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## ANCESTRY AND MECHANICS OF CIVIL PROCEDURES IN COMMON LAW COURTS

*(PLEADING CENTRIC & TRIAL BASED)*

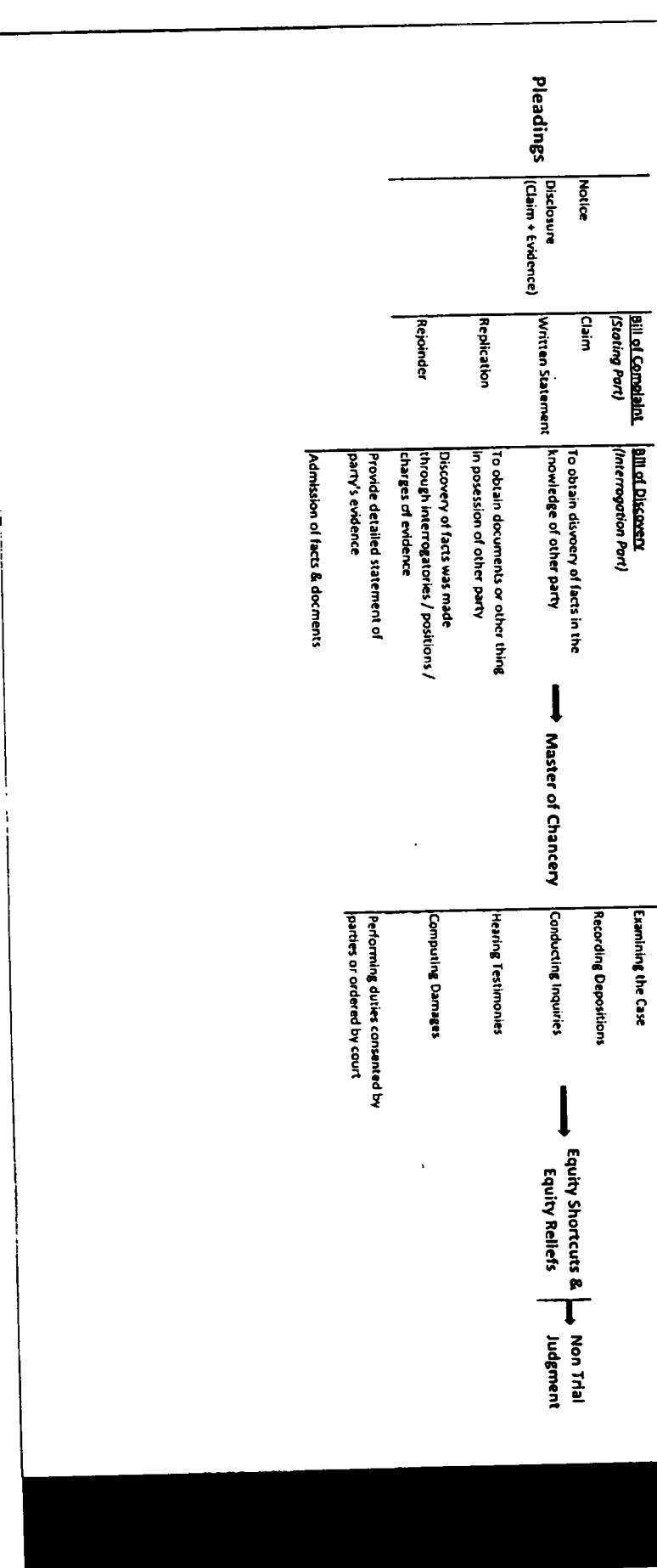
I (12th & 13th Century)

1

Pleadings		Controversy framed through imperfectly known facts.	
		Claims and defenses might be fictitious and non substantial.	
Claim		Written Reply → Pleading system incapacitated to differentiate between real and sham issues.	
Notice Disclosure (Claim)		Replication → Assertions of parties taken at face value.	
Rejoinder		Did not provide adequate basis for trial.	
Single Issue Pleading		Clear statement of facts gave way to vague claims and allegations by both plaintiff and defendant which could not be proved in trial.	
Smokescreening of facts		Written pleading was supposed to do something it was inherently incapable of doing.	
II (14th - 16th Century)			
Claim		Informed jury was replaced by lay jury.	
Written Reply		Instructional Proceedings → Jury Trial.	
Replication		Concentration of Trial → No pretrial/trial divide.	
Rejoinder		Orality → Public Access.	
Single Issue Pleading			
III (17th - 19th Century)			
Claim		Parties taken by surprise through production of evidence.	
Written Reply		Pre-trial procedure confined to pleading.	
Replication		No discovery/investigation.	
Rejoinder		Court took no responsibility of investigation.	
Single Issue Pleading		Investigation left to lawyers and litigants.	
Bill of Particulars		Investigation by mean of witness testimony occurred at trial.	
Notice Disclosure (Claim)			
Rejoinder		Jury Trial → Jury Trial.	
Single Issue Pleading			
IV (19th - 20th Century)			
Claim		Bill of Particulars did not improve investigation deficit.	
Written Reply		Concentration led to surprise.	
Replication		Jury corrupt and inefficient.	
Rejoinder		No equity shortcuts.	
Single Issue Pleading		No procedural flexibility.	
		No accommodation.	

## ANCESTRY AND MECHANICS OF CIVIL PROCEDURES IN EQUITY / CHANCERY COURTS

*(PLEADINGS - DISCOVERY - EQUITY SHORTCUTS - NON TRIAL JUDGMENT)*



3

ALL THE COMMON LAW PROCEDURE ACTS, AND ALL THE  
ACTS AND RULES RELATING TO TRIALS OF ISSUES OF FACT.

THE  
**COMMON LAW PROCEDURE ACTS**

OF

1852, 1854, AND 1860,

*With Notes, and the forms and Rules,*

TO WHICH ARE PREFIXED, OR APPENDED, ALL THE ACTS (OR PORTIONS  
OF ACTS) RELATING TO COMMON LAW PROCEDURE,  
OR

**THE TRIAL OF ISSUES OF FACT,**

IN THE

**COURTS OF COMMON LAW, CHANCERY, OR PROBATE,**

WITH THE RULES OF EACH COURT RESPECTIVELY.

ADAPTED TO THE USE OF PRACTITIONERS IN ALL THE COURTS ;  
AND ALSO TO THE USE OF STUDENTS.

BY W. F. FINLASON, Esq.

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW, EDITOR OF THE COMMON LAW  
PROCEDURE ACTS, 1852 AND 1854.

12.  
LONDON :

V. & R. STEVENS & SONS,

Law Booksellers and Publishers,  
26, BELL YARD, LINCOLN'S INN.

1860.

UK  
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8

THE  
SUPREME COURT OF JUDICATURE ACTS  
1873 AND 1875.

Schedule of Rules and Forms,

AND OTHER

RULES AND ORDERS.

WITH NOTES.

By ARTHUR WILSON,

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1875.

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# THE JUDICATURE ACTS

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## RULES OF THE SUPREME COURT,

1883.

WITH NOTES AND INDEX.

BY THE LATE

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(Edited by R. T. REID, Q.C.)

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whose behalf the caveat has been entered, and by the arrest of the property, if it then be or thereafter come within the jurisdiction of the Court.

