

**CONSULTANTS PAPER 4 (1978) - STUDIES IN COMPARATIVE CIVIL AND CRIMINAL PROCEDURE: VOLUME
1 - COURT PROCEDURE IN THE UNITED KINGDOM, UNITED STATES, SOUTH AFRICA AND NEW ZEALAND**

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Preface

During 1975 the Law Foundation of New South Wales made available to this Commission a grant so that research might be undertaken overseas in comparative court procedure. The Commission advertised the availability of four research scholarships which were awarded to Mr. J R T Wood of the New South Wales Bar and to Messrs. C. Bilinsky, J. Bishop and N. R. Carson, Solicitors of New South Wales.

Reports, based on that research, were made to the Commission and are being published in several volumes of which this, containing the work of Mr. Carson, is the first. The reports represent the personal views of the researchers.

Publication of the reports at this stage is intended to elicit comment, or suggestions for reform of procedure in this State, having regard to developments overseas. Written comments or suggestions should please be made to Mr. B. Buchanan, Secretary of the Commission, Box 6, G.P.O., Sydney 2001.

The Commission renews its thanks to the Law Foundation for having made the research possible and it gratefully acknowledges the contribution to the project of the then Chairman of the Commission, the Honourable Mr. Justice C. L. D. Meares, at whose initiative it was first organised.

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I. Introduction

The New South Wales Law Reform Commission, with funds provided by the Law Foundation of New South Wales, retained four persons, Mr. Claudius Bilinsky, Mr. John Bishop, Mr. James Wood and me, to carry out research into the organization, administration and procedures of courts in overseas countries for the purpose of making recommendations for the improvement of these matters in New South Wales. Under this retainer, I visited during late 1975 and early 1976 the Republic of South Africa, England, Scotland, New Zealand and, within the United States of America, Washington D.C. and the States of New York, New Jersey, Michigan, Colorado, Texas and California.

In each place which I visited, I was welcomed with courtesy and given great assistance in my research by members of the judiciary, court administrators, law enforcement officers, private practitioners and university staff. The persons who gave me assistance are listed in appendix A to this report and, in the main, I have not referred to them in the body of the report. May I, however, record my sincere thanks and appreciation to all those who gave so generously of their time and knowledge. I would also like to thank the Chief Justice of New South Wales for his kind letter of introduction which opened many doors for me.

By the width of the terms of inquiry the investigation and this report must be selective in the areas covered. I have sought to give particular attention to areas in which I have had experience in New South Wales. I should also indicate that, having in mind the proposals made in 1975 about legislation for a National Compensation Scheme, during the bulk of the period of inquiry personal injury litigation was only considered in the context of civil litigation generally. As that legislation is now deferred indefinitely, I have made reference to personal injury litigation as such in the writing of this report. Again, I have not dealt with matrimonial disputes as the jurisdiction of New South Wales Courts in that area will shortly cease.

Mr. N. J. Warton, the Chief Executive Officer of the Supreme Court, visited a number of the places I have visited and I have had the benefit of reading his memorandum to the Chief Justice of 24th April, 1975, and the attachments to that memorandum which deal briefly with the areas of his investigation and some of his conclusions. My path and that of Mr. John Bishop crossed in some areas within the United States of America. Inevitably this report will overlap the reports of Mr. Warton and Mr. Bishop. Hopefully, each report will demonstrate a different perspective which will enable those considering the reports to do so with an enlarged appreciation of what we each observed.

It is, perhaps, of some point to say at the outset that before I set off on this assignment I held the view that the courts should provide an efficient forum for the resolution of the disputes of citizens but that the conduct of those disputes was for the citizens and they should be responsible for the carriage of them. I did hold the view that, in a number of areas, the courts and the legal profession generally were not providing this service and that proof of this failing was exhibited by the continuing creation of tribunals outside the traditional legal arena. I saw my brief as being merely to make recommendations which would improve the efficiency of the courts to operate in the role which I saw for them. I am now of the view that the courts have not only a role but an obligation in what is conveniently termed case flow management. While it is not the role of Australian courts to alter substantive law, or at least to be seen to do so, in the way of the courts of the United States, the Australian courts clearly have an important role in the provision of remedies and sanctions.

There is a question of social philosophy in determining the availability of access to the courts and in evaluating the social and economic costs involved. Judicial time is not elastic, but is the time saved by employing particular procedures justified if other and greater costs are incurred?

Changes in social welfare and government control seem to indicate that there is a swing from the use of the courts to give a plaintiff compensation, whether it be for personal injury or for the effect of unfair commercial practice (the latter being more evident in the United States), to an assessment of the cost to the community of unlimited litigation. A clear example is the investigation being undertaken in the United States to attempt to control malpractice suits against medical practitioners.

Again, in the criminal arena, the presumption that the accused can await trial at the pleasure of the prosecution has been challenged successfully. "Speedy trial" provisions are gaining acceptance.

To survive with traditional values intact, the courts and the profession must accept and discharge the obligation not only to resolve disputes but also to ascertain and enforce those rights of all members of the community which society wishes enforced. To this end the courts should be in a position, with the concurrence of the community, to control the multiplicity of administrative tribunals which have been created and to enforce in them, not archaic rules of procedure and evidence, but rules of natural justice and hopefully the traditions of the law. Unless this is done, that part of the legal profession concerned with the upholding and enforcing of rights, as opposed to providing a facility in dealing with bureaucracy, will decline greatly in influence and relevance in society.

A. The Republic of South Africa

South Africa was occupied by the Dutch East India Company in 1652. During the wars of the French Revolution, the Cape of Good Hope came within the British orbit. From 1806 to 1910 the Cape was a British colony. The white population is split into two main sections: the English speaking and the Afrikaans speaking. At present the proportion between English speaking and Afrikaans speaking is roughly 40 to 60.

Also important, of course, is South Africa's racial composition. Less than four million whites share the country with some seventeen million blacks and other non-whites. The whites came to South Africa from Europe during the last 300 years. The blacks migrated to it in relatively recent times from Central Africa. By far the greater part of the country's wealth is in the hands of the whites and the blacks are, by developed Western standards, economically deprived and ill-educated.

The South African legal system must be considered in the light of two factors arising from this history. First, the effect of the superimposing of British law, particularly procedure, upon the existing Dutch or Roman law. Second, the effect of a white minority imposing the laws and social structure of a developed community upon the vast black majority.

Together with the laws of Scotland, Louisiana and Quebec, the law of South Africa is one of the systems of law which combine, to a varying extent, qualities and attributes of a civil law system with those of the common law. By descent South African law is a member of the civil law family, but after the severance of the Cape Colony from Holland in 1806 it acquired numerous features characteristic of common law systems.

As a civilian system, South African law rests broadly on a Roman law base but, unlike modern continental systems, it is not codified. Unlike England, law and equity are not separated.

As in New South Wales, the profession is divided into barristers (advocates) and solicitors (attorneys). The higher judiciary is appointed from the bar, and not on the model of the continental civil service judge. Magistrates, who

constitute South Africa's lower judiciary both in criminal and civil cases, are appointed from amongst the ranks of the public service. Procedure generally is on the English pattern.

The ultimate appellate court is the Appellate Division which sits in Bloemfontein.

The superior trial courts are the Provincial and Local Divisions of which there are six, each presided over by a judge-president. They are also known as Supreme Courts.

Civil matters come before a single judge although the judge may refer a matter before him for hearing to the full court. The quorum on appeal is two judges. Civil juries were abolished in the two provinces where they were possible, the Cape and Natal, in 1927. It is said they "passed unwept, unhonoured and unsung".

Civil proceedings are instituted by summons (equivalent to the old New South Wales statement of claim) or application (equivalent to the New South Wales summons) supported by affidavits. If proceedings are instituted by application when there is a dispute on the facts, the proceedings will be struck out with costs. There is power to make an order which forever stops a vexatious litigant. The time from setting down until trial is four to six months in Pretoria and nine months in Johannesburg. The Registrar fixes a date for hearing and unless there is very good reason for change the date is maintained.

Unless a Special Criminal Court is appointed, a Provincial or Local Division is competent to try any crime committed within its area. The court is given a list of prisoners each session. If there is any undue delay in cases being brought to trial the Attorney-General is informed. Petty crimes are prosecuted before inferior courts.

On an indictable charge there is normally a preliminary examination (equivalent to the New South Wales committal). The Attorney-General may give a certificate, which is final, dispensing with the preliminary examination if he is of opinion that there is a danger of interference with or intimidation of witnesses, or that it is in the interest of the safety of the State, or in the public interest. The charge then proceeds summarily. In such a case it is usual for the defendant to request particulars of the charge.

The concept of a Special Criminal Court was first implemented in 1914 by the Riotous Assemblies Act which enabled the executive to constitute a Special Criminal Court of two or three judges sitting without a jury to try charges under that Act or of treason, sedition or public violence. A procedure has been continued under the Criminal Procedure Act 1955 by which the Attorney-General of a province, who is a public servant - proposing to indict for treason, sedition, public violence or performing an act calculated to further, or for the purpose of advocating or defending, any object of communism - may state to the Minister for Justice, giving reasons, that it is in the interest of the administration of justice that the accused be tried by a Special Criminal Court. Thereupon the State President-in-Council may establish such a court of two or three Supreme Court judges. Their decision must be unanimous. In the absence of unanimity the accused can be retried before another special court composed of different judges. An appeal lies to the Appellate Division on the same principles as an appeal from a Provincial or Local Division.

An Act in 1917 provided for trial by a jury of 9 white males, 7 at least to determine the verdict; but where the accused desired it, the trial was before a judge alone who could summon to act in a purely advisory capacity two assessors, being magistrates, native commissioners or justices of the peace.

In 1935 the judge was compelled in a charge of treason, sedition, murder or rape (all possible capital offences) to summon two assessors, persons in his opinion experienced in the administration of justice or skilled in any matter that might have to be considered. Further, whatever the accused might wish, the minister could direct a non-jury trial which would have to be held with two such assessors where the offences fell within certain categories such as gold or diamond stealing (the experience was that no local jury would convict) or where the offence was in connection with a non-European where the accused was a European or vice-versa.

In 1955 the loss of confidence in jury trial was reflected in a change in the criminal code whereby trial was without a jury unless the accused elected otherwise. Trial by jury fell into disuse. For example, in the Transvaal, the percentage of jury trials dropped from 20 per cent in 1946 to 11 per cent in 1949, 7 per cent in 1950, 2 per cent in 1954, and 0.5 per cent in 1958 when all but 6 of the 1,231 Superior Court trials were non-jury. Not surprisingly black defendants did not elect to be tried by a white jury.

With the decline in jury trial came a rise in the use of assessors to decide questions of fact. Assessors in the principal towns are normally practising advocates, although occasionally the judge selects a person such as an engineer or accountant who is expert in the subject matter which is before the court. On circuit, the judge commonly summons magistrates from the surrounding districts or a local Bantustan Commissioner, who may be a black magistrate.

In civil cases assessors can be called in to assist in specialist areas, for example, difficult medical evidence but they have no decision making power. In the Transvaal assessors are sworn in open court. In the Orange Free State they are sworn in the judge's chambers. The selection of assessors is made by the judge and varies from judge to judge. One judge asks the secretary of the Bar Association to select the assessors. Another uses one senior counsel and one junior counsel and has a panel of each. Others use counsel from their former floor. Too frequent use by a judge of the same assessors is discouraged. The assessors are paid 41 rand (about \$40 Australian) for the first day and 32 rand for each other day. Accordingly, busy advocates are not often used.

The benefit of using advocates is that they are said to have a traditional impartiality and to be aware of the rules of evidence. Notwithstanding this, if there is a question on the admissibility of a confession, for example, an allegation of duress, the judge sends the assessors out of court while he decides if the confession is voluntary.

The assessors go to the judge's chambers half an hour before the case. They have morning tea and often lunch with the judge and generally will discuss the case. It is considered that there is a benefit in this continual discussion. After the addresses they adjourn for discussion.

If there is a judge and one assessor, and they disagree, the judge prevails. If there is a judge and two assessors, the majority prevails but the judge will report the reasons for the majority decision and the reasons for the minority decision. This may be considered a procedure which would intimidate the assessors but it does not seem to do so. Decisions where there has been a majority of the assessors against the judge in minority have been supported on appeal.

The Appellate Division has stated¹ that, as a matter of practice, a judge should summon two assessors "in serious cases, and especially where the death sentence may be imposed." It must be borne in mind that some 50 people are hanged each year in South Africa, mainly blacks found guilty of robbery with violence. A verdict of guilty for certain offences automatically carries the death penalty unless, at a further hearing, there are found to be extenuating circumstances. On this issue the judge has a discretion even if outvoted by the assessors. Some judges do not like using assessors and seldom summon them. It is said that such judges more easily find extenuating circumstances.

Appeal in criminal cases is by leave of the trial judge and, depending upon the judge, can be difficult to obtain. Alternatively, it is by petition to the presiding judge.

Another function of the Provincial or Local Division is the review as of course (automatic review) of certain decisions of the magistrates' courts. Since 1955, automatic review has not applied to the proceedings of the regional courts.

Apart from the native courts, there are three forms of inferior courts: the two types of magistrates court, those of a district (commonly called simply a magistrates court) and those of a regional district (commonly called a regional court), and the court of special justice of the peace which is of little significance. The native or Bantustan courts only operate in disputes between two blacks. They can apply tribal law.

There is a small debts court which has jurisdiction in relation to claims under 25 rand. It does not seem to operate or be used much. It is very informal and seldom has legal representation although legal representation is allowed.

The Suppression of Communism Act 1950 and the Terrorism Act 1967² provide for the holding in custody of various people. In 1973, 220 persons were held. I was told in 1975 that there was then thought to be a smaller number held. This has no apparent effect on ordinary criminal procedure. The form of a trial is very like the form in New South Wales. Advocates robe but do not wear wigs. Attorneys have no right of appearance in the Supreme Court. In the magistrates' courts the advocates do not robe. The attorneys do. Both robe in Bantu courts.

The courts are equipped for sound recording except in some country areas. In a magistrates' court I visited, the recording equipment was operated by the magistrate - although that was in a court where there were formal preliminary examinations taking place. The transcript is prepared by a private company which has a government contract.

At a trial of three blacks for robbery with violence, there was a large audience of blacks. The reason given was that the family helps pay for the representation and comes along to see that they get their money's worth. The defendants gave evidence through an interpreter and were cross-examined. One of the defendants' barristers commented that the decision has to be made in each case as to whether the defendant should give evidence. But if he is going to be convicted it is better to let him have his say.

There is a system of automatic review by the Supreme Court which is intended to enforce uniformity of approach by magistrates. There are approximately 1,000 cases reviewed by each judge each year. The review does not affect the defendant's right of appeal. Even if there is a request for an appeal, the court may treat the matter as on review. The system requires that every conviction and sentence of the magistrates' court falling within certain categories be confirmed by a judge of the Supreme Court, and each case is reviewed without any application by the accused person.

All convictions in the courts of special justices of the peace, all of which are in respect of petty offences, are subject to automatic review by the magistrate for the district.

When a magistrate passes a sentence which is subject to review, he is obliged to notify the accused of that fact, and the accused is entitled within three days after the sentence to supply to the clerk of the magistrates' court any written statements or arguments which he may desire to have placed before the reviewing judge.

The minutes of the proceedings are then laid before the reviewing judge within a very short period of time, the clerk being obliged to transmit the record within one week after the sentence. The reviewing judge considers the record in chambers, that is to say, in private, without hearing any oral argument. If it appears to him that the proceedings are in accordance with justice he issues a certificate to that effect and the record is then returned to the court from which it came.

If the reviewing judge is not so satisfied, he may direct that further information or evidence be supplied or taken by the magistrates' court or he may request that the magistrate furnish his reasons either for convicting the accused or for passing the sentence he did. If the additional information satisfies him that the proceedings were in accordance with justice, he issues a certificate to that effect. If, however, he still considers that the proceedings are not in accordance with justice, he lays the proceedings before the Court of Appeal, and that court whether after hearing argument or not, and whether it has called for and heard any evidence or not, will confirm, alter or quash the conviction, or confirm, reduce, alter or set aside the sentence or any order of the magistrates' court. The Court of Appeal is also able to remit the case to the magistrates' court with instructions to deal with any matter in such manner as the court may think fit. The reviewing judge should also consider the interests of the State. If he wishes to increase the sentence, it is suggested that he should return the case to the magistrate.

In 1974 the judges of the Transvaal Provincial Division reviewed over 25,000 cases.

When it is borne in mind that at least 90 per cent of the accused persons are either wholly or partially illiterate and that the great majority of them are undefended, the vital importance of the system in the administration of justice in South Africa becomes apparent.

I do not know what proportion of persons convicted by magistrates in New South Wales can be so described. My impression is that the proportion would not be large enough, in itself, to justify the institution of a system of automatic review. On the other hand, there have been complaints and studies indicating that in New South Wales there are wide, and in some cases predictable, disparities in the sentences passed on certain classes of defendant, particularly in relation to certain offences under the Motor Traffic Act, 1909.

A Criminal Procedure Bill was introduced in the House of Assembly, the lower house of the South African Parliament, in 1973. At the time I was in South Africa, the Bill had not been passed. The Bill provides in Chapter 20 for the abolition of preparatory examinations and for the pre-trial interrogation of the defendant by a magistrate. These changes follow proposals originally put forward by Mr. Justice Hiemstra in 1963 and a Commission of Inquiry conducted by Mr. Justice D. H. Botha in 1970-71. The proposals and the examination of them are of some interest.

By section 54 of the Criminal Procedure Act 1955, a person cannot be tried in a superior court for an offence unless he has been committed for trial by a magistrate. There are certain exceptions to which I have previously referred.

A preliminary examination is held when the prosecutor considers that a charge does not fall within the jurisdiction of the inferior court, either because of the serious nature of the crime or because the expected punishment exceeds the jurisdiction of the inferior court, for example because of the defendant's record of prior convictions. The indictment is formulated at the conclusion of the preliminary examination.

The system is considered to have the following advantages:

- (a) it operates as a sifting process;
- (b) the proceedings in the superior court may be shorter if the evidence has been given previously. The Attorney-General can decide what evidence to call. The judge has an easier task if the evidence given at the preliminary examination is before him;
- (c) it assists the Attorney-General in formulating the charge;
- (d) the defendant can prepare his defence, for example he can consult experts;
- (e) if there is a plea of guilty, it assists the court on sentence.

