the Appellate Jurisdiction of the Supreme Court of Ontario (1977).

119. Informal Commentary of 4 October 1982.

120. See para.5.2.

121. Supreme Court Act 1981, s.54(4) and Court of Appeal (Civil Division) Order 1982 (S.I. 1982 No.543).

122. 79th Report, para. 6.19.

123. 77th Report, para. 6.5.

124. Supreme Court (Revisional Jurisdiction) Rules of Court 1975.

125. Report on Administration of Ontario Courts, 1973, Part I, p.235.

126. Associate Chief Justice J.K. Hugessen: Lecture to the Conference on the Cost of Justice of the Canadian Institute for the Administration of Justice, 1979.

127. S.I. No.46 of 1978.

128. Regulation 81-174.

129. See paras. 12.3,4,6 and 13 and 14.3.

130. Rules of the Supreme Court (Writ and Appearance) 1979 (S.I. 1979 No.1716).

131. County Court Rules 1981 (S.I. 1981 No.1687).

132. Administration of Justice (Scotland) Act, 1933 (23 & 24 Geo.5 c.41), s.18.

133. Sheriff Courts (Scotland) Act 1971 (1971 c.58), s.33.

134. No.9349.

135. Supreme Court Act, 1970 (Act No.52, 1970), s.11(1).

136. Administration of Justice Act 1981.

137. E.g. The Bahamas, Hong Kong and Queensland.

138. E.g. British Columbia.

139. S.I. 1975 No. 1343.

140. L.N. 47 of 1979.

141. Paras. 287-297.

142. From an address given by Chief Justice Nemetz to the judges of Québec.

143. Report on the Administration of Ontario Courts, 1973.

144. Part I, p.17.

145. White Paper on Courts Administration, 1976, p.8.

146. Paras.643 to 654, 748, 749, 753, 754.

147. Paras.748, 749, 753 and 754.

148. Rules of the Supreme Court, 1978 (S.I.No.46 of 1978).

149. Administration of Justice Act 1981.

150. See Procedural Reforms on Court Congestion in Singapore by Michael Khoo (Malayan Law Journal, June 1981).

151. Code of Organisation and Civil Procedure (Amendment) Act, 1981 (Act No.VIII of 1981).

152. At p.15.

153. Senate of the Inns of Court 17th Submission, para B.2.5.

154. Eichelbaum, para.1(ii).

155. Submission No.17 para.B.2.8.

156. Para. XI 1/4/5 18(c).

157. Paras. 56 - 60.

158. Part I, pp.254 - 269.

159. At paras. 764, 835 - 844 and 901, and recommendations 181-3.

160. Eichelbaum.

161. At para.826.

162. The Bahamas, Cyprus, Guyana, Kenya, Singapore and Swaziland.

163. Paras. 10.2-10.11.

164. E.g. Hong Kong, New Zealand.

165. E.g. England.

166. Submission No.17, paras.B.1.4-6.

167. Reply to the Benson Commission, section XI, 1/4/5 2, and see para.13.6.

168. 1973, Part III, pp. 182-226.

169. See para.13.4.

170. At para.17.1.

171. Part III, pp. 203-204.

172. Prejudgment Interest Ordinance.

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QUESTIONS TO FACILITATE THE DIAGNOSIS OF THE CAUSES OF DELAY IN CIVIL PROCEEDINGS

A. Are there unreasonable delays in civil proceedings?

- A 1.1 Have complaints been received from legal practitioners?
- A 1.2 If so, have they been verified?
- A 2.1 Have complaints been received from members of the public?
- A 2.2 If so, have they been verified?
- A 3 Have apparently excessive delays been observed by the courts themselves?

B. At what stages do delays occur?

- B 1 Between taking out the writ and serving it?
- B 2 Between service of the writ and the summons for directions?
- B 3 During discovery?
- B 4 Between discovery and the date for hearing?
- B 5 During adjournments?
- B 6 Between hearing and judgment?
- B 7 Between judgment and satisfaction?

C. If there are unreasonable delays, are they wholly or partly the fault of the courts?

- C 1.1 Is the procedure unduly complicated?
- C 1.2 Are there unnecessary steps that might be eliminated?
- C 1.3 Would trials be shortened and/or adjournments avoided by the introduction of additional or different pre-trial procedures?
- C 2.1 Are the courts too accommodating in granting adjournments?
- C 2.2 Do judges reserve judgments for too long?
- C 3.1 Are heads of sections of the staff of the courts of the appropriate grade?
- C 3.2 Are the numbers of professional, administrative and clerical staff adequate?
- C 3.3 Is the ratio of professional to administrative staff appropriate?
- C 3.4 Is the staff organised to the best advantage?
- C 3.5 Are there weak links in the personnel?
- C 4 Are the methods of recording proceedings adequate?