18. Nothing in this Order shall prevent a solicitor from taking out a warrant for the arrest of any property, notwithstanding the entry of a caveat in the "Caveat Warrant Book;" but the party, at whose instance any property in respect of which a caveat is entered shall be arrested, shall be liable to have the warrant discharged and to be condemned in costs and damages, unless he shall show, to the satisfaction of the judge, good and sufficient reason for having so done.

Ord. XXIX.,  
rr. 17, 18.  
Ord. XXX.,  
rr. 1, 2.

339.  
(A. C. R. 1859,  
r. 61.)  
Arrest not  
withstanding  
caveat.

### ORDER XXX.

#### SUMMONS FOR DIRECTIONS.

1. In every cause or matter one general summons for directions may be taken out at any time by any party with respect to the following matters and proceedings: particulars of claim, defence, or reply, statement of special case, discovery (including interrogatories), commissions and examinations of witnesses, mode of trial (including proceedings in lieu of demurrer, trial on motion for judgment, and reference), place of trial, and any other matter or proceeding in the cause or matter previous to trial.

340.  
Summons for  
directions.

This follows the recommendations of Lord Coleridge's Committee, resolutions 2, 4.

In case the proceedings are not ripe for directions as to all the matters the summons can practically be adjourned as to part by reserving liberty to apply for further directions without a fresh summons. (See Form IV, Appendix K.)

2. Such summons for directions shall be a summons returnable in not less than four days, in the Form No. 3 in Appendix K., with such variations as circumstances may require, and shall be addressed to and served upon all such parties to the cause or matter as may be affected thereby. The applicant shall, so far as practicable, include in the summons all or as many of the above-mentioned matters and proceedings as, having regard to the nature of the cause or matter, can conveniently be dealt with by the order and directions of the Court or judge. Upon the hearing of the summons, any party to whom the summons is addressed shall be at liberty to apply for any order or directions as to any of the above-mentioned matters or proceedings which he may desire, and thereupon, after giving notice to such parties (if any) as the Court or judge may direct, any order may be

341.  
Form.  
What to be  
applied for by  
by opposite  
party.

Ord. XXX.,  
rr. 2, 3.  
Ord. XXXI.,  
r. 1.

Any order may  
be made.  
Form of order.

343.  
Costs of  
unnecessary  
application.

made, and all necessary directions given, as to all or any of such matters and proceedings as may be just, whether applied for or not; such order shall be in the Form No. 4 in Appendix K., with such variations as circumstances may require.

3. If, upon any other application as to any of the above-mentioned matters or proceedings, it shall appear to the Court or Judge that the application is one that could and ought to have been included in or made upon the general summons for directions, such application shall be granted only at the costs of the party making the same.

This rule is in accordance with resolution 5 of Lord Coleridge's Committee.

## ORDER XXXI.

### DISCOVERY AND INSPECTION.

343. [xxxii. 1,  
amended.]

Interrogatories  
without leave  
in cases of  
fraud or breach  
of trust. In  
other cases,  
with leave.

1. In any action where relief by way of damages or otherwise is sought on the ground of fraud or breach of trust, the plaintiff may at any time after delivering his statement of claim, and a defendant may at or after the time of delivering his defence, without any order for that purpose, and in every other cause or matter the plaintiff or defendant may by leave of the Court or a judge, deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: Provided also that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

Discovery is of two kinds—i. by interrogatories; ii. by disclosure of documents.

The general power of delivering interrogatories without leave given under the former rules is now confined to actions for fraud and breach of trust.

Previously in Chancery the power of interrogating was general, while at Common Law interrogatories could practically only be administered by leave of a judge under the Common Law Procedure Act, 1854, s. 51; and in practice, on a summons for leave to deliver interrogatories, the interrogatories sought to be administered had to be exhibited before the judge, and discussed before leave given if objected to, and an affidavit (s. 51) sworn stating the applicant's belief that he will derive material benefit from the discovery, &c.

Ord. XIII.,  
r. 13, 14.  
Ord. XIV., r. 1.

113 [part of  
Bill 10,  
annulled  
Dec. 1875.]  
In Admiralty  
actions in rem.

114.  
Action on bond.

13. In Admiralty actions in rem, upon default of appearance, if, when the action comes before him, the judge is satisfied that the plaintiff's claim is well founded, he may pronounce for the claim with or without a reference to the Admiralty Registrar or to the Admiralty Registrar assisted by Merchants, and may at the same time order the property to be appraised and sold, with or without previous notice, and the proceeds to be paid into Court, or may make such order as he shall think just.

14. Where the writ is indorsed with a claim on a bond within 8 & 9 Wm. 3, c. 11, and the defendant fails to appear thereto, no statement of claim shall be delivered, and the plaintiff may at once suggest breaches by delivering a suggestion thereof to the defendant or his solicitor, and proceed as mentioned in the said Statute and in 3 & 4 Will. 4, c. 42, s. 16.

#### ORDER XIV.

##### LEAVE TO SIGN JUDGMENT AND DEFEND WHERE WRIT SPECIALLY INDORSED.

115. [xiv. 1a.]

Application by  
plaintiff to sign  
judgment.

1. Where the defendant appears to a writ of summons specially indorsed under Order III, Rule 6, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any), and stating that in his belief there is no defence to the action, apply to a judge for liberty to enter final judgment for the amount so indorsed together with interest, if any, or for recovery of the land (with or without rent or mesne profits), as the case may be, and costs. The judge may thereupon, unless the defendant by affidavit or otherwise shall satisfy him that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment accordingly.

By himself or other person.]

The original rule under the Judicature Acts required the plaintiff himself to make the necessary affidavit, and consequently was inapplicable where a corporation was plaintiff.

On affidavit made.]

The affidavit need not be made before the summons is taken out. (*Begg v. Cooper* (C.A.), 40 L. T. N. S. 29.)

By affidavit or otherwise.]

Where a corporation is defendant, some qualified person on behalf of such defendant may make an affidavit to satisfy the Court that there is a defence. (See *Shelford v. South and East Coast Railway Co.*, 4 Ex. D. 317.)

It is a matter for the discretion of the Court or a judge (which may be exercised by a Master of the Queen's Bench Division) whether to

grant or refuse, or impose terms on, applications under this rule, but the discretion is limited in practice by the principles laid down in the following cases. (See r. 6.)

Ord. XIV,  
rr. 1-3.

When it appears from the defendant's affidavit that he disputes the claim, and that an account should be taken between the parties, he ought to be allowed to defend, and terms should not be imposed which are likely to prejudice him in setting up his defence; and in an action between mortgagor and mortgagee the former should not be ordered, as a condition of obtaining leave to defend, to pay money into Court or give security, except for very special reasons. (*Wallingford v. Mutual Society*, 5 Ap. Cas. 685, 696.)

So a person sued as a guarantor or surety should be able to put the plaintiff to the proof of his case unless he has acknowledged the debt or it appears that the defence is merely for delay. (Per Bramwell, B., *Lloyd's Banking Co. v. Ogle*, 1 Ex. D. 262.)

When a defendant shows a substantial or *bond fide* defence on the merits he ought not to be compelled to pay money into Court as a condition to his being let in to defend. (*Runnacles v. Masquita*, 1 Q. B. D. 416; *Yorkshire Banking Co. v. Beatson*, 4 C. P. D. 218.) When a defendant who had paid money into Court as a condition to being allowed to defend, was held entitled to take it out on obtaining judgment in his favour, notwithstanding notice of appeal.