The system is considered to have the following disadvantages:

- (a) delay generally and unnecessary delay in a simple case. There was a recommendation in 1947 for a simplified procedure for such cases.
- (b) it affords the defendant the opportunity of adjusting his case in the light of the evidence given by the prosecution witnesses at the preliminary examination.
- (c) witnesses are called twice.

The magistrate may convert a summary trial to a preliminary examination and must do so at the request of a public prosecutor but not of a private prosecutor. The defendant has no say in the matter.

A preliminary examination may be converted to a summary trial at the discretion of the magistrate with the consent of both prosecution and defence.

At the preliminary examination, the defendant is able, but not required, to give evidence. The magistrate must ask him what he says in answer to the charge and must caution him that he need not answer. What he says may be used against him at the trial.

The magistrate may:

- (a) discharge the defendant, which is not an acquittal.
- (b) commit the defendant for trial.
- (c) commit the defendant for sentence, but this is exceptional.
- (d) commit the defendant for further examination.

At the conclusion of the preliminary examination, the magistrate must send the papers to the Attorney-General who may:

- (a) decline to prosecute and inform the magistrate who causes the defendant to be freed or, if he is not in custody, informs him of the decision.
- (b) indict the defendant, even if the magistrate has discharged him.
- (c) in less serious cases, remit the case to the magistrate's court for trial.
- (d) direct the magistrate to re-open the preliminary examination.

If the defendant is not brought to trial at the first session of the court held after the expiry of six months from the date of committal, he is entitled to be discharged and freed.

In 1963 Mr. Justice Hiemstra proposed³ that the existing procedure of preliminary examination be replaced by a new procedure under which the defendant, as soon as possible upon arrest, be brought before a magistrate when the allegations and a summary of the evidence against him would be put to him. He would then be interrogated by a prosecutor and the magistrate and his replies or silence would be capable of being used as evidence against him at the trial. The proposal was that the proceedings should not be public and that no police should be present. Mr. Justice Hiemstra originally conceded the defendant's right to legal representation but subsequently submitted to Mr. Justice Botha that he should not have representation as this would only be obstructive. Mr. Justice Hiemstra also proposed the abolition of the Judges' Rules.

In the course of considering the Hiemstra proposals, the Commission of Inquiry dealt with the following matters⁴:

- (a) the experience in the Scottish system of judicial examination, which was said to be that the defendant practically never makes a statement or replies to questions.
- (b) the problem of how a magistrate can decide whether or not a committal is justified if he does not hear evidence other than that of the defendant.
- (c) even if the defendant gives an explanation which, if accepted, is satisfactory, there may well still be a prima facie case. Interrogation of the defendant may only result in more committals.
- (d) investigations under, for example the Companies Act, are for a different purpose and are not comparable.
- (e) a comparison between the experience in provinces where, in summary trials, copies of the statements of prosecution witnesses are, or are not, given to the defence before the trial. In the Orange Free State, where copy statements are supplied, this is said to avoid adjournments.
- (f) a recommendation that, independently of the preliminary examination, the defendant should at the earliest possible stage be brought before a magistrate and given an opportunity to state his side of the case or to make a statement, if he should choose to do so.

The recommendation of Commission of Inquiry as to a new procedure, which recommendation has been incorporated into the Criminal Procedure Bill is in the following terms⁵:-

It is consequently recommended that, except in special cases where the Attorney-General is of the opinion that it is necessary for the more effective administration of justice, the present system of preparatory examinations be abolished, but that in the place thereof, and also in respect of the present summary trials in

the Supreme Court in terms of Section 152bis, the following procedure be prescribed in the Criminal Procedure Act -

1. Where it is decided that an accused should be charged in a superior court, either by reason of the nature and extent of the offence charged, Or by reason of his previous convictions, the public prosecutor in question shall, as soon as he is ready, cause the accused to be brought before a magistrate.

2. The charge is put to the accused before the magistrate and he is asked to plead thereto, if he has not on a previous occasion pleaded to the charge.

3. If he pleads guilty to the offence charged or to an offence of which he might be convicted on the charge, the substantial elements of the offence to which he has pleaded guilty shall be put to him by the magistrate, if they were not on a previous occasion put to him, and he shall be required to state whether his plea of guilty amounts to an admission of each of the said elements. The elements of the offence as put by the magistrate and the accused's comments on each one of them shall be recorded by the magistrate.

4. If the accused pleads not guilty, and if it had not been done on a previous occasion, he shall be asked by the magistrate whether he wishes to give an explanation with reference to his attitude to the charge, or whether he wishes to make a statement indicating the basis of his defence, or whether he wishes to say anything in connection with the charge against him, which he wishes to bring to the attention of the magistrate or the trial court. The accused shall be asked by the magistrate whether his plea of not guilty amounts to a denial of all the elements of the offence charged, and whether he wishes to have the elements not denied by him to be recorded as admissions, and he should further be advised that it might prove to be to his advantage to disclose the details of his defence at that stage. Whatever the accused says shall be fully recorded by the magistrate.

5. Thereafter the accused shall be asked whether he wishes to call any witnesses at his trial, and if so, he shall be asked to furnish their names and addresses in order that they may be warned to be present at the trial. The accused shall further be warned that if he intends to raise the defence of an alibi, he should furnish particulars thereof for recording, together with the names and addresses of the witnesses which he intends to call in support of that defence, otherwise he shall not be allowed at his trial, without the leave of the trial court, which shall be granted only on good cause shown, to raise that defence or to call a witness whose name and address he did not furnish.

6. A copy of the record of the proceedings before the magistrate shall be forwarded to the Attorney-General who shall thereupon decide either -
 - (i) that a preparatory examination be instituted against the accused; or
 - (ii) that the accused be summarily tried by a superior court, or a regional court or a magistrate's court; or
 - (iii) that the charge against the accused be withdrawn.

7. If the Attorney-General decides to arraign an accused summarily before a superior court, he shall cause to be served upon the accused, together with the indictment and notice of trial, a copy of the record of the proceedings before the magistrate, together with a summary of the substantial facts, as they appear from the statements of the witnesses, which are alleged against the accused, and a list of the State's witnesses (with their names and addresses), and he shall cause a copy of the said documents to be forwarded to the

registrar of the superior court in question for the information of the trial judge: Provided that if the Attorney-General is of the opinion that there is a danger of interference with or intimidation of a witness, or whenever he deems it to be in the interest of the safety of the State, he shall not be obliged to furnish to the accused the name and address of such a witness, or the names and addresses of the State's witnesses.

8. At the trial of the accused in any court anything that he may have said before the magistrate, shall be admissible as evidence by the mere production of the record of the proceedings before the magistrate.

9. Where the evidence at the trial deviates or differs from the summaries of the substantial facts referred to in paragraph 7, and the trial court is of the opinion that the accused may thereby be prejudiced in his defence, the court may, on the application of the accused, adjourn the trial for such period as it may deem fit.

B. Scotland

The legal system of Scotland is significantly different from that of England and Wales. Scots law, like South African law, is a mixed system having legal principles, rules and concepts modelled on both Romanistic law and English law. It claims its own originality determined by its distinctive history and its relationship to other legal systems.

The main sources of Scots law are: first, judge made law; second, certain legal treatises having "institutional" authority; and, third, legislation. The first two sources are sometimes referred to as the Common Law of Scotland.

The development of Scots law differed from that of English law in at least three ways. First, in Scotland judicial procedure was general in character and did not rely upon the closed category of writs used in the English Common Law Courts. Second, Scots law did not have the two separate systems of law and equity. Third, in the central courts of Scotland, juries were not used to decide issues of fact in civil actions as they were in the English Common Law Courts.

The two main civil courts in Scotland are the Court of Session, the supreme central court (subject only to appeal to the House of Lords) and the Sheriff Court, the principal local court. It was suggested to me that it is an anomaly to have two courts of primary jurisdiction and that this is an area susceptible to reform.

The Court of Session sits in the Parliament House in Edinburgh. It does not sit on circuit. There are twenty judges, of whom twelve, called Lords Ordinary, try cases at first instance. This branch of the court is called the Outer House. The eight other judges are divided into two divisions of four judges each, the quorum being three and the two divisions form the Inner House. The first division is presided over by the Lord President of the Court of Session and the second division by the Lord Justice-Clerk. The main business of each division is to review the decisions of the Lords Ordinary or of inferior courts which have been appealed to it.

The Sheriff Court deals with the main bulk of civil litigation in Scotland. There are six Sheriffdoms which are subdivided into Sheriff Court Districts of which there are fifty. The Sheriff hears cases at first instance in the Sheriff Court of a District and an appeal may be taken from his decision to the Sheriff Principal, and thereafter to the Inner House of the Court of Session. Alternatively, an appeal may lie direct from the Sheriff to the Inner House.

In addition to the ordinary procedure available in the Sheriff Court, there is a summary procedure for actions under 250 pounds sterling in value.

There are two main criminal courts, the High Court of Justiciary and the Sheriff Court. The High Court of Justiciary deals with the more serious offences and the Sheriff Court with less serious offences. In addition lay courts called District Courts deal summarily with minor statutory offences.

The judges of the High Court of Justiciary are the same persons as the judges of the Court of Session but are called Lord Commissioners of Justiciary. The Lord President is called the Lord Justice-General. The High Court sits on circuit.

The High Court is both a trial court and an appeal court. When it sits as the court of appeal, it consists of at least three judges. It hears appeals from High Court Judges and from the Sheriff Court. There is no appeal to the House of Lords.

The Sheriff Court has solemn jurisdiction, that is jurisdiction to hear cases on indictment, but most prosecutions before it are brought as summary complaints. The Sheriff Principal does not hear appeals, and acts only as a trial judge. The sentencing powers of the Sheriff Court are limited to a maximum period of two years' imprisonment in cases on indictment and up to six months' imprisonment in summary cases. Where a case merits a more severe penalty, the Sheriff may remit it to the High Court for sentence.

The District Courts (Scotland) Act 1975 (U.K.) introduced a new system setting up district courts in each of the 56 new district and island areas. The District Courts, manned by lay-Justices, deal summarily with breaches of the peace and other minor offences. The maximum fine is 100 pounds sterling⁶ and the maximum period of imprisonment is generally 60 days. An appeal lies to the High Court.

Criminal procedure in Scotland, as in New South Wales, takes the form of adversary procedure. The public prosecution of crimes is under the control of the Lord Advocate and the Crown Office in Edinburgh. The police never prosecute.

The Lord Advocate, the principal law officer of the Crown in Scotland, is responsible for prosecution and, other than his responsibility to Parliament, need not give reasons for his decision whether or not to prosecute. He delegates most of the work of prosecution to the Solicitor General and Advocates-depute, of whom there are currently seven. The Lord Advocate, the Solicitor General and the Advocates-depute are practising advocates and are known as Crown Counsel. They are assisted by a small staff of full-time civil servants headed by the Crown Agent. The whole organization is known as the Crown Office. The Crown Office also directs the procurator-fiscal service.

The procurators-fiscal are the public prosecutors in the Sheriff Courts and the District Courts. They must be either advocates or solicitors and are usually solicitors. The police report the details of a crime to the procurator-fiscal, who has a discretion whether or not to prosecute, subject to the direction and control of the Crown Office. The procurator-fiscal is also responsible for instituting fatal accident inquiries before the Sheriff and may be concerned in similar inquiries concerning fires. There are no coroners in Scotland. The procurators-fiscal have a high tradition of independence and impartiality; for example, I was told that it is accepted by the public without objection that they should investigate complaints against the police.

Following an arrest, the control of the investigation passes to the procurator-fiscal. The procurator-fiscal also assumes control of investigations of those serious crimes which are notified to him by the police before an arrest has been made. He examines the police file and decides whether to charge the accused and, if so, whether by summary complaint or indictment, or whether to take no further proceedings and release him.

If the procurator-fiscal decides provisionally that the offence is important enough to warrant prosecution on indictment, he brings a charge in a petition which is given to the accused. The accused then goes before the Sheriff for judicial examination in private. The role of the judicial examination has changed over the years. It is a survival from a time when pre-trial procedure was inquisitorial rather than adversary in character. By the later nineteenth century the purpose of the judicial examination was to enable an accused but innocent person to clear himself at any early stage in the proceedings and to persuade the Sheriff not to commit him for trial or, alternatively, its purpose was to give the accused an opportunity to make a confession or damaging admissions which would be used in evidence at his trial. At that time an accused had no right to give evidence at his own trial. At present, the judicial examination has become a purely formal procedure - perhaps because the accused has now a right to an interview with a solicitor and to be represented by him at the judicial examination and because the accused may, if he wishes, give evidence at his trial.

At the judicial examination, the accused, with his solicitor, appears in private before the Sheriff. It is very rare for the accused to make a statement at that stage. The procurator-fiscal then moves for committal for further examination or trial and, subject to the determination of any application for bail, the Sheriff grants the motion.

The fiscal continues his preparation of the case by taking statements (called "precognitions") from all the witnesses. The precognition is not in the words of the witness or signed by him and it cannot be used to discredit him at the trial. It is a statement prepared by the police or the fiscal. The witness may be precognosed on oath before the Sheriff and this may be enforced if he refuses to attend. The fiscal reports to the Crown Office for decision as to the form of the charge, whether it should be by indictment or by summary complaint and, if so, in what court, or whether to discontinue the proceedings and discharge the accused. The papers are considered by one of the Crown Counsel. The Crown Office is jealous of its central control of indictments.

If an accused has been committed to prison to await trial, and his trial is not concluded within 110 days of the date of his committal, he must forthwith be set at liberty and declared forever free from further prosecution for the crime charged. The 110 day rule does not apply where the accused is awaiting trial on bail.

If the Crown Office decides to prosecute on indictment, the indictment is served on the accused. It sets out the crimes charged, lists the Crown productions (items to be produced in evidence and relied on by the Crown at the trial, such as medical reports, offensive weapons allegedly used by the accused) and particulars of Crown witnesses. The accused is entitled to precognose the Crown witnesses. The indictment cites the accused to appear at two diets (hearing dates). At the first or pleading diet the accused states whether he intends to plead guilty or not guilty. If he wishes to rely on certain defences known as "special defences" - being alibi, insanity, discrimination, self defence or asleep at the time - he must give notice of them at that hearing.

The proceedings until the first diet are in private and the newspapers are only entitled to know the identity of the accused and the charges against him. Scots lawyers are critical of the English system, particularly in the case of a death, which involves the publicity of an inquest and the committal proceedings before the trial. One can only speculate what such critics would think of American newspaper practice.

The trial on indictment takes place before a judge (either a Lord Commissioner of Justiciary or a Sheriff) and a jury of 15. There must be evidence from two sources of the accused person's guilt. Often one source is an admission by the accused. The verdict may be "guilty", "not guilty" or "not proven". Originally the jury merely found the facts. The question of innocence or guilt was, until the eighteenth century, one of law for the judge. During that century the jurors asserted a right to say "not guilty". The verdict may be reached by a majority. The

size of the majority is not disclosed. If the number of jurors is reduced during the trial, a verdict of "guilty" must still be supported by eight jurors.

In summary procedure, only one document is prepared, a summary complaint which specifies, among other things, the court and where and when it will sit, particulars of the accused, of the offence charged and of the facts inferring guilt. The procurator-fiscal will usually give the defence a list of Crown witnesses, normally in exchange for a list of the defence witnesses. On the date assigned in the complaint, the accused is asked to plead guilty or not guilty. If he pleads not guilty, it is rare for the trial to proceed at once and normally a date is assigned for hearing. In summary procedure, the Sheriff cannot remit the case to the High Court for sentence. Either the fiscal or the accused may require him to state a case for the opinion of the High Court on a question of law.

Civil litigation in Scotland, like criminal procedure, takes the form of adversary procedure. The Court of Session proceedings are nearly all either actions or petitions.

An action in the Court of Session is commenced by the pursuer serving a summons on the defender. He also lodges a copy in the offices of the court. Attached to the summons is a request to the court to grant the remedies sought by the pursuer, called the conclusion of the summons; a detailed statement of the facts upon which the pursuer relies, called the condescendence; and finally a brief statement of the legal grounds, called the pleas-in-law, which, if the facts are proved, entitles the pursuer to the remedy he seeks. The defender puts forward his statement of the facts, either accepting or rejecting the pursuer's statement, together with the pleas-in-law in support of his argument.

Thereafter both pursuer and defender have three months to adjust their own cases in the light of the statement and allegations put forward by the other side. This involves actual amendments written on the original pleadings. The object of these written pleadings is to focus the area of disagreement between the litigants and to give each party fair notice of the case he has to answer. The pleadings are then made into a "closed record" which sets out, one against the other, the numbered allegations, admissions and denials of each party and any interlocutory orders. The matter then goes forward for determination by the court.

Of particular note is the requirement that the pleadings set out the legal grounds, or causes of action and defences, on which the parties rely. On occasion this leads to an intermediate step to decide the legal issues (in the nature of a demurrer) where, for example, the defender says that the pursuer's case is irrelevant.

There is a procedure which is very seldom used known as "reference to oath". In that small class of cases, such as secret trusts or gratuitous promises (it must be remembered that, under Scots law, a contract does not require consideration), where the pursuer can only prove his case by the writing of the defender or the defender's oath, he may refer the issue in question to the oath of the defender. The pursuer is then bound by what is said by the defender. The only sanction is the law against perjury.

Formerly, pursuers seeking damages for personal injuries took proceedings in the Court of Session so as to avail themselves of a jury of twelve. This is seldom done at present.

All productions of documents or things intended to be introduced into evidence must be lodged with the court four weeks before the hearing and can be inspected by the other party. Anything not so lodged cannot be admitted into evidence. To avoid inconvenience, especially to strangers to the action, it is common to agree to admit copies.

A petition is strictly an ex parte application to the court and is often used where the petitioner and the respondents to the petition are not in dispute but where the court's approval is nevertheless required. Some petitions are contentious, for example some petitions for custody of children. When the petition is presented, the court decides which person should receive service of it. Any respondent to the petition may lodge answers in much the same way as a defendant to a summons lodges defences.

Ordinary procedure in the Sheriff Court is modelled on the Court of Session procedure.

Advocates have an exclusive right of audience in the High Court of Judiciary and the Court of Session, and can also appear in every other court of Scotland. Solicitors undertake most of the litigation in the Sheriff Courts. They do not have a right of audience in the High Court and the Court of Session. The bar is resident only in Edinburgh and appears more closely knit than the New South Wales bar. This can be expected to have some effect on the conduct of litigation; for example, affidavits are not used in interlocutory proceedings, the court relying on the word of counsel.

In 1970 a committee was set up to examine criminal procedure in Scotland and to report whether any changes in law or practice were required. The chairman of that committee is the Honourable Lord Thomson. The first report⁷ of that committee dealt only with certain matters relating to criminal appeals. The third report will cover appeal procedures generally.