D. If there are unreasonable delays, are they wholly or partly the fault of the litigants and/or their lawyers?

- D 1.1 Are proceedings being instituted prematurely or when there is no serious intention of prosecuting them as a way of exerting pressure during negotiations?
- D 2.1 Are proceedings delayed by deliberate procrastination (e.g. debtors trying to gain time)?
- D 3.1 Are solicitors taking on more work than they can pursue effectively?
- D 4.1 Are counsel too often asking for adjournments, and too ready to accommodate each other?
- D 5.1 Are counsel too reluctant to pass on briefs when they are already heavily committed?
- D 5.2 Does a fused profession tend to reduce or to aggravate delays?

E. Does the law of limitation tend to make parties institute proceedings prematurely?

NOTE ON EXAMINATION FOR DISCOVERY AND THE "ECONOMIC LITIGATION PROGRAMME"

Having regard to the importance attached in Canada to the examination for discovery, extending to non-party witnesses, it is interesting to note that in the United States the process appears to have been abused, with resultant increase in costs and delay. It has been said that -

> "thanks to the wonders of modern word processing technology, it takes very little time to produce several hundred questions, often only peripherally relevant to a claim, or defence, that it may take weeks or even months to answer."[1]

It seems strange that the courts have not stamped out such abuses, by striking out any questions that cannot be shown to be necessary and by penalising offenders in costs.

Be that as it may, the abuse of discovery led in California to what was known as the "Economic Litigation Programme". It is said that this virtually abolished the process of discovery, without any overall saving of time, as there was a corresponding increase in the time taken by the trial. Not only was the quality of justice lowered, but the procedure led to fewer settlements, because it was more difficult to analyse the merits of a case.

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1. "American Experiments for Reducing Civil Trial Costs and Delays" (Weller, Ruhnke and Martin. Civil Justice Quarterly, p.154)

NOTE ON THE FRAMING OF ISSUES

In India, section 146 of the Code of Civil Procedure, 1882, required the judge at the first hearing of a suit to frame the issues. This is still the procedure in India and also in the East African countries where the Code formerly applied.

In the majority of cases, it is possible to condense the issues into a few short questions. In practice, counsel frequently submit agreed issues to the judge, but he is not bound to accept them if he does not consider that they fairly represent the issues raised by the pleadings. The issues as framed may be amended by the judge at any time before passing a decree. In East Africa, it has been held that the issues may be amended on appeal.

The framing of issues does not appear to have been a formal requirement elsewhere, although it was the creation of very eminent English jurists and it has been the practice of some English judges.

Simplification or narrowing of the issues is one of the objects of a pre-trial conference and may, of course, be achieved on a summons for directions.

Apart from its salutory effect in clearing the minds of all concerned, the framing of issues has two specific merits. First, it encourages settlements, because it leads to the realisation by each party of what is at stake and of the strength or weakness of his case. Secondly, it enables the court to exercise more control over the hearing, by exposing what is irrelevant.

It is suggested that the framing of the issues should be undertaken at an earlier stage than in India; possibly immediately the pleadings are closed or when discovery is complete.

THE NORTHERN IRELAND JUDGMENTS ENFORCEMENT OFFICE

A. In Northern Ireland, the recommendations of a Joint Working Party which reported in 1965 led to legislation[1] under which a Judgments Enforcement Office was set up in 1970. The legislation provided several new methods of enforcement, including attachment of earnings and restraining orders against shares in private companies, while the power to appoint a receiver was considerably enlarged.

B. The essential difference between the new system and the old is that once an application for enforcement has been accepted, the initiative passes to the Enforcement Office. An Enforcement Officer visits the debtor and questions him as to his means, except when it is thought necessary to summon him and examine him under oath, and the Chief Enforcement Officer decides in his discretion what form of order is appropriate. The creditor cannot insist on any particular order.

C. Most orders operate initially as provisional orders, so as to permit the debtor to show cause, and there are provisions to enable third parties who regard themselves as adversely affected to apply for relief.

D. Where a money judgment cannot be enforced within a reasonable time, a certificate of unenforceability may be granted and this constitutes an act of bankruptcy on the part of the debtor.

E. Although suggestions have been voiced that the new system does not work as well as had been hoped, it seems clear from detailed statistics provided by the Master for the Enforcement of Judgments that it has resulted in a substantial increase in the number of judgment debts recovered: from about 30% in 1963, which was regarded as a typical year, to just over 50% in 1978 and 1979. There has also been a marked increase in the number of applications for orders, which would appear to indicate public satisfaction with the work of the Office.

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1. Judgments (Enforcement) Act (Northern Ireland) 1969 (1969 c.30 (N.I.), as amended by the Judicature (Northern Ireland) Act 1978 (1978 c.23) and the Judgments Enforcement (Northern Ireland) Order 1981.

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