**Appeals.]**

Orders made under this rule are interlocutory, and appeals from them must be brought within twenty-one days. (*Standard Discount Co. v. La Grange*, 3 C. P. D. 67; and see notes to Ord. LVIII, r. 15.)

It will be noticed that judgment for recovery of land may now be obtained in this way.

2. The application by the plaintiff for leave to enter final judgment under the last preceding Rule shall be made by summons returnable not less than four clear days after service, accompanied by a copy of the affidavit and exhibits referred to therein.

116. [xiv. 2,  
amended.]  
Application by  
four days'  
summons.

3. The defendant may show cause against such application by affidavit, or (except in actions for the recovery of land) by offering to bring into Court the sum indorsed on the writ. Such affidavit shall state whether the defence alleged goes to the whole or to part only, and (if so) to what part, of the plaintiff's claim. And the judge may, if he think fit, order the defendant, or, in the case of a Corporation, any officer thereof, to attend and be examined upon oath: or to produce any leases, deeds, books, or documents, or copies of or extracts therefrom.

117. [xiv. 2,  
amended.]  
Showing cause.

**Bringing money into Court.]**

An offer to bring the money into Court is a circumstance to be considered, but does not necessarily entitle a defendant's leave to defend. (*Crump v. Cavendish* (O.A.), 5 Ex. D. 211.)

**Affidavit in reply.]**

The judge may, if he think fit, allow the plaintiff to file an affidavit in reply to the defendant. (*Davis v. Spence*, 1 C. P. D. 719, followed by the Master of the Rolls in *Girvin v. Grepe*, 18 Ch. D. 174, notwithstanding the contrary decision in *North Central Waggon Co. v. North Wales Waggon Co.*, 39 L. T. N. S. 628.)

Ord. XIV.,  
r. 3-6.  
Ord. XV., r. 1.

The question to be decided being whether there is such a *prima facie* defence that the defendant ought to be allowed to have it tried, *Girvin v. Greys*, 18 Ch. D. p. 177.

118. [xiv. 4.]  
Judgment for part.

4. If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into Court by the sheriff, the taxation of costs, or otherwise, as the Judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim.

The proper order under this rule is judgment for the plaintiff for the amount admitted to be due, leave to the defendant to defend as to the residue. (*Dennis v. Seymour*, 4 Ex. D. 80.)

119. [xiv. 5.]  
Judgment against one defendant.

5. If it appears to the Judge that any defendant has a good defence to or ought to be permitted to defend the action, and that any other defendant has not such defence, and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter, and may issue execution upon such judgment without prejudice to his right to proceed with his action against the former.

120. [xiv. 6,  
amended.]  
Leave to defend  
subject to  
terms.

6. Leave to defend may be given unconditionally or subject to such terms as to giving security, or time and mode of trial (in cases which, under these Rules, may be tried without a jury) or otherwise, as the judge may think fit.

See notes to r. 1.

## ORDER XV.

### APPLICATION FOR AN ACCOUNT.

121. [xv. 1.]  
Order for account.

1. Where a writ of summons has been indorsed for an account, under Order III, Rule 8, or where the indorsement on a writ of summons involves taking an account, if the defendant either fails to appear, or does not after appearance, by affidavit or otherwise, satisfy the Court or a judge that there is some preliminary question to be tried, an order for the proper accounts, with all necessary inquiries and directions now usual in the Chancery Division in similar cases, shall be forthwith made.

By affidavit or otherwise.]

See note to Ord. XIV., r. 1.

Taking accounts.]

Assigned to the Chancery Division. (Judicature Act, 1873, s. 84.)

**MECHANICS OF JUDICATURE ACT, 1875 (ENGLAND & WALES) : FUSION OF LAW AND EQUITY COURTS**

Common Law Courts

Equity Courts

(Pleadings - Jury Trial)

(Pleadings - Discovery - Equity Shortcuts/Reliefs - Non Trial Judgment)

Fusion

(Pleadings — Summon for Directions — Discovery — Equity Shortcuts/Reliefs — Non Trial Judgment — Trial)

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STATUTORY INSTRUMENTS

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1998 No. 3132 (L.17)

SUPREME COURT OF ENGLAND AND WALES  
COUNTY COURTS

The Civil Procedure Rules 1998

*Made* - - - - - *10th December 1998*

*Laid before Parliament* *17th December 1998*

*Coming into force* - - - *26th April 1999*

The Civil Procedure Rule Committee, having power under section 2 of the Civil Procedure Act 1997(1) to make rules of court under section 1 of that Act, make the following rules which may be cited as the Civil Procedure Rules 1998—

PART 1

OVERRIDING OBJECTIVE

Contents of this Part

---

The overriding objective	Rule 1.1
Application by the court of the overriding objective	Rule 1.2
Duty of the parties	Rule 1.3
Court's duty to manage cases	Rule 1.4

---

**The overriding objective**

- 1.1.—(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
- (2) Dealing with a case justly includes, so far as is practicable—
- (a) ensuring that the parties are on an equal footing;
  - (b) saving expense;

---

(1) 1997 c. 12.

- (c) dealing with the case in ways which are proportionate—
  - (i) to the amount of money involved;
  - (ii) to the importance of the case;
  - (iii) to the complexity of the issues; and
  - (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

#### **Application by the court of the overriding objective**

- 1.2. The court must seek to give effect to the overriding objective when it—
  - (a) exercises any power given to it by the Rules; or
  - (b) interprets any rule.

#### **Duty of the parties**

- 1.3. The parties are required to help the court to further the overriding objective.

#### **Court's duty to manage cases**

- 1.4.—(1) The court must further the overriding objective by actively managing cases.
- (2) Active case management includes —
  - (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
  - (b) identifying the issues at an early stage;
  - (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
  - (d) deciding the order in which issues are to be resolved;
  - (e) encouraging the parties to use an alternative dispute resolution<sup>(GL)</sup> procedure if the court considers that appropriate and facilitating the use of such procedure;
  - (f) helping the parties to settle the whole or part of the case;
  - (g) fixing timetables or otherwise controlling the progress of the case;
  - (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
  - (i) dealing with as many aspects of the case as it can on the same occasion;
  - (j) dealing with the case without the parties needing to attend at court;
  - (k) making use of technology; and
  - (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

### The court's general powers of management

3.1.—(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

(2) Except where these Rules provide otherwise, the court may—

- (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);
- (b) adjourn or bring forward a hearing;
- (c) require a party or a party's legal representative to attend the court;
- (d) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;
- (e) direct that part of any proceedings (such as a counterclaim) be dealt with as separate proceedings;
- (f) stay<sup>(GL)</sup> the whole or part of any proceedings or judgment either generally or until a specified date or event;
- (g) consolidate proceedings;
- (h) try two or more claims on the same occasion;
- (i) direct a separate trial of any issue;
- (j) decide the order in which issues are to be tried;
- (k) exclude an issue from consideration;
- (l) dismiss or give judgment on a claim after a decision on a preliminary issue;
- (m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.

(3) When the court makes an order, it may—

- (a) make it subject to conditions, including a condition to pay a sum of money into court; and
- (b) specify the consequence of failure to comply with the order or a condition.

(4) Where the court gives directions it may take into account whether or not a party has complied with any relevant pre-action protocol<sup>(GL)</sup>.

(5) The court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, practice direction or a relevant pre-action protocol.