The second report⁸ of the Thomson Committee, presented to Parliament in October, 1975, deals in great detail with present criminal procedure in Scotland and makes a number of recommendations for change. Although the report will no doubt be read by those interested in the subject, I refer here to a few matters with which it deals.

The Committee⁹ deal with time limits for proceedings, and with indictable offences and summary proceedings.

In the case of indictable charges, I have already referred to the 110 day rule which applies when the defendant is in custody. The Committee¹⁰ recommend that this remain, with slight amendments to avoid certain difficulties. The Committee¹¹ also deal with the position of defendants who are not in custody pending the trial. They express concern at the present position and say that the only way it can be controlled is by laying down a statutory maximum period during which the case must be brought to trial or the person freed of the charge. They recommend a period of 12 months from the first appearance on petition to the commencement of the trial, with provision for extending the period on cause shown.

In relation to summary cases, the Committee take the view¹² that summary procedure should be truly summary and that undue delays are unacceptable. The Committee recommend that the citation must be served or the warrant to arrest obtained within three months and that the trial must commence within six months of either the date of the offence or the date when sufficient evidence to justify prosecution came to the knowledge of the prosecutor.

Reference is made¹³ to the problems associated with a late change of plea to a plea of guilty. The Committee note that at least one scheme, proposed to alleviate these problems, proved to be a complete failure in practice. It seems to be the Committee's view that the problems must be accepted.

Bearing in mind the controversy regarding plea-bargaining in the United States, it is interesting that the Committee say firmly that plea-adjustment is accepted as proper practice.¹⁴ The point is made that the judge is not involved in the plea-adjustment.

In the course of discussing the time-table for a trial the Committee express hope¹⁵ that the legal advisers of accused persons will consider it to be their duty to the court to admit facts which are not in dispute and which they consider will certainly be proved rather than prolong trials by forcing the Crown to call witnesses to give evidence about matters upon which they would not be cross-examined. This hope is repeated¹⁶ when the Committee deal with minutes of admission and agreement.

The Committee recommend¹⁷ that the special defences, of which notice must be given by an accused at the first diet, should be renamed "substantive defences" and should be defined as any defence relevant either to exculpate the accused or to reduce the quality of the offence charged.

The Committee considered a suggestion¹⁸ that the judge at the trial should see the precognitions as is the practice with depositions in England and Wales. The Committee rejected this suggestion.

The Committee also received a suggestion that in cases involving complicated commercial frauds, the jury should contain a number of experienced businessmen. The Committee also rejected this suggestion.¹⁹

C. England and Wales

Both civil and criminal procedure in New South Wales has traditionally been modelled on English procedure. Dealing first with civil procedure in this State, the Supreme Court Act, 1970, and the rules made under it follow closely the English Rules of the Supreme Court. To a lesser extent, so do the District Court Act, 1973, and the rules made under it. The English *Supreme Court Practice*²⁰ is used extensively. There is, therefore, little need for a general excursus on English procedure. It is relevant, however, to comment on certain matters of practice in English civil litigation.

After the initiating process is filed in the High Court, the subsequent pleadings are not filed with the court until the case is ready for trial. This presumably involves an administrative saving for the court. It also highlights the arbitrary distinction in New South Wales between those pleadings which are filed and those, such as particulars, which are not.

In an endeavour to encourage settlement before setting the case down for hearing, there is a significant fee (fifteen pounds sterling) payable on setting down. Experience indicates that the court cannot control whether the parties will settle at a particular stage and one third of cases are still settled at the door of the court. On setting down, the plaintiff takes out a summons for directions returnable before a Master. Before the directions hearing, all experts' reports must be exchanged. In the provinces, a certificate of readiness is used. It is not used in London, where it is regarded as being of little use.

At the directions hearing, the Master sits behind a bench which is not raised. The solicitors for the parties approach, and sit at the other side of the bench. The plaintiffs solicitor hands up the pleadings and the summons for directions which is a printed form containing alternative orders and blanks²¹. Either side may file further

affidavits, in particular, the defendant files an affidavit to "reveal a triable issue". The Master then goes through the printed form making such alterations by hand as are necessary. If any additional order is necessary the Master writes it in the margin. Such additional orders are not common as the procedure is designed to avoid them. Among the orders made is an order as to the number of expert witnesses each party may call. The Master fixes the venue and assigns the case to Category A, B, or C. Category A is for cases of public importance. Category B is for cases of gravity which require a more senior and experienced judge. The balance go into Category C and are usually heard before a Circuit Judge. The Master may refer small cases for trial in a County Court.

Cases in the commercial list come before the Commercial Judge for directions. The role played by the judge in isolating and limiting the issues in dispute, and in pushing the parties towards settlement, varies from judge to judge, as also does the flexibility of the court in such matters as court hours and formal pleadings.

There is a practice in cases in the commercial list of preparing an "Agreed Bundle". The practice is similar to that set out in New South Wales Supreme Court. Practice Note No. 5 of 10 April, 1974²². The English Commercial Judges expect the documents which are relevant and not subject to objection to be in the agreed bundle, numbered and handed up. In fact, the practice is followed. While this is, no doubt, to a large extent due to the influence of the bench, it must be borne in mind that there is a relatively compact specialized commercial bar, the members of which, in general, undertake fewer cases than corresponding New South Wales counsel, although charging more for each case. This is said to lead to greater care in the preparation of cases for trial.

After discovery, counsel for each party advises on evidence. In the advice, he lists the documents which, in the interests of the party he represents, should be in the agreed bundle. The solicitors for the parties meet. All the documents required by the parties are assembled in a convenient order, for example, in chronological order, accounts and correspondence separately or correspondence in separate sets, and are numbered. Any document, for example, a prejudicial letter by a stranger, to which objection is taken is put into an "Unagreed Bundle" and the judge rules upon its admissibility. Throughout the hearing, a document is referred to simply by number.

Interlocutory proceedings in the Commercial List, and for that matter generally in the Queen's Bench Division, are in private. In the Chancery Division they are not. This practice leads a plaintiff who wishes to avoid publicity to prefer the Commercial List - a situation which illustrates the incongruity of some of the historical divisions within court structures.

Note must be taken of the English use of Recorders in criminal cases, which saves the appointment of additional judges with the heavy expense that involves. It is said to enable the court to make use of talent at a reduced cost. Recorders are appointed from acceptable barristers and solicitors. Appointment is considered a great honour. It must also be noticed that most appointments to the bench are made from those who have served as Recorders. A Recorder sits as such for four weeks each year. The four weeks may be nominated during the preceding year and Recorders do exchange sitting dates. There are problems of timing and to some extent the Recorders must fit in with the court administrators. Disappointment has been expressed that Recorders are not used in civil work such as divorce. On the subject of appointments, to some practitioners, appointment as a Master is more desirable than appointment as a Circuit Judge as a Master is not obliged to leave London.

In relation to criminal procedure, until the Criminal Justice Act 1967 (U.K.), the English system of committal before a magistrate in indictable cases was similar to the present New South Wales system. The committal can now take one of three forms:-

- (a) The accused concedes that there is a *prima facie* case against him, although he may assert that he can answer it at the trial. The prosecution serves on the accused copies of statements of its witnesses and of

documents which it proposes to tender at the trial.²³ At the formal committal before the magistrate, it is agreed which statements can be read to the jury and which witnesses the defence requires for cross examination. The magistrate does not seek to influence the defence to admit statements. The accused is instructed to give notice of any alibi relied upon but this is not often done.

(b) At the hearing before the magistrate²⁴ the statements are read and, perhaps, witnesses called, and the accused argues that there is *no prima facie* case.

(c) At the election of either the prosecution or defence the committal can proceed as before. This rarely occurs. The prosecution may elect to take this course, for example, to obtain the evidence on oath of its witnesses before their identity is disclosed to the defence and before they become subject to pressure. An English Member of Parliament, Mr. John Stonehouse, elected to adopt this course.²⁵ The procedures just discussed are known colloquially as "section 1", "section 2" and "section 7".

In some smaller cases, the defence will say that it is going to trial and then, having obtained the prosecution evidence under section 1, elect to be tried summarily.

It is considered that the new system works well. Certainly the time of witnesses to undisputed facts is not wasted as it was under the former system.

White Collar Crime

To a large extent, the investigation of corporate fraud is carried out by, or at the instance of, the Board of Trade. The prosecution of offenders then passes to the Company Fraud Squad of Scotland Yard. Inevitably this leads to delay in the institution of prosecutions. Delay can also be caused by the difficulty of obtaining international comity in the investigation of such cases.

It is recognized that the procedure of appointing investigators under the relevant companies legislation²⁶ causes delay. But it is considered part of the system of checks and balances, and avoids allegations of political influence in the bringing and conduct of prosecutions.

There is divided opinion as to the course the prosecution should take in a case where the accused is thought to have committed a number of offences, perhaps of differing severity, arising from one situation or series of transactions. One view is that once the prosecution is in a position to prove one reasonably representative offence, it should prosecute that offence and take no further steps in relation to the others. The other view, and the one currently held, is that the investigation should be as thorough as possible and then there should be a prosecution of all offences of which there is proof.

Doubt was expressed to me as to the capacity of juries to cope with complicated commercial charges. It was suggested to me that the jury should be replaced by two assessors, experienced in commercial matters, who, with the judge, would decide the issues of fact.

D. New Zealand

The first courts in New Zealand were established by ordinance of the Legislative Council in 1841. The Supreme Court then set up has continued to the present day with increasing jurisdiction and without change of its institutional identity. There were experiments in the early years with inferior courts with various names. There emerged by the 1860's a three-tier system of courts of first instance with civil and criminal jurisdiction; resident magistrates courts, district courts and the Supreme Court, together with a court of appeal which consisted of Supreme Court judges.

This three-tier system was gradually transformed into a two-tier system by successive extensions of the jurisdiction of the resident magistrates courts. In 1957 a separate Court of Appeal was created.

The Supreme Court, having been established in 1841,²⁷ has been continued by Acts of 1860,²⁸ 1882²⁹ and 1908.³⁰ It is provided with all the jurisdiction which may be necessary to administer the laws of New Zealand. From the outset, the court has had jurisdiction in law and equity. In criminal trials, it sits with a jury of twelve. From time to time special provisions have been made for Maori participation on juries. There is now no distinction between Maoris and others for the purpose of jury service.

As well as being a court of first instance, the Supreme Court functions as an appeal court from decisions of the inferior courts in their civil and criminal jurisdictions and from certain courts of special jurisdiction.

During the last ten years or so there have been moves towards the revival of some form of intermediate court with the object of removing part of the workload of the Supreme Court. In February 1963 a committee under the chairmanship of the Chief Justice reported by majority in favour of the setting up of intermediate courts to be known as district courts. The report disclosed a sharp division of opinion between the views of the majority of the committee and those put forward by the New Zealand Law Society.³¹

A committee of the Supreme Court is currently engaged in preparing a revised Code of Civil Procedure.³² I have seen the draft of Parts I, II and III. Although the draft Code is in many ways similar to the New South Wales Supreme Court Act, 1970, and Rules, there are a number of differences which are worth noting:

- (a) a distinction is made between third party pleadings between existing defendants and such pleadings with strangers;
- (b) an interlocutory application is not to be supported by an affidavit. The notice of application is to state the facts and an opposing party may file a notice of opposition. Evidence, oral or by affidavit, is limited to disputed facts;
- (c) in the main court centres, cases are fixed for hearing by the Registrar upon receipt of a *praecipe* indicating suitable dates. There is provision for vacating a hearing date so fixed;
- (d) no expert shall be called unless a brief of the evidence he intends to give is given to the other party 24 hours before he is called;
- (e) the power of the court on a directions hearing is much greater than the power given by Part 26 of the New South Wales Supreme Court Rules.

The magistrates' courts have civil jurisdiction which is, in general, concurrent with that of the Supreme Court up to a monetary limit of \$2,000. The Supreme Court has, of course, jurisdiction in any civil action but there are rules to discourage small claims.

Since 1952 the magistrates have had summary jurisdiction to try, with the consent of the accused, almost all indictable offences against property and all but the most serious of other indictable offences. The power of punishment in such cases is limited to imprisonment for up to three years or a fine of a limited amount. They have, however, power to impose cumulative sentences for separate offences.

Prior to 1957 appeals to the Supreme Court from a conviction by a magistrate were by way of re-hearing. The evidence was heard *de novo*. Since 1957, an appeal is heard on the notes of evidence made by the magistrate although the Supreme Court has power to re-hear the whole or any part of the evidence and is obliged to re-hear the testimony of any witness where the judge considers that the magistrate's note of the evidence of that witness may be incomplete in any particular.³³

Justices of the Peace have a narrow jurisdiction over minor offences such as drunkenness.

The Court of Appeal in its civil capacity hears appeals from the Supreme Court³⁴ and may in certain cases exercise original jurisdiction where the matter is removed into the Court of Appeal by the Supreme Court.

On the hearing of criminal appeals, the Court of Appeal may instead of directing an acquittal, direct a new trial. This power is exercised in the majority of successful appeals and the usual result is the reconviction of the accused. On an appeal against sentence, the Court of Appeal may impose another sentence, whether more or less severe.

Grand juries operated in New Zealand from 1844 until their abolition in 1961. Their role has now been effectively taken over by the Supreme Court.

In a prosecution for a serious crime, there is a preliminary hearing which is similar to the New South Wales committal proceeding but the English system of a hand up brief has recently been adopted, although the defendant has the right to choose the full preliminary hearing. The preliminary hearing is sometimes regarded as a "rubber stamp" unless the accused considers he has a reasonable prospect of being discharged at that stage. Such a discharge does not have the effect of an acquittal, the accused can be charged anew. The preliminary hearing is usually presided over by two Justices of the Peace but, in serious cases such as murder, or if the defendant or prosecution requests it, a Stipendiary Magistrate may preside. A defendant wishing to give evidence of alibi is required by statute to give notice of such intention. In serious cases, a crown prosecutor usually conducts the preliminary hearing. In other cases, a police prosecutor performs this function.

Apart from the accused's moving that there is no case to answer on the taking of depositions in the magistrates court, there is provision under Section 347 or the Crimes Act 1961 (New Zealand) for the accused to move for an order that no indictment be presented. The practice is that a motion is filed in the Supreme Court and a judge then deals with the matter, generally following argument by counsel. Section 347 reads as follows:-

347. Power to discharge accused -

(1) Where any person is committed for trial, the Judge may in his discretion, after perusal of the depositions, direct that no indictment shall be presented, or, if an indictment has been presented, direct that the accused shall not be arraigned thereon; and in either case direct that the accused be discharged.

(2) Where an indictment is presented by the Attorney-General, or by anyone with the consent of the Attorney-General, under subsection (3) of section 345 of this Act, the Judge may in his discretion, after perusal of the statements of the witnesses for the prosecution, or after hearing those witnesses, direct that the accused shall not be arraigned on the indictment, and direct that he be discharged.

(3) The Judge may in his discretion, at any stage of any trial, whether before or after verdict, direct that the accused be discharged.

(4) A discharge under this section shall be deemed to be an acquittal.

(5) The provisions of subsection (5) of section 42 of the Criminal Justice Act 1954 shall extend and apply to a discharge under this section.

(6) Nothing in this section shall affect the power of the Court to convict and discharge any person.

The section is used, sometimes without argument, when it is apparent that there is no real *prima facie* case. It has sometimes been found that, after dealing with the motion and perhaps ruling that the indictment be presented, pleas of guilty are entered. The view has been expressed that the exercise of subsection (1) is justified if the judge is satisfied that it is unlikely that any jury properly directed would convict, or that it would be wrong for a jury to convict; but the judge should bear in mind that he has not had the advantage of seeing and hearing the witnesses.

Pre-trial motions are also available to seek a change of venue or a severance of the trial where there are either multiple defendants or charges. The pre-trial motions may be heard immediately preceding the trial - the fact that the jury is waiting tends to shorten the argument. There can be an appeal to the Court of Appeal from the Judge's decision on the pre-trial motion. Subject to any such appeal, trials normally take place within three months of the alleged offence.

A Small Claims Tribunals Act was passed in 1976 by the New Zealand Parliament. The main purposes of the Act are:-

- (a) to authorize the setting up of Small Claims Tribunals, each to be a division of a specified magistrates court;
- (b) to give the tribunals jurisdiction to hear and determine certain types of small claims;
- (c) to provide for the appointment of referees to exercise the jurisdiction;
- (d) to charge the tribunals with the primary task of bringing about an agreed settlement of claims;
- (e) to empower the tribunals to resolve those small claims which are not settled, in a manner which achieves a fair result without necessarily applying legal technicalities; and
- (f) to provide for a simplified, informal and inexpensive procedure for the proceedings of tribunals.

The jurisdiction of a tribunal is limited³⁵ to claims not exceeding \$500 based on contract or quasi-contract and excludes claims for recovery of debts and other liquidated demands.

A tribunal has power³⁶ to make the following orders:-

- (a) order a party to pay money;
- (b) declare that a party is not liable in respect of a particular claim;
- (c) order a party to deliver specific chattels to another;
- (d) order a party to make good a defective chattel or any services which have not been adequately performed;
- (e) vary or set aside an agreement between parties if it is harsh or manifestly unjust in its operation or if it has been induced by fraud, misrepresentation or mistake or if the written document is not a true reflection of the parties agreements; or
- (f) order that the claim be dismissed.

E. United States of America

When someone with a background in English legal procedure approaches the American legal system and attempts to isolate the differences between the two systems, he is first struck by the consequences of the application of the concept of democracy to the judicial process. There is the almost sacred right to trial by jury and the popular election of judges and law enforcement officers (including the prosecuting officer). But both of these processes are suffering from attrition. The jury is unwieldy and costly and is being by-passed more often. Federal judges are appointed and so are an increasing number of State judges.

It seems to me that an ingredient which is more important in understanding the American legal system is the operation of the concept of private enterprise. It is legitimate for a plaintiff to make an entrepreneurial profit from litigation and it is equally legitimate for a plaintiff's attorney to make an entrepreneurial profit. The individual is encouraged to compete with the public law enforcement agencies in the prosecution of those guilty of antisocial behaviour by the awarding of treble or punitive damages. The attorney is encouraged by the contingency fee and the referral fee. The plaintiff is not discouraged by the possibility of paying costs if he fails: party and party costs are almost unknown and, of course, having taken advantage of the contingency fee system he only pays his attorney if he wins. The enormously broad discovery rules have enabled persistent plaintiffs to discover material which otherwise would not have been available. But these very rules have made litigation very expensive and protracted. While they may assist some defendants, their effect generally is undesirable.

The prolific growth of the class action and the anti-trust suit has raised doubts as to whether the system is being abused, and there are suggestions, for example, for the creation of some form of administrative tribunal to replace the present system in the anti-trust area. But such suggestions are subject to concern as to the result if the system is run by bureaucrats. For example, the advertising industry is regulated by a commission which is both prosecutor and judge, although there is a limited appeal to the courts. This arrangement is criticized, both in theory and practice, as it has been in Australia.

One lawyer I met said that the courts in the United States are trying to change the social structure of the country, and he suggested that Australia should not let its courts become involved in social issues. This has happened in the United States because Congress had left a vacuum, for example, in relation to racial issues, and the courts stepped in and were more flexible. While I was in the United States, a Federal judge was running the Boston school system, another had ordered the Borough of Brooklyn to conduct a survey (at a cost of over \$150,000 which the borough said it could not afford) in relation to the entrance requirements to its schools and there seemed a general acceptance that if the City of New York became bankrupt, a Federal judge should take over.

Criminal Procedure

Criminal procedure in the United States is bedevilled by the multiple pre-trial hearings required by the decisions of the Supreme Court in recent years. Since 1 December, 1975, in the federal courts, discovery has become more a part of the criminal procedure. The defendant is required to state certain defences, such as alibi, and to name his witnesses. The procedures which these changes have given rise to are cumbersome and although steps are being taken to improve the situation, I did not feel that there was any real benefit in an examination of them.

While procedures vary across the country, the prosecution of most serious crime appears to involve a preliminary hearing of some sort. The use of the grand jury is diminishing and it is increasingly the subject of criticism.

One aspect of criminal procedure which is almost universal is plea bargaining. Most courts claim they could not cope with the work load without plea bargaining, although a pilot study conducted in 1971 by the Los Angeles District Attorney, during which plea bargaining was virtually halted, did not result in an unmanageable increase in the number of trials. Plea bargaining, in itself, is unexceptionable or at least it is common in New South Wales. It is simply the defendant agreeing to plead guilty to a particular charge, generally on the basis that other charges are withdrawn. The methods by which it is carried out in a number of situations have been the subject of criticism, mainly because it is said that unfair pressure is applied to the defendant. On the other hand, it is also, said that a great deal of plea bargaining arises from "over indicting" by prosecutors. For example, a defendant is charged with first degree murder when the facts will only support a charge of second or third degree murder.

There are some 13,000 indictments for felony pending in New York. This is 20 per cent more than two years ago. The rise is attributed to a fall in plea bargaining from 90 per cent of cases to 80 per cent and also to the rise in pre-trial hearings.

A further step which has attracted more severe criticism is sentence bargaining which must ultimately involve the judge in the bargaining.

On the subject of procedural reform generally, one American judge suggested to me that any reform is good, as those who support it will work to ensure that they are proved correct; but that such enthusiasm has a limited life; and so one should have reform every seven years, even if this means returning to a prior system.

Civil procedure

From Trial by Ambush to Trial by Avalanche. Rules of civil procedure for the District Courts of the United States were adopted by order of the Supreme Court of the United States of 20 December, 1937, and have been developed by amendment on a number of occasions since. Basic to the rules which were adopted was a departure from the traditional English method of ascertaining the issues in a case by pleading. I was informed that the superior trial courts in about half of the States now operate under rules which follow closely in principle the federal rules.

The fundamental approach taken by these rules is that there should be no surprise at the trial. All the evidence is to be uncovered and made known to the parties during the pre-trial procedures. Each party has knowledge of, and the opportunity to test, all the evidence available to the other parties.

The basic rule which gives effect to this approach is Rule 26 of the Rules of Civil Procedure.³⁷

The following differences from the practice in New South Wales should be noted:-

- (1) The issues are not ascertained by pleading.
- (2) There is no procedure to oblige a party to file a list of documents; that is, to give discovery of documents relevant to the issues.
- (3) There is only a very effective use of the concept of relevance. The last sentence of Rule 26 (b) (1) should be noted:³⁸

It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

- (4) The scheme of the rule is such that the party seeking information does not have to take any formal steps to establish his entitlement to it. On the contrary, the party from whom a document or information is sought must obtain a protective order or comply with the request.
- (5) Oral depositions are permitted; that is, the facility of examining, and cross-examining, the witnesses or submitting written questions to them before the trial.

The procedures during the course of an action vary from court to court. The federal district courts have local practice rules for each district and the rules of the state courts vary widely. Even within a particular jurisdiction, some practitioners take the view that formal notice under the rules should be given of each step; others proceed informally.

It may be of assistance to set out, with brief comments, the steps taken in a typical action.

The pleadings consist of a complaint and an answer, both of which are in very general terms.

Interrogatories. These are only available against another party to the action. They are often served with the complaint. They are, to a large extent, used to seek out documents held by the other party. An interrogatory may be to this effect:-

Identify all contracts entered into by the defendant and its subsidiaries with (a named person or class of persons) during the last 10 years.

The answers to the interrogatories. The answers in themselves are not of evidentiary value. The answering of interrogatories can involve a great burden on a party, not only in obtaining the documents and information but also in relation to the expense of preparing the answers.

Request to produce. The request is normally framed on the answers to the interrogatories. It is the "inspection" part of the discovery process. The request is only available against a party to the action.

If necessary a party can take out a motion to compel discovery. Alternatively, the party from whom discovery is sought may apply by motion for a protective order.

Oral depositions. This procedure is available against persons who are not parties to the suit as well as against the parties themselves. Some lawyers take oral depositions immediately, before they have seen the documents, so as to have the benefit of the witness's early recollection. Such a course has a disadvantage that invariably matters which arise from the documents are omitted from the oral deposition. For this reason it is more common for the deposition to be taken after production of documents.

This procedure is regarded as a most powerful tool in the "impeachment" of a witness at the trial, which is the demonstration that there are inconsistencies in the witness's testimony.

There has been a recent development that the deposition of an adverse party may be tendered at the trial as evidence in preference to his testimony at the trial.

Written interrogatories. This procedure replaces an oral deposition where that is inconvenient, normally because of distance. There appears to be, in the United States, a much greater geographic mobility, in particular at the commercial and legal professional level, than there is in Australia. For this reason it is common that witnesses are far removed from the court where the dispute is being litigated. The rules provide limits to the distance a witness must travel to give evidence.

The questions are prepared by the lawyer wishing to take the interrogatory and are asked of the witness by someone appointed for that purpose. The witness does not see the questions beforehand.

Requests for admissions. Admissions can be sought in respect of matters of fact and of matters of law. This is one of the few areas in which there is provision for party and party costs. Costs can be awarded in respect of the proof of a matter which was needlessly denied and, it appears, can be ordered against the lawyer personally. There is also the possibility of punishment for contempt of court.

Pre-trial statement. Ten days before the pre-trial conference each party supplies to the other parties a statement of the matters which he requires in the pre-trial order.

The pre-trial conference. This is presided over by the judge who often sits at the bar table with counsel. The judge exerts such pressure as he can to define and limit the issues. Often the conference is "off the record". Depending upon the judge concerned, some attorneys insist on the conference being "on the record".

A party may move for summary judgment, either partial or total. For this purpose, use is made of the oral depositions and documents produced.

During the pre-trial conference the pre-trial order is prepared.

The pre-trial order. This supersedes all prior pleading, is a guide to the issues, and lays down what has to be established both as to fact and law. A mistake made in drafting the pre-trial order can involve a party in considerable difficulty. For this reason the order often contains a multiplicity of so-called issues, a large number of which are repetitive and, in the result, the order is overlong in an attempt to be exhaustive, rather like a certain class of notice of appeal in New South Wales.

The pre-trial order is normally filed by the plaintiff or the party who prevails at the pre-trial conference. The judge will state, on the record, what he wants in the pre-trial order.

A copy of suggestions for the preparation of a pre-trial order issued by the United States District Court for the District of Colorado is appended.³⁹

Settlement conference. In some jurisdictions the settlement conference forms part of the pre-trial conference. Sometimes, according to jurisdiction, the settlement conference is held by the judge who will hear the case and sometimes by a judge who will not hear the case. The efficacy of the settlement conference appears to depend almost completely upon the personality and experience of the judge conducting it.

The federal courts use an individual calendar system, and all pre-trial procedures are supervised by the judge to whom the case was allotted on filing or by a magistrate to whom the judge has delegated a particular procedure. The magistrates are modelled on the English Masters. The name was chosen to avoid the connotations which the word "master" has in the southern States. The appointment and use of magistrates is increasing. Most State courts use some form of master calendar system and generally pre-trial procedures are dealt with by a motions judge.

One particular area which is currently causing concern in the United States is the rise in medical malpractice suits both in numbers and in the size of awards. Doctors in Los Angeles went on strike early in 1976 to protest at the heavy rise in insurance premiums. In California the average premium is \$US4,000 *per annum* and, in 1975, awards against doctors were equivalent to \$US1,000 per doctor. By way of comparison, the current premium in New South Wales is \$A60.

The problem has been approached in two ways in New York. First, the time for bringing action has been shortened to two years and six months or one year after discovery in the plaintiffs body of a foreign object. The insurance companies were apparently able to convince the legislature of the actuarial benefit of this step. Also, expert evidence is required in cases alleging lack of informed consent. Second, each case is reviewed by a tribunal consisting of a lawyer, a specialist doctor and a judge. The tribunal makes a recommendation as to what should happen. Although the tribunal had been in operation for one year when I was in New York, the rules to regulate it had not been drafted.

On the subject of time limits, in California a civil action which does not come on for trial within five years of the institution of proceedings is automatically dismissed. As with other jurisdictions, the Los Angeles Superior Court has been forced by the speedy trial legislation to give priority to criminal cases and this has slowed down the civil list. The court was anticipating that, if more judges were not appointed, it would shortly be in the position that some of the cases listed in the ordinary course would be five years old.

The San Francisco Superior Court - felony procedure

As an example of a superior criminal trial court at work I set out the procedure before this court. There are seven judges of the Superior Court allocated to criminal work, one calendar judge and six trial judges. On an average there are five trial courts sitting at any one time: 90 per cent of cases are disposed of without trial. I was informed that neither the court nor the prosecution could function if more than 10 per cent of cases went to trial.

When a person is arrested for felony, he either goes before a grand jury or undergoes a preliminary hearing. He is then arraigned before the Superior Court. There are about forty arraignments a week. The defendant is only allowed one adjournment of one week to obtain legal representation.

At the arraignment the defendant is informed of the nature of the charge and the plea of not guilty may be taken. A date is set for trial by jury about five weeks away and always on a Monday. Cases are fixed for every Monday of the year. For example, there is no respite just because of public holidays. A pre-trial conference date is set during the week preceding the trial date.

All pre-trial motions have to be heard by the time of the pre-trial conference. The motions are held in the mornings before trials. The trials start at 9.30 a.m. There are four or five pre-trial conferences before the calendar judge each morning and afternoon. It is at these conferences that settlements take place.

No adjournments are allowed except in the most extreme cases.

The court takes the view that criminal cases of this nature take priority over civil or misdemeanour cases and, accordingly, the lawyers must fit in with the schedule, that is, accept the date given. If a lawyer appears in more than one case, all his cases are fixed for the same week, one to follow the other.

It is common for all of the cases listed for a particular week to have been settled by the Wednesday of the preceding week.

The judges' hours of work are 8.00 a.m. to 6.30 p.m. The court hours are 9.30 a.m. to 4.00 p.m. or 4.30 p.m. although it is accepted that juries cannot operate effectively for these hours.

On the Monday of each week the defendants and their lawyers are required to attend. The calendar is called. The settlement process continues. Everyone remains at court until all courts have empanelled a jury. Those who have not been called on are then on a two hour stand-by for the rest of the week. If the parties are not notified by the end of the week, they are required to attend on the next Monday morning.

There are about two acquittals a month.

A worrying aspect of this procedure is the pressure which is put on the personal convenience of the defence lawyers. Defence counsel, once appointed, may only retire with the leave of the court. Inevitably some lawyers will be tempted to urge their clients to plead guilty to suit the lawyers' convenience.

The case movement is made necessary by the "speedy trial" legislation. In California, the defendant must be brought to trial within 90 days of arraignment.

White collar crime

It was put to me in the United States, as elsewhere, that the principal problems in the prosecution of white collar crime are the limits on the motivation of and resources available to those charged with its prosecution. Again, as elsewhere, there are moves to increase the available resources and, hopefully, the motivation.

By its nature, the prosecution of white collar crime invariably involves costly and time consuming investigation and preparation for trial. I came across two examples of the consequences of this.

First, the New York District Attorney's Office is unable to pay competitive salaries to its assistant district attorneys. Accordingly, a large part of its staff are young lawyers who work there for a few years to gain trial experience. Such people are just not interested in economic crime cases which may well involve six months' preparation for one hearing.

Second, the Federal Bureau of Investigation has recently been directed to move into the area of economic crime. I was told that the reason it had moved out of the area was that its annual results are evaluated by the number of convictions per operative. The prosecution of economic crime was too time-consuming and affected the results.

The Los Angeles District Attorney's Office is the largest prosecuting office in the United States of America. It employs 530 attorneys and 40 investigators and has various divisions.

Before the Los Angeles District Attorney proceeds with a prosecution the office assesses its priority; who and what was involved in relation to the time and cost of pursuing the case. This decision is made twice during the proceedings, once at their institution, and once immediately before the trial.

The Los Angeles assistant district attorneys are paid highly to avoid turn-over. Accordingly, the office does not have the same problem as the New York District Attorney's Office. A district attorney has at least four years' experience before he is assigned to fraud or a similar division.

In the early 1950's the Los Angeles District Attorney thought that not enough attention was paid to large frauds which needed special economic investigation. Accordingly, a special division was formed. There was then concern over consumer protection.

There is a 1932 Californian statute which allows the district attorney to take civil proceedings for economic crime. It gives him very broad powers.

In 1973 a federal grant of \$US500,000 was given to 15 district attorneys for an Economic Crime Project. The Los Angeles District Attorney was one of the 15. The grant was used to hold regular meetings to discuss progress

and to interest other district attorneys. There are now 50 district attorneys taking part in the project. In its third year the grant was increased to \$US1,500,000.

The Economic Crime Project is one of the National District Attorneys Association Criminal Justice Improvement programmes and operates from the association's Washington office. The project has been successful in that a number of district attorneys have set up economic crime units.

Currently the principal aim of the project is to convince the public and judges that there should be prosecutions for white collar crime and that those found guilty should be given prison sentences. Apparently it is rare, at least in California, for prison sentences to be imposed for non-violent crime. Although sentencing as such is outside the aims of this report, I was interested in the comments of one Colorado judge. He took the view that white collar crime is, almost by definition, premeditated and should be dealt with by short prison sentence - "No prison farms or rehabilitation - just let the businessman sit in a cell for three weeks".

In relation to the procedure on sentencing, while in New York I sat in on the sentencing of a drug pusher. The judge had before him a sentence report which was about 12 foolscap pages on the background of the prisoner and details of the offence. The report also indicated the appropriate range of sentence. The sentence report had been shown separately to two other judges, each of whom had indicated the sentence which he considered appropriate.

Grand Jury

Less than half the States have retained the grand jury. In New York, an indictment by a grand jury is required before a defendant can be tried for a felony although a recent amendment allows a defendant to waive the grand jury.

In New York, all felony cases come before the Criminal Court of New York which sits as a committing magistrate and sets bail. Only very sketchy evidence is given; it is usually sufficient for the court to find a case and order that the matter go before a grand jury. The defendant may give unsworn evidence at this stage although at the trial his evidence must be sworn.

The grand jury in New York consists of 23 people (in other States there are different numbers) and sits in private. The only persons present are the district attorney, or an assistant district attorney, the witness and a stenographer. Neither the defendant nor his counsel is entitled to be present, except that the defendant has the right to appear before the grand jury although he cannot be compelled to do so. If he does appear, he is not entitled to be represented but can withdraw to confer with his counsel. The defendant can ask for other witnesses to be called. Failure of a witness to attend before a grand jury is contempt of court. The prosecution is bound by the rules of evidence.

If the indictment is challenged on the ground of no evidence, the judge reads the testimony given before the grand jury to see if it sufficiently supports the indictment. The judge may dismiss the charge or allow the district attorney to submit the case to another grand jury.

In certain classes of case, such as corporate fraud, rackets, blackmail and sex cases, the district attorney will go straight to the grand jury to avoid publicity.

The grand jury has two functions. First, it operates as a "screening" procedure. Second, it is an investigating tool. The district attorney is called counsel to the grand jury and his function is comparable to counsel assisting a Royal Commission or a police sergeant assisting a coroner. The grand jury also operates to remove from the district attorney the responsibility of making a decision regarding prosecution in politically difficult cases, for example, where a policeman has shot a suspect, particularly if the suspect is a member of a minority ethnic group. In such a case the district attorney simply refers the matter to the grand jury. A grand jury is usually summoned for a year and meets periodically depending upon the amount of work. In small States the grand jury might meet only once a year. This leads more and more to the defendant waiving his right to grand jury. Special grand juries can be empanelled for particular cases.

When the defendant goes to trial, he is given a copy of the testimony before the grand jury of those witnesses who will be called at the trial. If he is indigent there is no fee.

The grand jury is increasingly the subject of criticism, principally because it is regarded merely as a rubber stamp giving effect to the wishes of the district attorney. On the other hand, it has great power and can undertake investigations on its own initiative. The following was given as an example. "We want the Governor called." "But this is just a drug case." "Doesn't matter, we think there is something funny about the way this State is run. We want the Governor."

Footnotes

1. R. v. Mati [1960] (1) S.A. 304 (A.D.).
2. Section 6.
3. (1963) 90 South African Law Journal, p. 187.
4. Commission of Inquiry into Criminal Procedure and Evidence Report (Pretoria), ch. 3.
5. *Id.*, para. 3.24.
6. Section 3(3).
7. *Criminal Appeals in Scotland (First Report) (Cmnd. 5038) 1972.*
8. *Criminal Appeals in Scotland (Second Report) (Cmnd. 6218) 1975.*
9. *Id.*, paras 15.01-15.19.
10. *Id.*, paras 15.06-15.07.
11. *Id.*, paras 15.08-15.09.
12. *Id.*, paras 15.14-15.18.
13. *Id.*, para. 20.05.
14. *Id.*, paras 21.02-21.05.
15. *Id.*, para. 30.06.
16. *Id.*, paras 36.01-36.05.