(6) When exercising its power under paragraph (5) the court must have regard to—

- (a) the amount in dispute; and
- (b) the costs which the parties have incurred or which they may incur.

(7) A power of the court under these Rules to make an order includes a power to vary or revoke the order.

### Court officer's power to refer to a judge

3.2. Where a step is to be taken by a court officer—

- (a) the court officer may consult a judge before taking that step;
- (b) the step may be taken by a judge instead of the court officer.

- (2) Where the court makes an order, whether granting or dismissing the application, a copy of the application notice and any evidence in support must, unless the court orders otherwise, be served with the order on any party or other person—
- (a) against whom the order was made; and
  - (b) against whom the order was sought.
- (3) The order must contain a statement of the right to make an application to set aside<sup>(GL)</sup> or vary the order under rule 23.10.

**Application to set aside or vary order made without notice**

- 23.10.—(1) A person served with an order made on an application but on whom a copy of the application notice was not served may apply to the court for the order to be set aside<sup>(GL)</sup> or varied.
- (2) An application under this rule must be made within 7 days after the date on which the order was served on the person making the application.

**Power of the court to proceed in the absence of a party**

- 23.11.—(1) Where the applicant or any respondent fails to attend the hearing of an application, the court may proceed in his absence.
- (2) Where—
- (a) the applicant or any respondent fails to attend the hearing of an application; and
  - (b) the court makes an order at the hearing,
- the court may, on application or of its own initiative, re-list the application.
- (Part 40 deals with service of orders)

## PART 24

### SUMMARY JUDGMENT

#### Contents of this Part

Scope of this Part	Rule 24.1
Grounds for summary judgment	Rule 24.2
Types of proceedings in which summary judgment is available	Rule 24.3
Procedure Rule 24.4	Rule 24.5
Evidence for the purposes of a summary judgment hearing	
Court's powers when it determines a summary judgment application	Rule 24.6

#### Scope of this Part

- 24.1. This Part sets out a procedure by which the court may decide a claim or a particular issue without a trial.

### **Grounds for summary judgment**

**24.2.** The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—

- (a) it considers that—
  - (i) that claimant has no real prospect of succeeding on the claim or issue; or
  - (ii) that defendant has no real prospect of successfully defending the claim or issue; and
- (b) there is no other reason why the case or issue should be disposed of at a trial.

(Rule 3.4 makes provision for the court to strike out<sup>(GL)</sup> a statement of case or part of a statement of case if it appears that it discloses no reasonable grounds for bringing or defending a claim)

### **Types of proceedings in which summary judgment is available**

**24.3.—(1)** The court may give summary judgment against a claimant in any type of proceedings.

**(2)** The court may give summary judgment against a defendant in any type of proceedings except

- (a) proceedings for possession of residential premises against a tenant, a mortgagor or a person holding over after the end of his tenancy; and
- (b) proceedings for an admiralty claim in rem.

### **Procedure**

**24.4.—(1)** A claimant may not apply for summary judgment until the defendant against whom the application is made has filed—

- (a) an acknowledgement of service; or
  - (b) a defence,
- unless—
- (i) the court gives permission; or
  - (ii) a practice direction provides otherwise.

(Rule 10.3 sets out the period for filing an acknowledgment of service and rule 15.4 the period for filing a defence)

(2) If a claimant applies for summary judgment before a defendant against whom the application is made has filed a defence, that defendant need not file a defence before the hearing.

(3) Where a summary judgment hearing is fixed, the respondent (or the parties where the hearing is fixed of the court's own initiative) must be given at least 14 days' notice of—

- (a) the date fixed for the hearing; and
- (b) the issues which it is proposed that the court will decide at the hearing.

(Part 23 contains the general rules about how to make an application)

(Rule 3.3 applies where the court exercises its powers of its own initiative)

### **Evidence for the purposes of a summary judgment hearing**

**24.5.—(1)** If the respondent to an application for summary judgment wishes to rely on written evidence at the hearing, he must—

- (a) file the written evidence; and

- (b) serve copies on every other party to the application, at least 7 days before the summary judgment hearing.
- (2) If the applicant wishes to rely on written evidence in reply, he must—
  - (a) file the written evidence; and
  - (b) serve a copy on the respondent,
 at least 3 days before the summary judgment hearing.
- (3) Where a summary judgment hearing is fixed by the court of its own initiative—
  - (a) any party who wishes to rely on written evidence at the hearing must—
    - (i) file the written evidence; and
    - (ii) unless the court orders otherwise, serve copies on every other party to the proceedings,
 at least 7 days before the date of the hearing;
  - (b) any party who wishes to rely on written evidence at the hearing in reply to any other party's written evidence must—
    - (i) file the written evidence in reply; and
    - (ii) unless the court orders otherwise serve copies on every other party to the proceedings,
 at least 3 days before the date of the hearing.
- (4) This rule does not require written evidence—
  - (a) to be filed if it has already been filed; or
  - (b) to be served on a party on whom it has already been served.

#### Court's powers when it determines a summary judgment application

- 24.6. When the court determines a summary judgment application it may—
- (a) give directions as to the filing and service of a defence;
  - (b) give further directions about the management of the case.

(Rule 3.1(3) provides that the court may attach conditions when it makes an order)

## 25.2

### INTERIM REMEDIES

#### Contents of this Part

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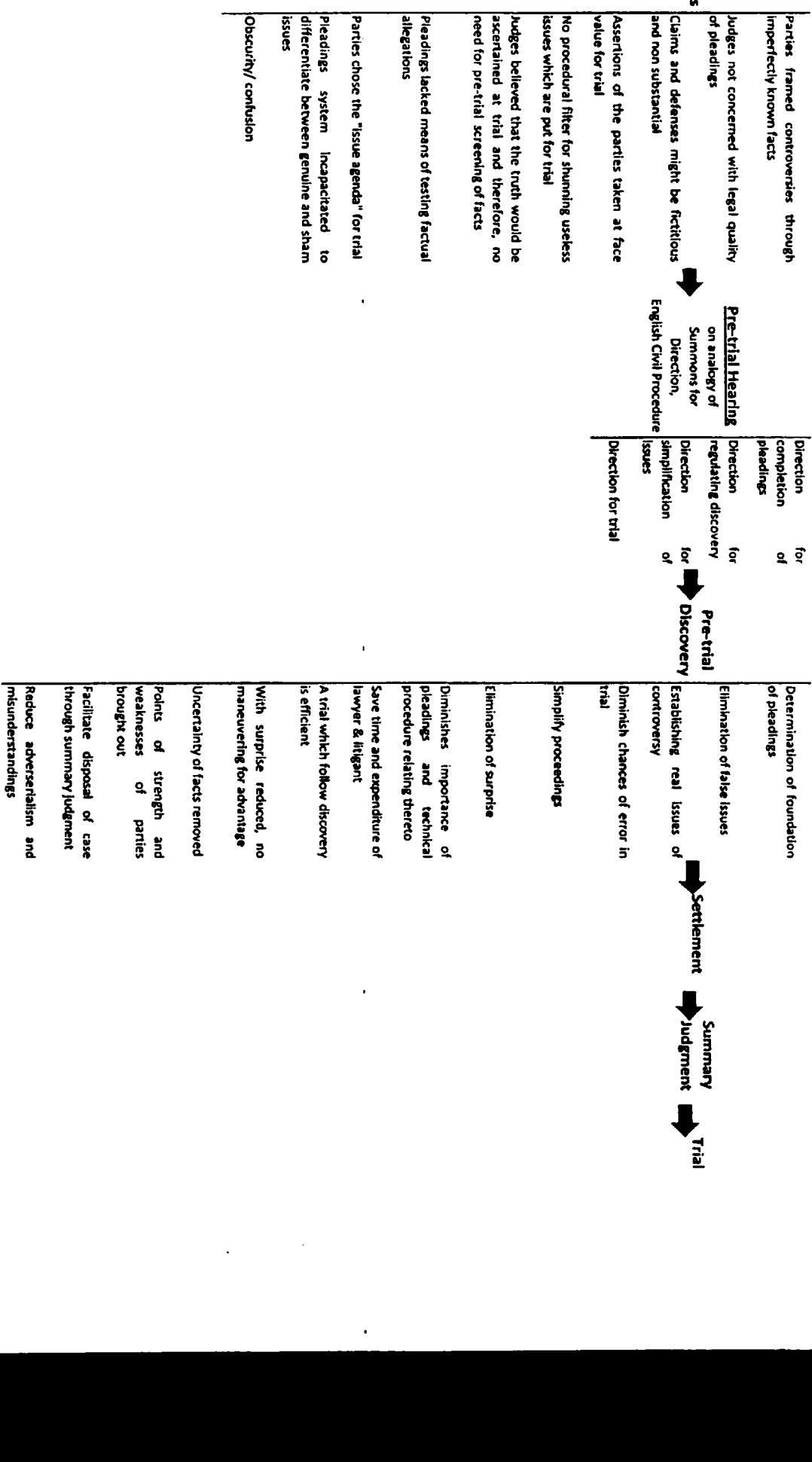
Orders for interim remedies	Rule 25.1
Time when an order for an interim remedy may be made	Rule 25.2
How to apply for an interim remedy	Rule 25.3
Application for an interim remedy where there is no related claim	Rule 25.4
Inspection of property before commencement or against a non-party	Rule 25.5