17. *Id.*, paras 37.11-37.13.
18. *Id.*, para. 44.17.
19. *Id.*, paras 51.34-51.37.
20. Jacob *Supreme Court Practice* (1976).
21. On Summonses for directions see *id.*, Vol. 2 form PF51, at p.69ff.
22. *cf.* (1974) 12 *Law Society Journal* p.65.
23. Criminal Justice Act 1967 (U.K.) s. 1.
24. *Id.*, s.2.
25. Magistrates' Courts Act 1952 (U.K.), s.7.
26. Companies Act 1948 (U.K.) & Companies Act 1967 (UK).
27. Supreme Court Act 1841 (N.Z.).
28. Supreme Court Act 1860 (N.Z.).
29. Supreme Court Act 1882 (N.Z.).
30. Judicature Act 1908 (N.Z.).
31. *cf.* [1976] *N.Z.L.J.* 122.
32. *Report of the Supreme Court Rules Revision Committee*; and see [1977] *N.Z.L.J.* 130, 150 & 176.
33. Magistrates' Court Act 1947 (N.Z.) s.76.
34. Judicature Act 1908 (N.Z.) s.66.
35. Small Claims Tribunals Act 1976 (N.Z.) s.9.
36. *id.*, s.16.
37. See Appendix B to this report.
38. See Appendix B.
39. See Appendix C.

**CONSULTANTS PAPER 4 (1978) - STUDIES IN COMPARATIVE CIVIL AND CRIMINAL PROCEDURE:
VOLUME 1 - COURT PROCEDURE IN THE UNITED KINGDOM, UNITED STATES, SOUTH AFRICA AND
NEW ZEALAND**

II. The Structure of the Courts

A. A Unified Court

The problems arising from a multiplicity of courts and the benefits of a unified court have been ventilated in numerous articles and studies. For the purpose of this report, I am not debating the merits of merger. I accept the arguments in favour of one court as overwhelming.

Although New South Wales has a three-tier system, at least all three tiers are funded from the one source. The process of merging the courts does not therefore involve the financial problems encountered, for example, in California.

In California, the merging of the trial courts is proceeding on a two-stage plan. Excerpts of the report regarding the plan and the completion of stage one have been published by the judicial Council of California.⁴⁰

I recommend that the trial courts of New South Wales be merged to form one court. Without attempting to put forward a detailed plan for such a merger, a task which is clearly beyond this report, I suggest a plan be prepared and that the plan have two ingredients or stages.

First, I suggest that the District Court and the Common Law Division of the Supreme Court be merged. Some of the benefits of such a merger are mentioned elsewhere in this report, for example, the use of a multiple calendar system of listing,⁴¹ the division of the court's business particularly the extension of the District Court default registry⁴² and the increasing use of Masters.⁴³

Second, I suggest that the magistrates' courts be absorbed by the, then, unified court. I suggest that the status of magistrate and Master be equal and that there should be transposition of personnel from time to time. The existing civil business of the magistrates' courts would be allocated among the divisions of the court. The summary criminal business would be dealt with in much the same way as at present, subject to the removal of default criminal work and, perhaps, a different method of allocation of work.

A benefit of this second part of the merger will be a further reduction of the "police court" image of the magistrates' courts.

B. Appointment of Judges

Australian lawyers tend to be critical of the American system of electing judges, asserting the apolitical nature of the British and Australian judicial structure. On the one hand, such criticism ignores the way the American system works and, on the other, overlooks features of the British system such as that the highest English judicial officeholder changes with a change in government. By way of contrast, a New York lawyer to whom I spoke was appalled at the power of patronage which would be available to a State Governor who had the power of

appointment of judges. There are sufficient judicial appointments in Australia which have an obvious political basis to illustrate the point.

The gradual change throughout America to the appointment of judges is not to a system of simple appointment by the government of the day. There are various systems of sifting, generally involving the relevant Bar Association, through which the appointee must pass. I expect that, if appointments continue to be made from the bar, eventually some such system of independent evaluation will come into operation in New South Wales. This involves its own problems. In New York, a judge seeking election stood on a ticket of "Integrity and Experience". In California, a judge was evaluated by his local Bar Association and received 3 out of 5 for integrity. I consider that the evaluation should be truly independent and I hope that the profession can provide a panel which is accepted as such.

A study done in America indicates that there is no real difference in performance between those judges who are elected and those who are appointed. No doubt the same result would be produced by a study in relation to Australian appointments. Notwithstanding this, there are two substantial disadvantages to a system of election:

- (a) In a small community, especially in a suit between a local and a stranger, there must be at least a fear of bias.
- (b) The expense of the election campaign. A recently contested election in California was estimated to cost the successful candidate, the incumbent, \$US35,000. The election fund is raised by seeking donations from the lawyers who appear before the judge which must affect the way in which the judge can conduct his court.

The view is commonly held in New South Wales, particularly by judges and barristers, that the only source of potential judges is the bar. I am not convinced that this is so. Certainly I consider that there should be more scope for the advancement, or deployment, of judicial officers who have demonstrated capacity. Also there should be more scope for career judges, that is, the appointment of judges at a younger age rather than treating the bench as a non-contributory retirement scheme for barristers, albeit determined by lot. Regard must be paid to the number of great judges who went to the bench at an early age. It must also be borne in mind that the administration of justice, in a community such as New South Wales, is concerned, at the present time, much more with processing work than with asserting the independence of the bench against the monarch, a task which was, as it happens, more often left to the jury. If appointments are to be made at a younger age and from people less experienced in court craft, there will be a greater need for judicial training to which must be coupled the need for continuing judicial education. This is a field which commands great attention in the United States but very little in Australia.

Basically what I am saying is that there must be a degree of professionalism in relation to the bench. The judges are the most important single element in the administration of justice, a proposition I am sure most judges would support. That position carries with it a responsibility. The situation was put to me in the simplest terms by a court administrator in the United States, "any system will work if the Judges will".

It is not yet time to put forward a particular plan for a change in the system of judicial appointment in New South Wales, but it is clearly an area where there must be developments. While the present system continues, I consider that the bar and the profession generally should make a contribution to judicial administration in the way it does in England through the system of recorders, although there need be no restriction to criminal work. The introduction of such a system would have the following benefits:

- (a) It would provide judicial officers at a lower cost.
- (b) It would limit the expansion of the permanent judiciary.

(c) It would provide future judges with judicial experience.

(d) It would enable an evaluation to be made of the capacity of an individual to perform as a judge.

To the extent that there is pressure for the appointment of solicitors to the bench, this would provide a proving ground. Once the system is under way, I suggest that the majority, at least, of judicial appointments should be made from those who have served as recorders.

I recommend that a number of barristers and solicitors be appointed recorders to serve as judges for four weeks each year.

In a number of jurisdictions which I visited, concern was expressed at the time taken by courts and judges to deliver reserved judgments and at the problems which the parties suffer by not knowing when the judgment will be delivered. There is considerable diffidence in New South Wales about asking a judge when he will deliver his judgment. In New Jersey, I heard a lawyer put most forcefully to a federal judge that he should deliver judgment by a certain date. Whether his submissions had any effect, I do not know; certainly he received no comfort from the bench during his argument.

It is difficult to legislate in this area and one really relies on the sense of responsibility of the individual judge. There is a practical step which I consider may be of some help. That is, to fix a deadline.

I recommend that if the court or a judge reserves its or his decision, it or he must fix a date upon which the decision will be given. There will obviously be pressure on the judge to fix a date which is reasonable and pressure on him to keep to the date fixed. If, for some reason, he is unable to give judgment on the date fixed, he must have power to fix a further date.

C. Division of Business

This is an area which I consider to be of some importance, yet it does not seem to have received much attention in the countries which I visited. In the United States, the individual calendar system in the federal courts precludes any division. At the State level, New Jersey has a chancery division, but otherwise I saw no evidence of a division of the civil business of a particular court. Some courts have a limited and specialized jurisdiction, such as the Detroit Court of Common Pleas, but lack other jurisdiction, and that must be a handicap.

South Africa, Scotland and New Zealand have no apparent formal division of civil business and no really separate criminal division. England maintains a division which is not unlike that which operates in New South Wales.

I recommend that where categories of business of the court, by reason of volume and common features, are amenable to being dealt with in a particular way, those categories should be recognized and treated accordingly. The division involved may occur at any stage of the court process and need not be maintained throughout the process. For example, a defended default action goes back into the ordinary list. Changes in society and legal rights will cause those categories to change and adjustments will have to be made from time to time.

The first step which should be made is to recognize the existing divisions of the present New South Wales courts that are working well. An example is the District Court Default Registry. This should be retained, with unlimited jurisdiction in the unified court.

At present, a plaintiff making a commercial claim for an amount under \$20,000 has a choice of forum. There is the District Court, or, in the Supreme Court, the Equity Division, the Common Law Division or the Commercial List in the registry of the Common Law Division. Each has different procedures, and more importantly, different delays before hearing.

It seems to me appropriate to review the existing division of business of the Supreme Court, in particular the historic division between the Equity Division and the Commercial List.

A recent development in the United States is the setting up of a system to "screen" appeals in an endeavour to reduce the appellate work load. There are two aims. First, to reduce the number of appeals, in particular, by prompting settlement. Second, to define the issues and thus reduce the volume of the briefs (written submissions) of the parties, It must be remembered that there is only very limited oral argument on appeal in United States courts.

The experience in New York, I gather, is satisfactory in relation to the first aim but not the second. This is because the lawyers do not work up the case before the "screening" hearing and accordingly are not prepared to give away any point.

The Colorado Court of Appeals set up a pilot "screening" scheme in one of its divisions this year. The hope was that more preparation would be done before the "screening" and that there would be more success in defining issues.

In New South Wales, with oral argument on appeal by more specialized advocates, I do not consider such a system worthwhile.

D. Multiple and Individual Calendars

While there are considerable variations possible, the basis of a multiple calendar system of listing is that all cases go onto a central list and come for trial before one of a panel of judges. The basis of an individual calendar system is that each case is allocated to a judge on filing and the management of that case remains the responsibility of that judge.

The United States District Court operates on an individual calendar. On filing, cases are assigned by rotation to each judge in the district or division. Each judge has between 300 and 400 current cases before him. The cases are of all types; criminal, anti-trust, personal injury and so forth. If a judge becomes unavailable, cases can be assigned to another judge.

The introduction of the speedy trial legislation has meant that the judges must give priority to criminal cases and the civil list has suffered accordingly. One district judge told me that he had 340 civil cases and 100 criminal cases on his docket and that he receives 30 new civil cases and 17 new criminal cases a month. Because of the

speedy trial requirements, he spends between 75 and 90 per cent of his time on criminal work. As a result, civil cases are three years behind and are going behind at the rate of ten a month.

The pressure on a judge to keep his docket up to date is exerted by court administrators. It is also said that a short docket leads to promotion to the Court of Appeal.

Under an individual calendar system, all pre-trial motions are dealt with by the judge to whom the case was assigned or by a magistrate, similar to a New South Wales Master, to whom he has delegated some or all of the pre-trial matters. As the judges tend to adopt different practices in dealing with motions, the practitioners complain of confusion and inefficiency. Also, a great many procedures can be dealt with by consent of the parties and need not concern the judge. Under an individual calendar, the judge seeks to control each such matter which gives rise to inefficiency. If a consent procedure is available, the court need only be approached if the parties cannot agree.

New York has a master calendar system. An attempt was made to allocate all cases to a judge on filing for him to hear the pre-trial motions. It was found that the judges had no time to hear cases and the attempt was discontinued.

In California, following a study done in 1974, the view is taken that the master calendar system is better if properly administered. If there is no proper administration, the individual calendar system is better. What I observed was consistent with this view, with the further comment that federally funded courts could afford the individual calendar while the State courts, with less funds and larger volumes of work to process, used the multiple calendar.

In the United States, a distinction is made between complex civil litigation and other civil litigation. It is said that complex cases should be assigned to an individual judge at the outset.

The person who must ensure that a 'complex case' is thoroughly prepared prior to trial is the trial judge himself ... Without a firm attitude on the part of the judge, no measure for minimum volume, expense and delay will be effective.⁴⁴

Under the adversary system, the parties' legal advisers are bound, subject to a duty to the court and ethical considerations, to advance the interests of their clients. It is left to the court to control the processing of the case. If complex litigation is to be assigned to a particular judge, it then becomes the duty of that judge to ensure that the case is resolved as speedily and economically as justice allows.

Comments of this nature must be read in the light of the United States discovery procedures and the massive litigation (anti-trust, class actions, multi-district) which occurs there. But there are complex cases brought before the New South Wales courts. For example, elsewhere⁴⁵ I refer to the prosecution of white collar crime in this context. Certainly cases which involve a great number of documents or a long hearing come within this category and there could well be a benefit in assigning such cases to an individual judge, though not necessarily all to the same judge, at an appropriate stage in the proceedings.

In a previous section of this report⁴⁶ I have suggested a review of the division of business of the court. In the course of such a review, consideration could be given to changing the emphasis within the common law division

from Commercial List cases to complex cases. For example, some defamation cases would be classed as complex and, bearing in mind the way in which some such cases are conducted, there seem good reasons why such cases should be referred to a particular judge at an early stage so that he can ensure that they are brought to trial quickly and without the exploration of irrelevant issues.

The current vogue in New South Wales of proceeding where possible in the District Court or by summons in the Commercial List, looked at in the light of the Californian view,⁴⁷ suggests a benefit in an examination of the working of the common law master calendar of the Supreme Court.

Various United States federal judges explained to me how they handle their dockets. Each case is assessed in terms of the steps which are required before it is ready for hearing, or for the pre-trial conference. The docket is reviewed periodically, often monthly. If a case is not proceeding at the correct speed, the judge's secretary telephones the lawyers involved to find out why. If the explanation is not satisfactory, the judge summons the lawyers to a conference before him. It is, of course, always open to a party to proceed by motion.

To the extent that the court operates by way of individual calendar, I suggest that the judges concerned should follow the system to which I have referred in the preceding paragraph.⁴⁸ In particular, I recommend that the system of running mentions employed in the Commercial List be discontinued.

With a master calendar system, there is no need for more than the statement of claim and appearance to be filed with the court until the pre-trial conference or directions hearing. But while an action is proceeding on an individual calendar, copies of all documents, or notice of them, should go to the judge, in the way copy documents go to an arbitrator, so that he can keep track of the progress of the action.

E. Court Facilities

The first point to be made about court facilities is that they must be planned in co-ordination with other authorities and departments. This was stressed to me in the United States, where I was told that: "There is no point in having new courts and judges if there are no prosecutors".

Then the needs of the courts must be studied. It is rather embarrassing to put 12 person jury boxes into Scottish courts, as it seems an English architect did. And, of course, provision must be made for future trends.

The McGeorge School of Law at Sacramento, California, has a "court room of the future". It is basically designed as a jury court. The jury sit opposite the judge, in front of the spectators, the lawyers on either side. The court makes considerable use of videotape. It also has a number of security features.

The school runs an elective course on advocacy. The students run mock trials before a judge and jurors from the local community. Part of the study is to observe the jury which is videotaped and watched.

In the United States, a large problem in court planning is the notion of some judges that they have a proprietary right over a particular court room. This notion is hard to dispel and inconsistent with the efficient use of facilities if these are limited.

There are a number of court room facilities which may be needed for a particular trial, but which are otherwise unnecessary. Some of these are:

- (1) Seating for the jury, and external jury facilities.
- (2) In criminal cases, access to the court by the defendant and any police or prison officials and, if the use of it is continued, a dock.
- (3) Security. Hopefully this is a problem of more importance in the United States and United Kingdom.
- (4) Ample facilities for lawyers in cases with a large number of parties.
- (5) Spectator facilities for cases of public importance and interest.
- (6) Screens, blackboards for demonstrative aids, models and films.
- (7) Storage of and access to large quantities of exhibits.
- (8) Easy access and egress of lawyers in callover courts.

With multi-storey court buildings with private lifts for the judges and their staff, there is no reason why a series of courts with different facilities cannot be planned.

In a number of places in the United States I was told of the court hours. One judge sits in trials from 8.30 to 12.30 and 1.30 to 5.30 (even with a jury) and hears interlocutory matters outside those hours. More generally, court hours were said to be 9 a.m. to 5 p.m.

The office of the Court Administration of New York publishes a *Bench Book for Trial Judges*. It contains a number of useful tables, medical terms and such matters. One of the New York trial judges considered it to be of assistance.

A great number of judges in the United States have the assistance of a law clerk. To some extent this is rendered necessary by the number of written opinions (judgments) which they give on interlocutory matters (which come before them in written form). I was given the impression that a lot of these opinions are drafted, or even written, by the law clerks. The question of judges' staffing was very much alive when I was in New York. The administrative head of the courts had sacked the judges' confidential assistants and the judges had commenced proceedings in the federal court alleging a breach of their constitutional rights.

Judges' staffing can be considered either from the position of a perquisite of office or as assistance in performing his judicial duties. To the extent that the judge's staff assist him in his duties there may be a need for differing assistance to judges performing different work. As a judge's requirements will vary from case to case, it may be more helpful to have staff attached to the court administration who can be made available in particular situations.

F. Computers

It has been said that a computer is only a thousand clerks. But what is important is whether one needs a thousand clerks. Three States in the United States are using computers in their courts.

Colorado uses a computer. It assists with jury selection among its other duties.

Michigan has a computer and is progressively putting the work of the courts onto it. So far three courts are on the computer. The three courts are:

The Recorders Court which, as the main criminal court, deals with 12,000 felony cases each year. It has 20 judges. It presently has an individual calendar system but is changing to a master calendar system.

Wayne County Court which has a master calendar system.

Oakland County Circuit Court which has an individual calendar system. It has 11 judges and is the most productive court per judge.

The Recorders Court has 160 cases which are over four months old. Of its 12,000 new cases a year it is only disposing of 10,000 which means it is falling behind. It relies on a plea rate of 85 per cent to keep going.

The primary duty of the computer is case flow management. It shows:

The full history of each case including each appearance before a judge.

The daily calendar for each judge.

The periodic list for each judge.

Statistics of the case flow.

The computer has details of the parties, including the criminal record of defendants. This involves a problem of privacy, especially in relation to juveniles. Xerox copies of information can be produced by the computer.

Traffic fines are entered on the computer. It may be that if the New South Wales court system wanted use of a computer it could do so in co-operation with the police department.

The computer is clearly an important tool in case flow management. Its introduction to the New South Wales court system seems to me to be principally a question of relative cost.