## Structural Procedural Matrix of Civil Procedure Code of UK

Pre-action Protocol-Discovery-Case Management-ADR-Summary Judgment Centric & Non Trial Bases

**THEORETICAL CONCEPTUAL FRAMEWORK OF FEDERAL RULES OF CIVIL PROCEDURE PROPOSED BY  
EDSON SUNDERLAND & CHARLES E. CLARK**

7



## STRUCTURAL PROCEDURAL PARADIGM OF CIVIL PROCEDURE IN FEDERAL COURTS, U.S.A.

*(Case Management - Discovery - ADR - Summary Judgment - Centric & Non Trial Based)*

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<b>Pleadings</b> Notice → Management & Scheduling Conference	<b>Rule 16 / Case</b> Improving quality of trial through preparation	<b>Expediting disposal of actions</b> Establishing early and continuing control of the case over the case	Improves judicial oversight to prevent abuse and delay Establishes continuous and judge over the case	Depositions	Investigation of fact Parties understand each other positions	Court mediation Court annexed Arbitration
				Discovery of facts and documents	Element of surprise reduced	Early neutral evaluation
				Admission of facts and documents	Centrality of facts	→ ADR
				Expert evidence	Less Adversarialism	Special Master Rule-53
				Report of special master	More cooperation	Judicial Settlement conducted under Rule 16, FRCP
				Cases settled under process of discovery & management	Parties know strength and weaknesses of each other case	→ Summary Judgment → Trial
				Scheduling and Planning amendments in the suits	Provide chances to the parties to structure their case	More chances of settlement
				Scheduling and planning motions	Judge decides the pace of a case as case manager	Disposal of case without resorting to trial
				Scheduling and planning discovery	Aggressive case management diminishes incidence of trial	
				Scheduling and planning trial	Encourages exchange of information between parties	
				Facilitating Settlement	Reduce discretion, and increase flexibility and cooperation	

Public Law 101-650  
101st Congress

An Act

To provide for the appointment of additional Federal circuit and district judges, and for other purposes.

Dec. 1, 1990  
[H.R. 5316]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Judicial Improvements Act of 1990".*

Judicial  
Improvements  
Act of 1990.  
Courts.  
28 USC 1 note.  
Civil Justice  
Reform Act of  
1990.

**TITLE I—CIVIL JUSTICE EXPENSE AND  
DELAY REDUCTION PLANS**

**SEC. 101. SHORT TITLE.**

This title may be cited as the "Civil Justice Reform Act of 1990".

28 USC 1 note.

**SEC. 102. FINDINGS.**

The Congress makes the following findings:

(1) The problems of cost and delay in civil litigation in any United States district court must be addressed in the context of the full range of demands made on the district court's resources by both civil and criminal matters.

(2) The courts, the litigants, the litigants' attorneys, and the Congress and the executive branch, share responsibility for cost and delay in civil litigation and its impact on access to the courts, adjudication of cases on the merits, and the ability of the civil justice system to provide proper and timely judicial relief for aggrieved parties.

(3) The solutions to problems of cost and delay must include significant contributions by the courts, the litigants, the litigants' attorneys, and by the Congress and the executive branch.

(4) In identifying, developing, and implementing solutions to problems of cost and delay in civil litigation, it is necessary to achieve a method of consultation so that individual judicial officers, litigants, and litigants' attorneys who have developed techniques for litigation management and cost and delay reduction can effectively and promptly communicate those techniques to all participants in the civil justice system.

(5) Evidence suggests that an effective litigation management and cost and delay reduction program should incorporate several interrelated principles, including—

(A) the differential treatment of cases that provides for individualized and specific management according to their needs, complexity, duration, and probable litigation careers;

(B) early involvement of a judicial officer in planning the progress of a case, controlling the discovery process, and scheduling hearings, trials, and other litigation events;

(C) regular communication between a judicial officer and attorneys during the pretrial process; and

- (D) utilization of alternative dispute resolution programs in appropriate cases.
- (6) Because the increasing volume and complexity of civil and criminal cases imposes increasingly heavy workload burdens on judicial officers, clerks of court, and other court personnel, it is necessary to create an effective administrative structure to ensure ongoing consultation and communication regarding effective litigation management and cost and delay reduction principles and techniques.

**SEC. 103. AMENDMENTS TO TITLE 28, UNITED STATES CODE.**

(a) **CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS.**—Title 28, United States Code, is amended by inserting after chapter 21 the following new chapter:

**"CHAPTER 23—CIVIL JUSTICE EXPENSE AND DELAY  
REDUCTION PLANS"**

"Sec.

- "471. Requirement for a district court civil justice expense and delay reduction plan.
- "472. Development and implementation of a civil justice expense and delay reduction plan.
- "473. Content of civil justice expense and delay reduction plans.
- "474. Review of district court action.
- "475. Periodic district court assessment.
- "476. Enhancement of judicial information dissemination.
- "477. Model civil justice expense and delay reduction plan.
- "478. Advisory groups.
- "479. Information on litigation management and cost and delay reduction.
- "480. Training programs.
- "481. Automated case information.
- "482. Definitions.

**"§ 471. Requirement for a district court civil justice expense and delay reduction plan**

"There shall be implemented by each United States district court, in accordance with this title, a civil justice expense and delay reduction plan. The plan may be a plan developed by such district court or a model plan developed by the Judicial Conference of the United States. The purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.