G. Videotape and Recording of Evidence

Dealing first with the transcription of evidence given during trials, I must say that of the courts which I visited:

1. None had a transcription service better than that provided by the New South Wales Court Reporting Branch and most services were distinctly inferior.
2. The cost of such services was higher and in some cases spectacularly so. For example, in Sacramento, California, the cost of shorthand reporting and transcription is \$US175 per hour of evidence which is about 50 U.S. pages. In San Francisco, the transcript for a trial lasting one week costs \$US27,000.

I make no recommendation to change the present system although development in videotape and other technology must be watched, particularly in the light of rising salary costs.

In the United States there is a basic premise of a right to trial by jury on an issue of fact. The increasing congestion of the courts has led to moves to abolish or limit this right. It has been said that "technological advances offer possible solutions to court congestion without raising difficult constitutional questions".⁴⁹

One area of technological advance which is receiving considerable attention in the United States is videotape. New processes, for example, photographs and computers, are accepted into legal administration after they are generally accepted by the community. This is a demonstration of the conservatism of the legal profession. Even in the United States, it is not yet suggested that criminal trials are suitable for pre-recorded videotape trial.

There are a number of excellent articles explaining the technical aspects and uses of videotape.⁵⁰ I see no need to reproduce them here.

The first area of use of videotape is to record the trial. It has advantages for an appellate court in relation to seeing the witnesses, observing misconduct by counsel or the judge and the like. It has some advantages at the hearing in relation to replay of evidence during the trial and exhibiting documents to all. So far as I know it is not yet in day to day use in any system of courts in the United States. Bearing in mind my satisfaction with the present New South Wales system of recording evidence, as I have said, I do not recommend use of videotape for this purpose at this stage.

The second area of use of videotape is to pre-record the trial, that is the evidence of the witnesses. This is only really important in relation to jury trials. The evidence of the witnesses is taken before the judge and recorded. The tape is edited to remove any inadmissible evidence. The jury is then empanelled and counsel open to the jury knowing what the evidence will be. In courts which I attended, both counsel open to the jury before the evidence. The jury then watch the videotape in the absence of the judge and counsel, who can attend to other matters. After the jury have seen the evidence, counsel address and the judge sums up. I do not think that the number of civil jury trials which actually proceed in New South Wales would justify the institution of such procedure here.

The third area is of some interest. It is to pre-record the evidence of a particular witness, for example an expert witness. Such a system would enable experts, such as doctors, to give evidence at appointed times and, it is suggested, would make experts more amenable to giving evidence. It would also be available where a witness is about to leave the jurisdiction, is sick or elderly or for some other reason cannot attend the court.

Elsewhere I suggest⁵¹ that more use can be made of the reports of doctors and other experts. But I was told of a case which had to be retried. At the first trial, the evidence of a doctor was read from a deposition. At the second it was given by videotape, from which it was apparent that a number of questions were answered with great hesitation which greatly affected the weight of his evidence. I doubt if the difference is significant in very many cases.

I recommend that Part 27 of the Supreme Court Rules be amended to allow the deposition of a witness to be taken on videotape and for the videotape to be admitted into evidence. The videotape operator would have to be sworn in the same way as a shorthand writer.

Videotape can also be used to record a demonstration of a process, such as a machine in operation or a medical operation, which can then be shown to the court.

The fourth area of use is in recording actual evidence such as the signing of a will to demonstrate the capacity of the testator, a motorist walking a line or an identification line up. Such uses seem outside the scope of this report.

The fifth area is as a teaching and research aid. In particular videotape is used in experiments in relation to jury reactions.

FOOTNOTES

40. Judicial Council of California, *Final Report on the Unified Trial Court Feasibility Study and the California Lower Court Study* (1975).

41. P. 43.

42. P. 42.

43. *infra*.

44. "Prettyman Report" (1951) 13 *F.R.D.* pp. 65-66.

45. pp. 35-37.

46. p. 42.

47. Referred to at p. 43.

48. Note also the comments at p. 43.

49. Kornblum, "Videotape in Civil Cases" (1972) 24 *Hastings Law Review* p. 9 at 10.

50 Kornblum, *loc. cit.*, p. 9; Kornblum, "Videotape in Legal Education" (1973) 4 *A.L.I.- A.B.A.C.L.E. Review* p. 4; Kornblum & Rush, "Television in Courtroom and Classroom" (1973) 59 *A.B.A. Journal* p. 273; McCrystal & Kornblum, "The Pre-recorded Videotape Trial: a Status Report" (1975) 25 *Federation of Insurance Counsel Quarterly* p. 121.

51. p. 22.

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VOLUME 1 - COURT PROCEDURE IN THE UNITED KINGDOM, UNITED STATES, SOUTH AFRICA AND
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III. Criminal Procedure

A. Prosecution

The structure of the prosecuting authority varied in the countries, and even within the countries, I visited. For example, in Scotland, all prosecutions are under the control of the Crown Office, are conducted by members of the legal profession and are conducted independently of the police. In the United States, the bulk of prosecutions are dealt with by the District Attorney's office. The District Attorney is an elected county official and he employs such number of assistant District Attorneys, who are qualified lawyers, as is appropriate. In some counties the position of District Attorney is part-time, in others he has a staff of hundreds. In New York, the District Attorney decides whether to prosecute and directs the operations of the police. A squad of police is attached to his office. The police charge people in respect of street crimes on arrest and they are brought into a Criminal Court. There is a pilot scheme financed by a Federal grant for these cases to be "screened" at the first hearing by an assistant District Attorney and an assistant is stationed at the court for this purpose. The assistant decides what charge will be laid.

Other prosecutions in the United States, including the bulk of those relating to corporate or securities crime, are instituted by State Attorneys General or by federal bodies. As District Attorneys have either no power to institute civil proceedings, or power only in very limited areas, semi criminal proceedings such as anti-trust suits are brought by these other bodies.

Without canvassing the relevant arguments, I consider that it is desirable that the carriage and, where practical, the institution of prosecutions should not be in the hands of the police or other investigatory bodies. This is the position in the two examples referred to above. In each case, the division works, and is regarded as important by those involved.

Although there is not necessarily a matter of principle involved, I consider that there are considerable practical advantages in consolidating the various existing prosecuting bodies into one. Particularly with the use of computers, the work-load can be more efficiently evaluated and the available personnel more efficiently deployed. This will be of greater importance with the advent of speedy trial. In addition, there can be more helpful liaison with the court both in relation to short term requirements and long term planning.

I recommend that the carriage of criminal prosecutions at the instance of the State of New South Wales be controlled by one body. It is obviously important that such a body be under the direction of an individual of considerable capacity and experience who will enjoy the confidence of the public and of organizations, such as the police and Corporate Affairs Commission, with whom the body will deal. Status commensurate with the requirements of the position should be accorded to the head of such an organization, who should be appointed either from within the organization or from without, for example, from the judiciary or the profession. The appointment should be for a limited period, say, five or seven years. An appropriate title would be Director of Public Prosecutions and the organization could be the Department of Public Prosecutions.

Without setting out in detail all the functions of such a department, they would include receiving information from investigatory bodies such as the police, deciding whether a prosecution lies and if so its form, instituting further inquiries, assembling evidence for and conducting trials, and conducting investigations at the instance of the Attorney General.

B. Committal Procedure

There are a number of sifting processes which operate between the commission of a crime and the trial of a person for that crime. The victim or a witness may or may not report the incident. The police may or may not investigate a complaint and, if they do, may or may not prosecute. At present in New South Wales, in respect of serious crime, a magistrate may or may not commit for trial. In the United States, there is the grand jury.

Even where a matter goes to trial, the jury may or may not convict and the judge has a discretion in relation to punishment.

Within more narrow limits, the sifting achieved by the committal procedure and the incidents of that procedure are under inquiry in a number of places. Some of these enquiries are referred to earlier in this report and the advantages and disadvantages of the procedure are briefly adverted to.⁵²

I recommend that the present committal procedure operating in New South Wales be abolished and that the following procedure apply in cases where the defendant would stand trial before a jury:

- (1) The defendant is served with particulars in writing of the charge.
- (2) The defendant is supplied with:
 - (a) Any necessary further particulars of the charge which he has requested;
 - (b) Signed statements or depositions of all witnesses which the prosecution proposes to call at the trial;
 - (c) Copies or the opportunity to inspect, all documents or objects which the prosecution proposes to tender at the trial.
- (3) The defendant may:
 - (a) plead guilty, in which case the matter comes before a judge;
 - (b) elect for summary trial where it is available;
 - (c) apply to the court in the same manner as provided by Section 347 of the Crimes Act 1961 (New Zealand);⁵³
 - (d) apply to the Attorney General for a "no bill", in respect of special circumstances, such as the lapse of time since the commission of the offence, the age and health of the defendant or subsequent changes in the law.

(4) A pre-trial hearing before a Master or magistrate at which there would be some resolution of the issues to be the subject of contest at the trial and at which the trial date is fixed. At this pre-trial hearing the defendant must give notice of such defences as require notice.

After the service of particulars of the charge, that is during stage 2, either the prosecution or the defendant may require a witness to come before a magistrate for examination on oath or to produce documents. The examination would be in closed court and in the absence of the opposing party. In the case of a witness whom the prosecution proposes to call at the trial, a copy of his deposition will be given to the defendant. Such examination will produce and record the deposition of a recalcitrant witness or one against whom the prosecution fears pressure may be directed. I do not propose, subject to the rules as to hostile witnesses, that the witness should be cross-examined by the party bringing him before the magistrate, but this may have to be adjusted in the light of experience. There seems no reason why such an examination should be open to the public and there are reasons why press publicity should be avoided.

There is, of course, no objection to the defence interviewing a prosecution witness with the consent of the witness.

The arguments in relation to discovery by the defence and rules requiring advance notice of particular defences are thoroughly canvassed in Part V of a Working Paper issued by the Canadian Law Reform Commission.⁵⁴ To some extent any new rule in relation to these matters would involve an intrusion upon the substantive rights of the defendant.

Discovery could be sought from the defendant at various levels:

- (a) All documents, statements *et cetera* in the defendant's possession, as in civil discovery and as available to the prosecution in some places.
- (b) All documents and the names of all witnesses intended to be tendered or called by the defence.
- (c) Notice of specified defences, with necessary particulars.
- (d) Production of records which the defendant is required by law to keep.

It seems to me that the relevant interests are adequately served if the defendant is invited, at the pre-trial hearing, to disclose any substantial defence, and the prosecution is entitled to comment at the trial on the failure to do so if such a defence is raised, and also if power is conferred upon the court to grant an adjournment in the case of surprise.

One of the matters dealt with at the pre-trial hearing will be which issues can be dealt with at the trial by way of admission and the admissions will be formally recorded. The admissions will be by the defence and the prosecution. It will be the duty of the defendant's legal adviser to acquaint the defendant with the admissions that should be made.⁵⁵ It is not intended that the defendant be denied the right to put the prosecution to proof of an issue, but rather that attention be directed to issues, or factual areas, upon which the prosecution will clearly

succeed and in respect of which evidence will only be time-wasting. This is particularly likely to occur in prosecutions of white collar crime.

If the matter proceeds to trial, should the trial judge, before the hearing, see the statements and depositions? There are divided views. South African and English judges see the evidence obtained on the preliminary examination. Scottish judges do not. I understand the practice in New South Wales in relation to the depositions taken at the committal varies. If the judge does see this material, there should be a duty on the prosecution not to include material which is irrelevant and prejudicial. Although the judge does not decide the facts, if he has formed a mistaken view of them, his attitude can influence the course of the trial. This is particularly so where the judge sums up the facts to the jury. In the United States the judge normally does not sum up on the facts. On balance I feel the statements should be available to the trial judge.

C. White Collar Crime

There are two elements which are of much greater significance in the prosecution of white collar crime than in the prosecution of crime generally. They are the difficulties involved in assembling the evidence in admissible form and the higher standard of legal assistance available to the defendants.

The first step in assembling the evidence is the investigation of the crime to find out what actually took place. In the United States, a grand jury is often used as it can compel attendance and production of records. Special grand juries are empanelled for this purpose. In areas covered by the Companies Act, 1961, New South Wales relies in important cases on investigators appointed under Part VI A of that Act. There is a similar practice in the United Kingdom.⁵⁶ The practice of appointing independent persons, often barristers, as investigators avoids criticism in relation to political interference. If, as I have recommended, a simple prosecuting body is set up under an independent Director, it may be appropriate for officers of that body, who would accumulate experience in the area, to be appointed.

By their very nature, such investigations do not determine the guilt or innocence of individuals. The investigations produce evidence upon which prosecutions can be launched. In my view it is clearly wrong for the results of such investigations to be made public.

The quality of the prosecution of white collar crime, as with other crime, will depend upon the motivation of, and the facilities available to, those charged with its prosecution. First, efforts must be made to ensure that the motivations and facilities are maintained at the highest practical level. This includes employing able and experienced staff who must be recompensed accordingly. Second because there must be some limits to the available resources, there must be a careful sifting of the cases which are pursued. There should be a demonstrable degree of moral turpitude in those cases.

The employment by defendants in white collar crime cases of more expensive legal representation not only puts the prosecution to proof of its case more severely but also, by the nature of things, complicates and prolongs the proceedings. This is more so in the United States with its system of pre-trial hearings. The Denver District Court has 18 judges of whom six sit in criminal work. One of these six is assigned, by arrangement between the Chief Justice and the District Attorney to sit in complex cases. Federal judges have individual calendars and accordingly must control the progress of such complex cases. I was told that the judge must overcome the

obstruction of counsel in order to get the case on for trial. I was also told that a great deal of time is saved if the prosecution reveals its evidence to the defence at an early stage.

I recommend that complex criminal cases be allocated to a particular judge at an early stage and that that judge should be responsible for ensuring that the case comes to trial at the earliest possible date. If the procedure recommended⁵⁷ comes into force, I suggest that the case be allocated to a judge at the first stage. The judge to whom the case is allocated would also be responsible for the fourth stage, that is, to limit the issues at the trial so far as possible.

Elsewhere, I suggest that there is a class of small civil claims which are more advantageously dealt with by the State by way of criminal or quasi criminal procedures. Consumer claim bodies are being set up and should be able to effect restitution as well as to seek punishment.

A major problem in the United States is the intrusion of organized crime into legitimate business with the consequent employment of violence, intimidation and corruption in the commercial area. With the exception of the matters raised before the Royal Commission into licensed clubs, so far as I am aware, Australia is not presently exposed to a problem of that nature but the consequences are of such magnitude that if signs do occur, it is clearly important to take all available steps to combat such intrusion. It is in this area that the acceptance by the community in general, and by the authorities in particular, of open criminal activity and of criminals, such as occurred during prohibition in the United States and has occurred in New South Wales in relation to gambling clubs, constitutes a very real danger.

I have referred⁵⁸ to some of the steps being taken in the United States in this area. There are other steps, such as inducing members of trade associations to assist in the discovery of the criminal activity, which can be taken. One hopes that a situation requiring such steps does not arise. But, as Mr. Curran said, in effect, the condition of liberty is eternal vigilance.⁵⁹

D. Small Crimes

There are an increasing number of offences, one hesitates to use the word "crimes", which do not involve great villainy and do not require the full panoply of the legal process. As society becomes more complex, individuals are required to comply with rules which are technical and arbitrary. Enforcement of the rules involves use of a sanction. The sanction should not be more costly in its operation than the conduct subject to complaint. In other words, the traditional legal process is inappropriate for such matters. Certain undefended traffic offences have already been taken out of the court system and I suggest that there is scope for an increasing number of offences to be treated by a default process.

The United States District Court (Southern and Eastern Divisions of New York) Rule 25.2 provides that a person charged with a petty offence may post collateral, waive appearance and consent to forfeiture of the collateral. There is a scale of the collateral required for each offence. In Australia, failure to vote may be dealt with by the elector depositing a sum of money and agreeing to abide the ruling of the Commonwealth Electoral Officer which, I understand, results in the imposition of a penalty in the amount of the sum deposited.

There seems to me no need for these fictional arrangements. In the case of minor offences, I see no reason why there cannot be a simple notice of penalty and a time within which the defendant can require the matter to be referred to a court for proof of the alleged offence. There should be an overriding power in the court to review the imposition of such penalties to cover such cases as where the defendant did not receive the notice or for some reason did not understand it.

I recommend that a default procedure be instituted in respect of petty offences. This will involve the creation of a list of the offences concerned indicating the penalty for each such offence. I expect that it would prove adequate to serve the default notice by post. If this proves not to be so, the matter can be reviewed.

If there is a sufficient volume, this is an area where consideration should be given to the use of a computer.

E. Speedy Trial

Earlier in this report I have referred to the time limits from arrest or charge to trial as operating or recommended in South Africa⁶⁰ and Scotland.⁶¹ I have also made a number of passing references to the operation of the speedy trial legislation in the United States.

In the federal courts of the United States, the position is governed by Sections 3161 and 3162 of the rules of Criminal Procedure.⁶² The rules require an information or indictment to be filed within 30 days from the arrest or charging of the defendant and for the arraignment to take place within ten days of the indictment. The trial must commence within 60 days of the arraignment. There is provision for the periods mentioned to be extended in certain circumstances. If the defendant is not brought to trial within the 60 days, as extended, the information or indictment shall be dismissed on the motion of the defendant. Failure of the defendant to move before trial, or a plea of guilty, constitutes a waiver of the right to dismissal. The government may re-prosecute, which is a matter the court must consider on the motion to dismiss.

A number, at least, of the States have similar provisions although the time periods vary. For example, in Oregon the time limit is 60 days from arrest.

The Scottish and, I think, the South African position is that the defendant cannot be re-charged for the same offence. In the United States he can. On balance, I think it should be possible for the defendant to be re-charged, perhaps on the prosecution showing that new evidence has become available.

The time limit can operate in one of three ways. It can be absolute, absolute subject to extension or it can operate upon application of the defendant. I take the view that it should operate absolutely, subject to extension by order of the court. Although the consent of the defendant would be an important consideration in an application for such an order, it would not be conclusive.

It has been suggested that the imposition of such time limits would open the way to corruption within prosecuting offices: that prosecutors would allow prosecutions to get out of time. I do not see this possibility as a sufficient disability to outweigh the benefits of speedy trial. The possibility would be reduced by the introduction of a prosecuting office, as I have recommended, and by the use of a computer to control the case flow. It must also be borne in mind that the cases will appear on the court list and the dismissal will be a public matter.

The fact that the defendant is in custody is relevant to the time limit to be imposed. I suggest that the time limits to be imposed, after an initial period to allow adjustment should be:

- (a) from arrest or charge to commencement of committal - 30 days;
- (b) from committal to commencement of trial, where the defendant is in custody - 90 days;
- (c) from committal to commencement of trial, where the defendant is not in custody - 180 days;
- (d) in summary matters - 90 days.