**"§ 472. Development and implementation of a civil justice expense and delay reduction plan**

"(a) The civil justice expense and delay reduction plan implemented by a district court shall be developed or selected, as the case may be, after consideration of the recommendations of an advisory group appointed in accordance with section 478 of this title.

"(b) The advisory group of a United States district court shall submit to the court a report, which shall be made available to the public and which shall include—

- "(1) an assessment of the matters referred to in subsection (c)(1);
- "(2) the basis for its recommendation that the district court develop a plan or select a model plan;
- "(3) recommended measures, rules and programs; and

Reports.

“(4) an explanation of the manner in which the recommended plan complies with section 473 of this title.

“(c)(1) In developing its recommendations, the advisory group of a district court shall promptly complete a thorough assessment of the state of the court’s civil and criminal dockets. In performing the assessment for a district court, the advisory group shall—

“(A) determine the condition of the civil and criminal dockets;

“(B) identify trends in case filings and in the demands being placed on the court’s resources;

“(C) identify the principal causes of cost and delay in civil litigation, giving consideration to such potential causes as court procedures and the ways in which litigants and their attorneys approach and conduct litigation; and

“(D) examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts.

“(2) In developing its recommendations, the advisory group of a district court shall take into account the particular needs and circumstances of the district court, litigants in such court, and the litigants’ attorneys.

“(3) The advisory group of a district court shall ensure that its recommended actions include significant contributions to be made by the court, the litigants, and the litigants’ attorneys toward reducing cost and delay and thereby facilitating access to the courts.

“(d) The chief judge of the district court shall transmit a copy of the plan implemented in accordance with subsection (a) and the report prepared in accordance with subsection (b) of this section to—

“(1) the Director of the Administrative Office of the United States Courts;

“(2) the judicial council of the circuit in which the district court is located; and

“(3) the chief judge of each of the other United States district courts located in such circuit.

**“§ 473. Content of civil justice expense and delay reduction plans**

“(a) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction:

“(1) systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case;

“(2) early and ongoing control of the pretrial process through involvement of a judicial officer in—

“(A) assessing and planning the progress of a case;

“(B) setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint, unless a judicial officer certifies that—

“(i) the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or

“(ii) the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases;

“(C) controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion; and

“(D) setting, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition;

“(3) for all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences at which the presiding judicial officer—

“(A) explores the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation;

“(B) identifies or formulates the principal issues in contention and, in appropriate cases, provides for the staged resolution or bifurcation of issues for trial consistent with Rule 42(b) of the Federal Rules of Civil Procedure;

“(C) prepares a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and with any procedures a district court may develop to—

“(i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and

“(ii) phase discovery into two or more stages; and

“(D) sets, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition;

“(4) encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices;

“(5) conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion; and

“(6) authorization to refer appropriate cases to alternative dispute resolution programs that—

“(A) have been designated for use in a district court; or

“(B) the court may make available, including mediation, minitrial, and summary jury trial.

“(b) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following litigation management and cost and delay reduction techniques:

“(1) a requirement that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so;

“(2) a requirement that each party be represented at each pretrial conference by an attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters;

"(3) a requirement that all requests for extensions of deadlines for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request;

"(4) a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation;

"(5) a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference; and

"(6) such other features as the district court considers appropriate after considering the recommendations of the advisory group referred to in section 472(a) of this title.

"(c) Nothing in a civil justice expense and delay reduction plan relating to the settlement authority provisions of this section shall alter or conflict with the authority of the Attorney General to conduct litigation on behalf of the United States, or any delegation of the Attorney General.

#### **"§ 474. Review of district court action**

"(a)(1) The chief judges of each district court in a circuit and the chief judge of the court of appeals for such circuit shall, as a committee—

"(A) review each plan and report submitted pursuant to section 472(d) of this title; and

"(B) make such suggestions for additional actions or modified actions of that district court as the committee considers appropriate for reducing cost and delay in civil litigation in the district court.

"(2) The chief judge of a court of appeals and the chief judge of a district court may designate another judge of such court to perform the chief judge's responsibilities under paragraph (1) of this subsection.

"(b) The Judicial Conference of the United States—

"(1) shall review each plan and report submitted by a district court pursuant to section 472(d) of this title; and

"(2) may request the district court to take additional action if the Judicial Conference determines that such court has not adequately responded to the conditions relevant to the civil and criminal dockets of the court or to the recommendations of the district court's advisory group.

#### **"§ 475. Periodic district court assessment**

"After developing or selecting a civil justice expense and delay reduction plan, each United States district court shall assess annually the condition of the court's civil and criminal dockets with a view to determining appropriate additional actions that may be taken by the court to reduce cost and delay in civil litigation and to improve the litigation management practices of the court. In performing such assessment, the court shall consult with an advisory group appointed in accordance with section 478 of this title.

#### **"§ 476. Enhancement of judicial information dissemination**

"(a) The Director of the Administrative Office of the United States Courts shall prepare a semiannual report, available to the public, that discloses for each judicial officer—

Reports.

“(1) the number of motions that have been pending for more than six months and the name of each case in which such motion has been pending;

“(2) the number of bench trials that have been submitted for more than six months and the name of each case in which such trials are under submission; and

“(3) the number and names of cases that have not been terminated within three years after filing.

“(b) To ensure uniformity of reporting, the standards for categorization or characterization of judicial actions to be prescribed in accordance with section 481 of this title shall apply to the semi-annual report prepared under subsection (a).

**“§ 477. Model civil justice expense and delay reduction plan**

“(a)(1) Based on the plans developed and implemented by the United States district courts designated as Early Implementation District Courts pursuant to section 103(c) of the Civil Justice Reform Act of 1990, the Judicial Conference of the United States may develop one or more model civil justice expense and delay reduction plans. Any such model plan shall be accompanied by a report explaining the manner in which the plan complies with section 473 of this title.

“(2) The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations to the Judicial Conference regarding the development of any model civil justice expense and delay reduction plan.

“(b) The Director of the Administrative Office of the United States Courts shall transmit to the United States district courts and to the Committees on the Judiciary of the Senate and the House of Representatives copies of any model plan and accompanying report.

**“§ 478. Advisory groups**

“(a) Within ninety days after the date of the enactment of this chapter, the advisory group required in each United States district court in accordance with section 472 of this title shall be appointed by the chief judge of each district court, after consultation with the other judges of such court.

“(b) The advisory group of a district court shall be balanced and include attorneys and other persons who are representative of major categories of litigants in such court, as determined by the chief judge of such court.

“(c) Subject to subsection (d), in no event shall any member of the advisory group serve longer than four years.

“(d) Notwithstanding subsection (c), the United States Attorney for a judicial district, or his or her designee, shall be a permanent member of the advisory group for that district court.

“(e) The chief judge of a United States district court may designate a reporter for each advisory group, who may be compensated in accordance with guidelines established by the Judicial Conference of the United States.

“(f) The members of an advisory group of a United States district court and any person designated as a reporter for such group shall be considered as independent contractors of such court when in the performance of official duties of the advisory group and may not, solely by reason of service on or for the advisory group, be prohibited from practicing law before such court.

Reports.

**“§ 479. Information on litigation management and cost and delay reduction**

“(a) Within four years after the date of the enactment of this chapter, the Judicial Conference of the United States shall prepare a comprehensive report on all plans received pursuant to section 472(d) of this title. The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations regarding such report to the Judicial Conference during the preparation of the report. The Judicial Conference shall transmit copies of the report to the United States district courts and to the Committees on the Judiciary of the Senate and the House of Representatives.