As there is provision to approach the court for extensions of time and the time limits are reasonably liberal, I do not think it necessary to have provision for automatic extensions of the periods.

If the committal proceedings are abolished, I suggest that the period of 30 days in (a) be added to the periods in (b) and (c).

I recommend that a defendant to criminal proceedings whose trial or committal has not commenced within the times set out above should be discharged.

FOOTNOTES

52. pp. 12, 17, 24, 27, 37 *cf.* p. 27.

54. *Working Paper No. 4 - Criminal Procedure - Discovery* (1974).

55. See p. 21.

56. Companies Act 1967 (U.K.) s. 164 ff.

57. p. 51.

58. See pp. 35-37.

59. Speech on election as Lord Mayor of Dublin, 10 July 1790.

60. p. 13.

61. p. 21.

62. Title 18, U.S.C.A., chapter 208.

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IV. Civil Procedure

A. Pleadings

In relation to civil procedure in the United States I have referred to the pleading, or lack of it. The basic approach is to simplify the pleadings and expand the discovery. It is assumed that issues cannot be defined until a late stage in the proceedings, in particular, until after discovery. For this reason the pleadings are often amended. The pleadings do not define the issues, they merely give notice of the general nature of the claim or defence.⁶³ An explanation for this occurring in some cases is the need for speed due to either a short period of limitation for action or, less acceptably, concern to be the first plaintiff in a class action.

The approach which I take is quite different. I consider that the issues, both as to law and fact, should be defined by the pleadings. New South Wales has a system of law which includes private rights. If a member of the community wishes to enforce such a right, I do not see why he should not state what right he seeks to enforce and the facts on which he relies. I am fortified in my approach not only by the Scottish system which proceeds on the same basis, but also by comments by American lawyers, in particular one of considerable litigious reputation, who felt that accurate pleading could be used with advantage.

There are certain classes of cases which are susceptible of an individual method of pleading. For example, the common money counts which are not only time hallowed but are recognized in the new procedural rules in New South Wales. I seek to isolate one such class of case later in this report, namely, personal injury cases.⁶⁴

Recent suggestions that pleading be by affidavit should not be allowed to obscure the purpose of pleading, namely to identify the issues. It is one thing to verify the pleadings on oath, or, as I have mentioned,⁶⁵ require an affidavit, relating to evidence, to demonstrate a triable issue. It is quite another to replace pleadings by affidavits. To do that is to follow the United States system of taking the evidence first and I have referred to the problems which this causes.

It has been said that, if the facts are stated, a good lawyer will know the cause of action or defence relied upon. If that is so, why should not the proponent of the facts state the cause of action or defence on which he relies? It is becoming common to use the summons procedure of the Commercial List to avoid the delay elsewhere in the Common Law Division of the Supreme Court, and thus actions with complicated issues are being conducted without pleadings. If this practice is to continue, there should at least be a requirement that the issues be defined in some way.

I recommend that a pleading should commence by stating the cause of action or defence upon which the party relies. The pleading should then set out the facts relied upon to support the cause of action or defence.

The present system of description of what were once third parties has become confused under the present rules. I suggest that once a party is described, for example "second defendant", that description should be maintained.

In my view, it is in the interest of the community that litigation should have an end. In particular, if a plaintiff does not proceed with his action, it should be dismissed. In California, an action which does not come on for trial within five years is dismissed.⁶⁶ I consider a similar provision should apply in New South Wales.

I recommend that, subject to the power of the court to grant an extension, any civil action, the trial of which has not commenced within five years of the date of the filing of the initiating process, should stand dismissed. The court could well, and in fact should, accept the obligation to notify the parties of the approach of the time limit. This is another area where a computer may be useful. Although I do not suggest that this provision should replace the right of a party to apply to strike out the opponent's pleading for want of prosecution, in practice it would largely make that remedy unnecessary.

B. Pre-trial Discovery

Earlier in this report I have mentioned⁶⁷ that, in the United States, pleadings have been effectively replaced by pre-trial discovery. The pre-trial discovery involves two aspects:

- (a) the taking of the depositions of witnesses, and I draw a distinction between this procedure and that of taking the evidence of a witness for use at the trial;
- (b) seeking out and inspecting documents.

I have referred⁶⁸ to the absence of a requirement of relevance.

It is said that the procedure allows a rich defendant to "string out" a poor plaintiff but it is also said that it has enabled poor plaintiffs to find the evidence to make their cases. There are abuses; for example, the procedure can be used to examine the books of a company as a prelude to a takeover. It is used by the government in cases against large corporations to enable the government to assemble its evidence. In such cases, pre-trial discovery is of no use to the defendant.

It seemed to me that the oral deposition was of more significance in small cases, particularly accident cases. There is a benefit in obtaining at an early stage the testimony of a witness to an accident, but it seems to me that a statement made to an investigator may often be just as effective and a great deal cheaper.

The deposition is used a great deal to challenge the evidence of a witness at the trial by reference to inconsistencies. On the other hand, a party or witness is entitled to know what impeachment evidence will be

used against him. If the evidence is a movie film, the plaintiffs attorney is entitled to ask if and when the film has been taken, and for its production. Accordingly a witness can tailor his evidence.

The use of interrogatories and the discovery of documents seemed to me to be of more significance in more complex cases. A leading anti-trust lawyer commented that any important discovery will be in the documents, nothing important arises from the oral examination.

In a case concerning the BART (Bay Area Rapid Transit) subway system in San Francisco, eleven million documents have been discovered. One firm of attorneys I visited had more than 20 current cases in each of which more than 20,000 documents had been discovered. A computer company has designed a computer programme to deal with discovery.

In a complex case, discovery is conducted in waves. The first wave is to discover the identity of witnesses and documents. The second wave is to examine the witnesses and documents. The third wave is to deal with any special issues.

Lawyers generally were concerned at the mounting cost of litigation caused mainly by the discovery procedure. Individual comments were that there should be a return to a system of pleading, that the court should exercise more control over the process, that the appellate courts should lay down tighter procedures, that the "fishing" proviso should be removed and that the English system, limited to relevant documents, is preferable.

Some lawyers use the procedures to put pressure on their opponents, so to harass them that a settlement is forced. Apparently some firms of attorneys have standard interrogatories which they administer in all cases. It was suggested to me that disciplinary action should be taken against such firms for abuse of the process of the court.

One reason given for the creation and use of systems of reference to arbitration is that such arbitration proceedings do not have provision for discovery.

There are interlocutory procedures by way of motion to object to, or to enforce, discovery. I observed some of these motions. One which, I think, illustrates the use to which the procedure can be put, took place in New York. The plaintiffs were black prisoners and the defendants were four officers of the prison department. The plaintiffs alleged that the defendants had discriminated against them because they were anti-Ku-Klux-Klan, active NAACP and black. Apparently there had been fires in a number of cells in the prison, not being cells in which the plaintiffs were housed. The cells in which the fires occurred contained both black and white prisoners. The prisons department had conducted an investigation into the fires.

The plaintiffs sought discovery of the results of investigation on the basis that:

- (a) it may have mentioned the defendants; and

(b) it may have indicated that the defendants had, on another occasion, and to other people, exhibited anti-black behaviour.

Unfortunately, the defence was conducted by a counsel whose only submission was to complain continually that she could not cope with the plaintiffs' claims for discovery as she had other matters to deal with. The plaintiffs were represented by a lawyer from NAACP.

One of the matters which concerned the judge, although not argued before him, was the problem of the publicity which would arise if the NAACP obtained the information contained in the results of the investigation. Apparently the litigation arose because the NAACP alleged that the administration of the prisons department was anti-black. Since the litigation had commenced, the city had appointed a black as controller of prisons and that had "defused" the situation to a large extent.

It should be borne in mind that the present practice in New South Wales, of making subpoenas returnable at the directions hearing and allowing access to the material produced, provides a benefit largely co-extensive with the benefit of the United States discovery procedure.

I recommend that the existing pre-trial discovery procedure in New South Wales be retained.

C. Admissions and Dispensing with Formal Proof

It is said that those who framed the present United States pre-trial rules thought that the procedure for admissions would be of greatest value. In fact, it is not greatly used and has turned out to be of little value. It is not the practice in the United States for parties to seek admissions. To some extent the issues are limited by the pre-trial order, where there is one, but, as the parties are usually entitled to have issues of fact determined by a jury, no great help is obtained in this area.

Elsewhere there seems to be little use of admissions, although generally practitioners expressed the view that there should be greater use of them.

If the judge is an inquisitor, he need not be concerned with admissions or formal proof, but if the adversary approach is to be maintained, a properly functioning procedure for admissions and for dispensing with formal proof must be brought into practice. There is little use in New South Wales, at present, of admissions or of dispensations from formal proof. It is hard to suggest that this situation arises because of any lack of power in the court.

The Commercial Causes Act, 1903, was repealed by the Supreme Court Act, 1970. Section 6 (b) and (e) of the former Act provided that a Judge of the Supreme Court might:

dispense with the technical rules of evidence for proving any matter which is not bona fide in dispute, also with such rules as might cause expense and delay arising from commissions to take evidence and otherwise; and without limiting the generality of this power, dispense with the proof of hand-writing, documents, the identity of parties or parcels, or of authority;

and require either party to make admissions with respect to any question of fact involved in the cause.

Before the repeal of the 1903 Act these powers were sparsely invoked.

The matter is now governed by section 82 of the Supreme Court Act, 1970, which provides that:

(1) The Court may at any stage of the proceedings -

(a) dispense with the rules of evidence for proving any matter which is not bona fide in dispute, also with such rules as might cause expense and delay arising from any commission to take evidence or arising otherwise; and, without limiting the generality of this power, dispense with the proof of hand-writing; documents, the identity of parties or parcels, or of authority; and

(b) require any party to the proceedings, not being a minor or person of unsound mind, to make admissions with respect to any document or to any question of fact; and in case of refusal or neglect to make the admissions may, unless the Court is of opinion that the refusal or neglect is reasonable, order that the costs of proof occasioned by the refusal or neglect shall be paid by that party.

(2) An admission made under paragraph (b) of subsection one of this section -

(a) shall be for the purpose of the proceedings in which it is made and for no other purpose;

(b) shall be subject to all just exceptions; and

(c) may, with the leave of the Court, be amended or withdrawn.

(3) The Court may give leave for the purpose of paragraph (c) of subsection two of this section on terms.

With the possible exception of any problem which may arise from the words "bona fide in dispute" there is a clear opportunity for the court to influence an obdurate party to allow matters not in issue to be excluded from the trial. In discussing this area, I was told, "You do not need to amend your rules, you need to amend your judges". Or, as an American judge said to me, "If the court orders an admission, and it is not made, the court has power to deal with contempt of its orders".

At present, an issue can be contested for one or more of the following reasons:-

(1) There is a genuine dispute.

(2) There is a hope that the party bearing the onus will not be able to discharge it.

(3) For the purpose of obtaining a tactical advantage such as forcing the other party to call a witness from whom other evidence can be extracted or who will bring discredit upon the party calling him.

(4) The party, or his legal adviser, does not know enough about the issue either because the information is not available or through lack of investigation.

(5) Sheer obstruction.

Clearly a number of these reasons are not acceptable and, to a large extent, the fact that issues are contested for unacceptable reasons must be attributed to a reluctance on the part of the bench to act positively. While the bench is more effective if patient and forceful than if intemperate, in this area it may be necessary for there to be either a few draconian orders or great persistence to enforce acknowledgement that proof of matters about which there is no dispute cannot be allowed to prolong, and increase the cost of, proceedings generally and the trial in particular.

I recommend that there should be greater use of the procedures provided by section 82 of the Supreme Court Act, 1970.

D. Pre-trial Conference

In New South Wales, an attempt is made, at a directions hearing or callover, to define and limit the issues in an action, to estimate its hearing time and to ascertain dates convenient for counsel and witnesses for the hearing. In certain cases, before the directions hearing or callover, the parties complete a schedule which is intended to isolate the factual issues.

In London, the matter is dealt with by summons for directions⁶⁹ which I felt worked more efficiently than our system. In the United States, the procedure varies. A typical procedure is set out above.⁷⁰

When I was in Denver, the Denver District Court was considering proposed rules which were aimed at avoiding a formal pre-trial conference y requiring the counsel to meet informally at least six weeks before the trial to:

- (a) exchange and number all proposed exhibits;
- (b) exchange a list of witnesses;
- (c) prepare jury instructions (this is a matter of some importance in the United States, although rarely treated as a formal step in our procedure);
- (d) conduct good faith settlement negotiations;
- (e) explore matters which can be agreed.

The parties are then required to file a trial data certificate dealing with undisputed facts, disputed issues of fact, points of law, witnesses, exhibits, special damages, settlement negotiations and matters relating to the trial. The rules provide for sanctions for failure to comply with them, as well as the awarding of expenses, including attorneys' fees, against the party in default or his attorney. This is an interesting example of the growth in the United States of the use of party and party costs.

Behind every system of pre-trial conference or procedure is the objective, described to me by the framers of the proposed Denver District Court rules as utopian, of cases being fully prepared well before the trial date. It is said, and the view is held in New South Wales, that if cases were to be so prepared there would be more settlements generally and less settlements at the door of the court. I accept the view expressed to me in England that you cannot prevent settlements at the door of the court. There are factors, other than the state of preparedness of the lawyers, which operate on settlements.

It seems to me inefficient and tedious to prepare a case for trial twice. I prefer to deal with the problem of court door settlements of, say personal injury cases, not by requiring preparation for trial some six weeks before hearing but by use of a master calendar listing system with a sufficiently large volume of cases to enable use to be made of the statistical rate of settlement. To create a sufficient volume, it may be necessary to sit judges from other divisions in the particular division for say one month, or to use Recorders. This type of allocation of judicial resources can clearly be better handled by a single court using modern administrative methods.

I take the view that, with cases involving simple issues and a short hearing time, there is need for no more pre-trial conference than the present New South Wales District Court callover. In more complex cases, there is a benefit in a more detailed pre-trial conference. This was the experience in California where pre-trial conferences in other than complex cases were discontinued when it was found that they doubled costs. In California judges are elected. It was suggested to me that the federal judges, who are not, can afford to make themselves unpopular with the lawyers who appear before them and insist that things be done.

In complex cases I consider that there is a very real benefit in the judge sitting down with the parties, or on his bench if he prefers, and having a full pre-trial conference. There is not the scope which exists in the United States for making findings on the facts, that is giving summary judgment on a particular issue, as the judge would not have available the depositions of the witnesses although he would have the agreed bundle.⁷¹ But he has power to order admissions and to direct methods of proof.

I recommend that in complex cases the judge should hold a pre-trial conference four to six weeks before the hearing.

E. Settlement Conference

The formal settlement conference is something which I encountered only in the United States. I discussed it with a great number of lawyers. Opinions differed as to whether it is effective as a general procedure. Most opinions were that some judges are more effective than others in its use, which, trite though it may seem, is really the key to the use of the procedure.

In the New York Supreme Court, the parties are called before a panel of three judges and asked why the case cannot be settled. If it still does not settle, it is fixed for hearing the next day or at least within the next week. In Denver, where the court has an individual calendar system, a test scheme of sending cases to another judge for a "no holds barred" settlement conference has produced good results. On the other hand, a mandatory settlement conference scheme introduced in California in 1975, produced, in its first six months, fewer settlements than before.

The trial judge in the United States has power to review a verdict. That is, if the jury brings back a verdict with which he disagrees, he has power to substitute a verdict in its place. Where the trial judge conducts the settlement conference, some judges inform the parties that if a verdict outside a particular range is returned, he will alter it. This practice was the subject of criticism, which leads to another role of the settlement conference. If a lawyer cannot convince his client to accept a settlement, he arranges a settlement conference at which the judge's attitude is hoped to be persuasive.

In relation to the judge's attitude, in most States, a party can make a peremptory motion for one change of judge, that is, to veto a particular judge for that case. Sometimes it has to be done on cause but the cause is easily made out. In addition, if a lawyer has lodged a complaint about a judge he never has to appear before that judge again.

There are problems where the trial judge holds the settlement conference, which occurs in most federal courts, and the case is not to be heard with a jury.

The opinion which I found most persuasive was that of a court administrator who said that whatever is saved in trial time is lost in pre-trial time. The procedure does not speed things up or dispose of more cases. I do not recommend that such a procedure be instituted in New South Wales.

F. Juries

In the United States, litigants have a right to a jury in criminal cases and in what would have been common law cases as opposed to equity cases. The right, if that is really the appropriate term, operates in a much smaller area in New South Wales.

The abolition or retention of juries is often an emotional issue, a reflection of community views on the one hand and of allegations of inefficiency on the other. I have referred⁷² to the moves in the United States to eliminate inefficiency by modern technology. The size of the problem in the United States is illustrated by the estimate given to me that a small percentage reduction in jury panels would save \$US50,000,000 a year.

The reflection of community attitudes can be very apparent. A stockbroker suing a client, or a newspaper defending a defamation action, is left in no doubt as to the response of the community. A doctor who had not harmed his patient will not be convicted of illegal abortion by a jury. In the area of damages for personal injuries, juries have not followed the massive verdicts awarded by some judges. Personally, I consider this reflection of community attitudes to be important.

The ability of the jury to express the attitudes and prejudices of its members in its verdict, particularly in a racially mixed country, is significant. I have referred to the demise of the jury in South Africa.⁷³ The composition of juries in New York has been affected by the change in population. It is in this context that the examination of prospective jurors in the United States must be considered. An important element of such examination is to ensure that the juror will accept the judge's rulings as to law, even if his personal inclination is to find otherwise.

Although it is said that jury trials take longer, an impression of mine was expressed by an American judge. A jury trial need not take longer if properly prepared. On the other hand, if a judge sits alone, he has to give detailed findings of fact which takes time. A jury cannot reserve its decision.

In Los Angeles, and no doubt elsewhere, prospective jurors are given a juror's handbook. I feel sure that something of this nature would be of assistance to New South Wales jurors and that there are other aids which jurors would appreciate.

From my observation of the jury system at work during my investigation, and from the comments made to me, I am happy with the operation of that system in New South Wales, bearing in mind the balancing of different interests which is involved. I make no recommendation for change.

G. Small Claims

There is a basic social evaluation involved in any investigation of this subject. Should society bear the cost of determining where a small loss should fall? Is the loss of \$5, the cost of a cab-fare or a carton of cigarettes, really an injury which the law should protect? If there is persistent cheating of consumers, or of anyone for that matter, is not the criminal law better able to deal with the situation?