Reports.

“(b) The Judicial Conference of the United States shall, on a continuing basis—

“(1) study ways to improve litigation management and dispute resolution services in the district courts; and

“(2) make recommendations to the district courts on ways to improve such services.

“(c)(1) The Judicial Conference of the United States shall prepare, periodically revise, and transmit to the United States district courts a Manual for Litigation Management and Cost and Delay Reduction. The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations regarding the preparation of and any subsequent revisions to the Manual.

Government publications.

“(2) The Manual shall be developed after careful evaluation of the plans implemented under section 472 of this title, the demonstration programs conducted under section 104 of the Civil Justice Reform Act of 1990, and the programs conducted under section 105 of the Civil Justice Reform Act of 1990.

“(3) The Manual shall contain a description and analysis of the litigation management, cost and delay reduction principles and techniques, and alternative dispute resolution programs considered most effective by the Judicial Conference, the Director of the Federal Judicial Center, and the Director of the Administrative Office of the United States Courts.

**“§ 480. Training programs**

“The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts shall develop and conduct comprehensive education and training programs to ensure that all judicial officers, clerks of court, courtroom deputies, and other appropriate court personnel are thoroughly familiar with the most recent available information and analyses about litigation management and other techniques for reducing cost and expediting the resolution of civil litigation. The curriculum of such training programs shall be periodically revised to reflect such information and analyses.

**“§ 481. Automated case information**

“(a) The Director of the Administrative Office of the United States Courts shall ensure that each United States district court has the automated capability readily to retrieve information about the status of each case in such court.

“(b)(1) In carrying out subsection (a), the Director shall prescribe—

"(A) the information to be recorded in district court automated systems; and

"(B) standards for uniform categorization or characterization of judicial actions for the purpose of recording information on judicial actions in the district court automated systems.

"(2) The uniform standards prescribed under paragraph (1)(B) of this subsection shall include a definition of what constitutes a dismissal of a case and standards for measuring the period for which a motion has been pending.

**Records.** " (c) Each United States district court shall record information as prescribed pursuant to subsection (b) of this section.

#### **§ 482. Definitions**

"As used in this chapter, the term 'judicial officer' means a United States district court judge or a United States magistrate.".

**28 USC 471 note.** (b) **IMPLEMENTATION.**—(1) Except as provided in section 105 of this Act, each United States district court shall, within three years after the date of the enactment of this title, implement a civil justice expense and delay reduction plan under section 471 of title 28, United States Code, as added by subsection (a).

(2) The requirements set forth in sections 471 through 478 of title 28, United States Code, as added by subsection (a), shall remain in effect for seven years after the date of the enactment of this title.

**28 USC 471 note.** (c) **EARLY IMPLEMENTATION DISTRICT COURTS.**—  
(1) Any United States district court that, no earlier than June 30, 1991, and no later than December 31, 1991, develops and implements a civil justice expense and delay reduction plan under chapter 23 of title 28, United States Code, as added by subsection (a), shall be designated by the Judicial Conference of the United States as an Early Implementation District Court.

(2) The chief judge of a district so designated may apply to the Judicial Conference for additional resources, including technological and personnel support and information systems, necessary to implement its civil justice expense and delay reduction plan. The Judicial Conference may provide such resources out of funds appropriated pursuant to section 106(a).

**Reports.** (3) Within 18 months after the date of the enactment of this title, the Judicial Conference shall prepare a report on the plans developed and implemented by the Early Implementation District Courts.

(4) The Director of the Administrative Office of the United States Courts shall transmit to the United States district courts and to the Committees on the Judiciary of the Senate and House of Representatives—

(A) copies of the plans developed and implemented by the Early Implementation District Courts;

(B) the reports submitted by such district courts pursuant to section 472(d) of title 28, United States Code, as added by subsection (a); and

(C) the report prepared in accordance with paragraph (3) of this subsection.

(d) **TECHNICAL AND CONFORMING AMENDMENT.**—The table of chapters for part I of title 28, United States Code, is amended by adding at the end thereof the following:

"23. Civil justice expense and delay reduction plans..... 471".

## PUBLIC LAW 101-650—DEC. 1, 1990

104 STAT. 5097

## SEC. 104. DEMONSTRATION PROGRAM.

28 USC 471 note.

(a) IN GENERAL.—(1) During the 4-year period beginning on January 1, 1991, the Judicial Conference of the United States shall conduct a demonstration program in accordance with subsection (b).

(2) A district court participating in the demonstration program may also be an Early Implementation District Court under section 103(c).

(b) PROGRAM REQUIREMENT.—(1) The United States District Court for the Western District of Michigan and the United States District Court for the Northern District of Ohio shall experiment with systems of differentiated case management that provide specifically for the assignment of cases to appropriate processing tracks that operate under distinct and explicit rules, procedures, and time-frames for the completion of discovery and for trial.

(2) The United States District Court for the Northern District of California, the United States District Court for the Northern District of West Virginia, and the United States District Court for the Western District of Missouri shall experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution, that such district courts and the Judicial Conference of the United States shall select.

(c) STUDY OR RESULTS.—The Judicial Conference of the United States, in consultation with the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall study the experience of the district courts under the demonstration program.

(d) REPORT.—Not later than December 31, 1995, the Judicial Conference of the United States shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report of the results of the demonstration program.

## SEC. 105. PILOT PROGRAM.

28 USC 471 note.

(a) IN GENERAL.—(1) During the 4-year period beginning on January 1, 1991, the Judicial Conference of the United States shall conduct a pilot program in accordance with subsection (b).

(2) A district court participating in the pilot program shall be designated as an Early Implementation District Court under section 103(c).

(b) PROGRAM REQUIREMENTS.—(1) Ten district courts (in this section referred to as "Pilot Districts") designated by the Judicial Conference of the United States shall implement expense and delay reduction plans under chapter 28 of title 28, United States Code (as added by section 103(a)), not later than December 31, 1991. In addition to complying with all other applicable provisions of chapter 28 of title 28, United States Code (as added by section 103(a)), the expense and delay reduction plans implemented by the Pilot Districts shall include the 6 principles and guidelines of litigation management and cost and delay reduction identified in section 473(a) of title 28, United States Code.

(2) At least 5 of the Pilot Districts designated by the Judicial Conference shall be judicial districts encompassing metropolitan areas.

(3) The expense and delay reduction plans implemented by the Pilot Districts shall remain in effect for a period of 3 years. At the end of that 3-year period, the Pilot Districts shall no longer be required to include, in their expense and delay reduction plans, the

6 principles and guidelines of litigation management and cost and delay reduction described in paragraph (1).

(c) **PROGRAM STUDY REPORT.**—(1) Not later than December 31, 1995, the Judicial Conference shall submit to the Committees on the Judiciary of the Senate and House of Representatives a report on the results of the pilot program under this section that includes an assessment of the extent to which costs and delays were reduced as a result of the program. The report shall compare those results to the impact on costs and delays in ten comparable judicial districts for which the application of section 473(a) of title 28, United States Code, had been discretionary. That comparison shall be based on a study conducted by an independent organization with expertise in the area of Federal court management.