A distinguished American judge felt that consumer complaints should be dealt with by the public sector rather than by the private sector. The consumer should be reimbursed by the State which should pursue the defaulting merchant. Such a step involves no great advance in principle on the rationale of a National Compensation Scheme. And it may be that the cost to the community of such a scheme would be less than the provision of courts or other tribunals. I have not seen any figures, but the cost to have, say a Master, sit for an hour must be in the order of \$100. In California it costs the court \$1,500 for a hearing day.

If the community accepts that it should provide a tribunal for the resolution of small claims, a decision must be made as to whether that tribunal should be within the existing court structure or should be separate. In England, the Lord Chancellor said to the Council of County Court Judges in 1972:⁷⁴

... a review of County Court Procedure to make it more adaptable to situations where litigants wished to conduct their own cases, and perhaps later by extending once again the jurisdiction of registrars ... [is] a far more practicable approach and a far more economic use of skilled manpower and court accommodation

than to man and staff a new range of courts to do part (but not all) the work which County Courts already do very well.

In New Zealand, the Small Claims Tribunals recently introduced will be divisions of Magistrates' Courts.⁷⁵

There is a view that the speedy processing of small claims helps debt collectors and that the consumer feels oppressed. I suggest that that stigma will be avoided if debt collecting is confined to a separate default registry. It must be noted that debt collecting is, with few exceptions, excluded from the jurisdiction of the New Zealand Small Claims Tribunals.⁷⁶

In systems providing voluntary submission of small claims to informal arbitration, the trader has been criticized for refusing to submit, the suggestion being that he has no defence. On the other hand, a trader with a genuine defence could expect to receive a more impartial hearing before the courts and he may wish to take advantage of the normal procedures available to him there.

Whatever tribunal is used to determine small claims, clear information should be available to the public, preferably by way of a short handbook, explaining the workings of the tribunal and how a member of the public brings a claim before it.

H. Arbitration

This section is concerned, not with arbitration of disputes under building contracts, insurance policies and suchlike, but with reference of actions, generally small personal injury actions, already before the court for determination by an arbitrator, usually a practising lawyer.

The Los Angeles Attorneys' Special Arbitration Plan commenced in 1971. It has handled some 800 cases and it is estimated that it has saved in the order of \$10,000,000 in court time. The original limit of recovery was \$7,500, it is now \$15,000 and it is suggested that it be increased to \$25,000.

The plan is sponsored by the association of defence lawyers and the association of plaintiffs' lawyers. The arbitrators are lawyer volunteers who sit for one morning and one evening each year. The hearings take place at the courthouse.

Arbitration can be sought at any time after filing suit and the average time between the initiation of arbitration and a decision is 35 days compared with a wait of some years for a court trial.

A comprehensive review has been made of arbitration plans in the United States.⁷⁷

The Los Angeles County Superior Court also has a Personal Injury Short Cause Programme. Cases come under this programme if the parties waive a jury and agree to trial by one of a panel of judges. There are rules simplifying the introduction of evidence. It is said that the trial time is reduced from three days to three hours.

My impression is that the congestion of personal injury cases in the New South Wales District Court is not such as to require use of an arbitration plan. We do not have juries in motor vehicle cases, the great proportion of that category, and we do not have the discovery procedures common in the United States, which the arbitration plans are partly designed to avoid. But note should be taken of an important aspect of such plans. That is the basic premise that these cases should be brought on for trial as swiftly and as simply as possible.

If congestion of trial time for personal injury cases does become a problem, I suggest that consideration be given to the introduction of an assessment procedure along the lines suggested by Mr. R. M. Porter, the General Manager of the Government Insurance Office of New South Wales, at a seminar conducted by the Law Reform Commission in October, 1973. The procedure suggested was that each party submit all relevant material on the issue of damages to a court assessor so that he may assess the quantum of damages. If a party does not accept the figure and wishes to litigate the issue, he may do so but he suffers a penalty if he does not improve his position. Interestingly enough, under the Wayne County, Detroit, Mediation Programme, if a party rejects the mediator's decision and does not improve his position at the trial by at least 10 per cent, he pays the other party's costs of the trial.

I. Personal Injury Litigation

In 1968, when the N.S.W. Law Reform Commission was drafting the Bill for the Supreme Court Act, 1970, and the rules thereunder, I submitted certain proposals to the Commission relating to pleading in actions for damages for personal injury. The Commission informed me, with great courtesy, that it was not prepared to give effect to my proposals because they would be a major innovation and because they would involve the prescribing of forms. I have raised these proposals with various bodies on several occasions since with no effect. Nothing daunted, I put them forward again in an expanded form.

I recommend above⁷⁸ that certain categories of the court's business be treated separately. In my opinion, actions for damages for personal injury arising from motor vehicle accidents and industrial accidents, come before the courts in such a volume, and involve such issues of fact and law, as to make those actions amenable to be dealt with separately from other actions and in a way which will increase the efficiency of the courts. There is neither magic nor anything new in so treating a category of actions. As Bullen and Leake have said of the common *indebitatus* counts: "simple contracts, express or implied, resulting in mere debts, are of so frequent occurrence as causes of action, that certain concise forms of counts have been devised for suing upon them."⁷⁹ More recently particular forms of pleading and procedure have been adopted for matrimonial causes.

I recommend that actions for damages for personal injuries arising from motor vehicle accidents and industrial accidents, be treated by the court in the following way. After the completion of the pleadings, to which I refer in the next paragraph the parties should exchange all expert and medical reports, hospital and wage records, details of out-of-pocket expenses and affidavits by witnesses to the accident. The action should be placed in the court's master list. I favour a directions hearing on the English system but that is a matter of detail.

The matters which should be disclosed by the pleadings in such personal injury actions are of limited number and can be enumerated. They are the identity of the parties (also, I suggest, any insurers), details of the accident, the allegations of negligence relied on, any regulation or statute the breach of which is relied on, the injuries, disabilities and economic loss alleged. Similarly the defence and any cross claim. As the rules and forms which I earlier proposed are with the Commission, I shall not set them out in this report.

FOOTNOTES

63. 4 Moore's *Federal Practice* 26.02.

64. Heading I pp. 68-69.

65. p. 22.

66. See p. 34.

67. p. 32.

68. p. 31.

69. See p. 22.

70. p. 33.

71. See p. 23

72. p. 48.

73. p. 8.

74. Speech delivered in October 1972.

75. p. 28-29.

76. Small Claim Tribunals Act 1976 (N.Z.), s. 10.

77. John G. Fall, "The Role of Arbitration in the Judicial Process" (1973) *Report of the Judicial Council of California*, p. 31.

78. p. 42.

79. *Precedents of Pleading* (3rd ed., 1868), p. 35.

**CONSULTANTS PAPER 4 (1978) - STUDIES IN COMPARATIVE CIVIL AND CRIMINAL PROCEDURE:
VOLUME 1 - COURT PROCEDURE IN THE UNITED KINGDOM, UNITED STATES, SOUTH AFRICA AND
NEW ZEALAND**

Summary of Recommendations

The trial courts of New South Wales should be merged to form one court.

A number of barristers and solicitors should be appointed recorders to serve as judges for four weeks each year.

If a court or a judge reserves its or his decision, it or he must fix a date upon which the decision will be given.

Where categories of business of a court, by reason of volume or common features, are amenable to being dealt with in a particular way, those categories should be recognized and treated accordingly.

The system of mentioning matters in the Commercial List of the Supreme Court should be discontinued.

Part 27 of the Supreme Court Rules should be amended so that the deposition of a witness may be taken on videotape and that videotape admitted in evidence.

The carriage of criminal prosecutions at the instance of the State of New South Wales should be controlled by one body headed by, for example, a Director of Public Prosecutions.

The present committal procedure operating in New South Wales should be abolished and a new procedure, specified in detail in the paragraph, should be adopted.

Each complex criminal case should be allocated to a particular judge at an early stage.

A default procedure should be instituted in respect of petty offenders.

In criminal proceedings there should be time limits for the commencement of trial, or for committal. If the limits are exceeded, the defendant should be discharged.

A pleading should commence by stating the cause of action or defence upon which the party relies.

Subject to the power of the court to grant an extension, any civil action the trial of which has not commenced within five years of the date of the filing of the initiating process should stand dismissed.

The existing pre-trial discovery procedure in New South Wales should be retained.

There should be a greater use of the procedures provided by section 82 of the Supreme Court Act, 1970.

In a complex case the judge should hold a pre-trial conference four to six weeks before the hearing.

Actions for damages for personal injury arising from motor vehicle accidents should be treated by the courts separately from those arising from industrial accidents.

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VOLUME 1 - COURT PROCEDURE IN THE UNITED KINGDOM, UNITED STATES, SOUTH AFRICA AND
NEW ZEALAND**

Appendix A - Person Rendering Assistance to the Author

SOUTH AFRICA

Johannesburg

Supreme Court:

Mr Justice Cillie Ñ the Judge President of the Transvaal.

Members of the Bar:

Mr G. Alexander, S.C.

Mr Mark Hannon

Solicitors:

Mr S. W. Van der Merwe - President of the Law Society and members of its Council.

Mr David Goss

Pretoria

University of South Africa:

Professor C. R. Snyman

ENGLAND

London

High Court of Justice:

The Hon. Mr Justice Donaldson

Master I. H. Jacob

Master John Ritchie

Members of the Bar:

Mr Richard Yorke, Q.C.

Mr Robert Alexander

Solicitors:

Mr P. Baylis

Mr B. Hollingsworth

Mr C. R. L. James

Mr A. R. L. Mirams

Mr M. H. Sheldon

Mr R. E. Walker

Lord Chancellor's Office:

Mr Richard White

Mr H. D. New

Scotland Yard:

Detective Superintendent George

Detective Inspector Doveswell

Detective Inspector Stewart

Detective Sergeant Monk

Birmingham

University of Birmingham:

Professor G. J. Borrie

Mr John Baldwin

SCOTLAND

Edinburgh

High Court:

The Hon. Lord Thomson

Scottish Courts Administration:

Sheriff R. D. Ireland, Q.C.

The Crown Office:

Mr Douglas Allen

Advocates:

Mr James Mackay, Q.C.

Mr J. A. D. Hope

Solicitors:

Mr Ian B. Inglis

NEW ZEALAND

Supreme Court:

Mr Justice D. S. Beattie

Barristers & Solicitors:

Mr Colin Clere

Mr James Larsen (Crown Prosecutor)

UNITED STATES OF AMERICA

NEW YORK

United States District Court:

Judge Jack B. Weinstein

Judge Dudley Bonsal

Judge Meanor

New York Supreme Court:

Judge Richard J. Bartlett (State Administrative Judge)

Judge Thomas C. Chimera

District Attorney's Office:

District Attorney Robert Morgenthau

Mr David Worgan

Attorneys:

Mr Richard Barth

Mr T. Capon

Mrs E. Reiss

Mr P. Reiss

Lord Hacking

Mr Cyrus Vance

Mr Hugh A. Chapin

Mr Richard Nolan

Mr Whitney North Seymour

Mr Blair Fenterstock

Mr John Monkton

Mr Ralph L. McAfee

Mr Jack Guzetti

Mr B. Wruble

Mr William G. Mulligan

Institute of Judicial Administration:

Mr Paul Nijelski

WASHINGTON D.C.

District Court:

Judge John J. Sirica

Federal Judicial Center:

Judge Walter E. Hoffman

Miss Alice L. O'Donnell

Attorneys:

Mr Edward A. McDermott

Mr David E. McGiffert

Mr Curtis E. Von Kahn (member, ABA Commission on Standards of Judicial Administration)

MICHIGAN

Detroit

United States District Court:

Judge Charles W. Joiner

Court of Common Pleas:

Mr Tom Poole

Michigan State Court Administration:

Mr Lester Blagg

Attorneys:

Mr Robert E. Baker

Mr David Owen

Mr Allan L. Ronquillo

COLORADO

Denver

United States District Court:

Judge Richard Match

Magistrate Royce Sickler

Colorado Court of Appeal:

Judge Van Cise

Colorado Supreme Court:

Judge Charles Goldberg

District Attorney's Office:

District Attorney Dale Tooley

Judge Moore (formerly Chief Justice)

Mr Raymond Dean Jones

Attorneys:

Mr Jerry Conover

Mr James R. Miller

Mr Martin Shore

National Center for State Courts:

Mr E. McConnell

Institute of Court Management:

Professor Harry O. Lawson (State Judicial Administrator)

TEXAS

Dallas

Attorneys:

Mr Don Davis

Mr Cecil Magee

CALIFORNIA

San Francisco

United States District Court:

Judge Charles Renfrew

Judge R. H. Schenacke

California Superior Court:

Judge Ira A. Brown Jnr.

Judge Lynch

Judge Claude Perasso

Judicial Council of California:

Mr Ralph N. Kleps (Administrative Director of the Courts)

Attorneys:

Mr John Clark

Mr Guy O. Korhblum

Mr Richard J. MacLaury

Mr Joseph Martin

Mr Thomas G. Ottenweller

Mr Martin Quinn

Mr Joseph W. Rogers Jnr.

Sacramento

McGeorge College of Law:

Professor Glenn Shellhaus

Los Angeles

United States Court of Appeal:

Judge Shirley M. Hufstедler

United States District Court:

Judge Manuel L. Real

Attorney General's Office:

Attorney General Eville J. Younger

Mr S. Clark Moore

Superior Court:

Mr Frank S. Zolin (Executive Officer)

District Attorney's Office:

Mr Gilbert Garcetti

Attorneys:

Mr William C. Brown

Mr David Destino

Mr Marcus Mattson

Mr Charles L. Rogers

Mr G. William Shea

Mr Fredric J. Zepp

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Appendix B - Federal Rules Of Civil Procedure For The United States District Courts

V. DEPOSITIONS AND DISCOVERY

RULE 26

GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods: Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery: Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Insurance Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial Preparation: Materials. Subject to the provisions of sub-division (b) (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under sub-division (b) (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a

statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37 (a) (4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b) (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (1) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b) (4) (C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b) (4) (A) (ii) and (b) (4) (B) of this rule; and (ii) with respect to discovery obtained under subdivision (b) (4) (A) (ii) of this rule the court may require, and with respect to discovery obtained under Subdivision (b) (4) (B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) *Protective Orders:* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being seated be opened only by order of the court; (7) that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37 (a) (4) apply to the award of expenses incurred in relation to the motion.

(d) *Sequence and Timing of Discovery:* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Responses: A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty reasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty reasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

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Appendix C - Suggestions For Preparation Of Pre-Trial Order

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Unless Otherwise Ordered, Counsel for Plaintiff shall prepare the Pre-Trial Order

Listed below are matters ordinarily included in a Pre-Trial Order. For convenience of Court and counsel, it is suggested that the FOLLOWING SEQUENCE BE USED in the preparation of the Pre-Trial Order in those cases where it is feasible to do so, WITH EACH OF THE ITEMS LISTED BELOW CAPITALIZED AS A HEADING:

1. DATE AND APPEARANCES

Date of the Pre-Trial Conference and appearances for the parties.

2. JURISDICTION

Admitted or denied. If admitted, state the basis of jurisdiction; if denied, here insert the Court's Order for determination of the jurisdictional questions.

3. AMENDMENTS TO PLEADINGS

If none requested, insert "none"; if any are offered, set forth Court's ruling relative to same.

4. PRELIMINARY MOTIONS REMAINING TO BE DETERMINED

If there are no preliminary motions to be decided, it is sufficient to state "none"; otherwise here set forth Court's Order as to disposition.

5. (A) GENERAL NATURE OF THE CLAIMS OF THE PARTIES

(1) Plaintiff claims: (Set out brief summary without detail.)

(2) Defendant claims: (Set out brief summary without detail.)

(3) All other parties claims: (Same type of statement where third parties are involved.)

(B) UNCONTROVERTED FACTS

The following facts are established by admissions in the pleadings or by stipulations of counsel at the Pre-Trial Conference: (set out uncontroverted facts.)

6. ISSUES OF FACT AND LAW

(A) CONTESTED ISSUES OF FACT: The contested issues of fact remaining for decision are: (set out)

(B) CONTESTED ISSUES OF LAW: The contested issues of law in addition to those implicit in the foregoing issues of fact, are: (set out) OR: There were no special issues of law reserved other than those implicit in the foregoing issues of fact.

7. WITNESSES

(A) In the absence of reasonable notice to opposing counsel to the contrary, plaintiff will call, or will have available at the trial: (list) Plaintiff may call: (list)

(B) In the absence of reasonable notice to opposing counsel to the contrary, defendant will call, or will have available at the trial: (list) Defendant may call: (list)

(C) In the absence of reasonable notice to opposing counsel to the contrary, _____ will call, or _____ may call: (list) (use for third parties, if any.)

(D) In the event other witnesses are to be called at the trial, a statement of their names and addresses and the general subject matter of their testimony will be served upon opposing counsel and filed with the Court at least - days prior to trial.

8. EXHIBITS

There were identified and offered the following:

(A) Plaintiffs Exhibits: (list exhibits by number.)

(B) Defendant's Exhibits: (list exhibits by letter.)

(C) Exhibits of Other Parties, if involved: Except as otherwise indicated, the authenticity of received exhibits has been stipulated but they have been received subject to objections, if any, by the opposing party at the trial as to their relevancy and materiality. If other exhibits are to be offered and their necessity reasonably can be anticipated, they will be submitted to opposing counsel at least _____ days prior to the trial. (Note any exceptions or special provisions.)

9. DISCOVERY

Discovery has been completed. OR: Discovery is to be completed by _____. OR: Further discovery is limited to _____. OR: The following provisions were made for discovery: (specify)

10. MISCELLANEOUS ORDERS

Here set forth any orders not properly includable elsewhere.

11. MODIFICATIONS - INTERPRETATION

Unless otherwise ordered, the following paragraph shall be included in each Pre-Trial Order:

Hereafter, this Order will control the course of the trial and may not be amended except by consent of the parties and the Court, or by Order of the Court to prevent manifest injustice. The pleadings will be deemed merged herein. In the event of ambiguity in any provision of this Order reference may be made to the records of this conference to the extent reported by stenographic notes, and to the pleadings.

12. TRIAL AND ESTIMATED TIME

State whether trial to Court or Jury, estimated trial time, and any other orders pertinent thereto.

NOTE: Unless otherwise ordered, the Pre-Trial Order shall be approved by counsel for all parties prior to its submission to the Court. In case of disagreement, dissenting counsel shall file written objections with the Court within five days after the proposed Order is submitted to the Court.

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