(2)(A) The Judicial Conference shall include in its report a recommendation as to whether some or all district courts should be required to include, in their expense and delay reduction plans, the 6 principles and guidelines of litigation management and cost and delay reduction identified in section 473(a) of title 28, United States Code.

(B) If the Judicial Conference recommends in its report that some or all district courts be required to include such principles and guidelines in their expense and delay reduction plans, the Judicial Conference shall initiate proceedings for the prescription of rules implementing its recommendation, pursuant to chapter 131 of title 28, United States Code.

(C) If in its report the Judicial Conference does not recommend an expansion of the pilot program under subparagraph (A), the Judicial Conference shall identify alternative, more effective cost and delay reduction programs that should be implemented in light of the findings of the Judicial Conference in its report, and the Judicial Conference may initiate proceedings for the prescription of rules implementing its recommendation, pursuant to chapter 131 of title 28, United States Code.

#### SEC. 106. AUTHORIZATION.

(a) **EARLY IMPLEMENTATION DISTRICT COURTS.**—There is authorized to be appropriated not more than \$15,000,000 for fiscal year 1991 to carry out the resource and planning needs necessary for the implementation of section 103(c).

(b) **IMPLEMENTATION OF CHAPTER 23.**—There is authorized to be appropriated not more than \$5,000,000 for fiscal year 1991 to implement chapter 23 of title 28, United States Code.

(c) **DEMONSTRATION PROGRAM.**—There is authorized to be appropriated not more than \$5,000,000 for fiscal year 1991 to carry out the provisions of section 104.

Federal  
Judgeship  
Act of 1990.  
28 USC 1 note.

President.  
28 USC 44 note.

## TITLE II—FEDERAL JUDGESHIPS

#### SECTION 201. SHORT TITLE.

This title may be cited as the “Federal Judgeship Act of 1990”.

#### SEC. 202. CIRCUIT JUDGES FOR THE CIRCUIT COURT OF APPEALS.

(a) **IN GENERAL.**—The President shall appoint, by and with the advice and consent of the Senate—

(1) 2 additional circuit judges for the third circuit court of appeals;

45

Public Law 105-315  
105th Congress

An Act

To amend title 28, United States Code, with respect to the use of alternative dispute resolution processes in United States district courts, and for other purposes

Oct. 30, 1998  
[H.R. 3528]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

Alternative  
Dispute  
Resolution Act of  
1998.  
28 USC 1 note.

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Alternative Dispute Resolution Act of 1998".

28 USC 651 note.

**SEC. 2. FINDINGS AND DECLARATION OF POLICY.**

28 USC 651 note.

Congress finds that—

(1) alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements;

(2) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, minitrials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently; and

(3) the continued growth of Federal appellate court-annexed mediation programs suggests that this form of alternative dispute resolution can be equally effective in resolving disputes in the Federal trial courts; therefore, the district courts should consider including mediation in their local alternative dispute resolution programs.

**SEC. 3. ALTERNATIVE DISPUTE RESOLUTION PROCESSES TO BE AUTHORIZED IN ALL DISTRICT COURTS.**

Section 651 of title 28, United States Code, is amended to read as follows:

**"§ 651. Authorization of alternative dispute resolution**

"(a) DEFINITION.—For purposes of this chapter, an alternative dispute resolution process includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration as provided in sections 654 through 658.

**"(b) AUTHORITY.**—Each United States district court shall authorize, by local rule adopted under section 2071(a), the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy, in accordance with this chapter, except that the use of arbitration may be authorized only as provided in section 654. Each United States district court shall devise and implement its own alternative dispute resolution program, by local rule adopted under section 2071(a), to encourage and promote the use of alternative dispute resolution in its district.

**"(c) EXISTING ALTERNATIVE DISPUTE RESOLUTION PROGRAMS.**—In those courts where an alternative dispute resolution program is in place on the date of the enactment of the Alternative Dispute Resolution Act of 1998, the court shall examine the effectiveness of that program and adopt such improvements to the program as are consistent with the provisions and purposes of this chapter.

**"(d) ADMINISTRATION OF ALTERNATIVE DISPUTE RESOLUTION PROGRAMS.**—Each United States district court shall designate an employee, or a judicial officer, who is knowledgeable in alternative dispute resolution practices and processes to implement, administer, oversee, and evaluate the court's alternative dispute resolution program. Such person may also be responsible for recruiting, screening, and training attorneys to serve as neutrals and arbitrators in the court's alternative dispute resolution program.

**"(e) TITLE 9 NOT AFFECTED.**—This chapter shall not affect title 9, United States Code.

**"(f) PROGRAM SUPPORT.**—The Federal Judicial Center and the Administrative Office of the United States Courts are authorized to assist the district courts in the establishment and improvement of alternative dispute resolution programs by identifying particular practices employed in successful programs and providing additional assistance as needed and appropriate.”

#### SEC. 4. JURISDICTION.

Section 652 of title 28, United States Code, is amended to read as follows:

#### “§ 652. Jurisdiction

**"(a) CONSIDERATION OF ALTERNATIVE DISPUTE RESOLUTION IN APPROPRIATE CASES.**—Notwithstanding any provision of law to the contrary and except as provided in subsections (b) and (c), each district court shall, by local rule adopted under section 2071(a), require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation. Each district court shall provide litigants in all civil cases with at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, minitrial, and arbitration as authorized in sections 654 through 658. Any district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration.

**"(b) ACTIONS EXEMPTED FROM CONSIDERATION OF ALTERNATIVE DISPUTE RESOLUTION.**—Each district court may exempt from the requirements of this section specific cases or categories of cases in which use of alternative dispute resolution would not be appropriate. In defining these exemptions, each district court shall consult

with members of the bar, including the United States Attorney for that district.

**(c) AUTHORITY OF THE ATTORNEY GENERAL.**—Nothing in this section shall alter or conflict with the authority of the Attorney General to conduct litigation on behalf of the United States, with the authority of any Federal agency authorized to conduct litigation in the United States courts, or with any delegation of litigation authority by the Attorney General.

**(d) CONFIDENTIALITY PROVISIONS.**—Until such time as rules are adopted under chapter 131 of this title providing for the confidentiality of alternative dispute resolution processes under this chapter, each district court shall, by local rule adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.”.

**SEC. 5. MEDIATORS AND NEUTRAL EVALUATORS.**

Section 653 of title 28, United States Code, is amended to read as follows:

**“§ 653. Neutrals**

**(a) PANEL OF NEUTRALS.**—Each district court that authorizes the use of alternative dispute resolution processes shall adopt appropriate processes for making neutrals available for use by the parties for each category of process offered. Each district court shall promulgate its own procedures and criteria for the selection of neutrals on its panels.

**(b) QUALIFICATIONS AND TRAINING.**—Each person serving as a neutral in an alternative dispute resolution process should be qualified and trained to serve as a neutral in the appropriate alternative dispute resolution process. For this purpose, the district court may use, among others, magistrate judges who have been trained to serve as neutrals in alternative dispute resolution processes, professional neutrals from the private sector, and persons who have been trained to serve as neutrals in alternative dispute resolution processes. Until such time as rules are adopted under chapter 131 of this title relating to the disqualification of neutrals, each district court shall issue rules under section 2071(a) relating to the disqualification of neutrals (including, where appropriate, disqualification under section 455 of this title, other applicable law, and professional responsibility standards).”.

**SEC. 6. ACTIONS REFERRED TO ARBITRATION.**

Section 654 of title 28, United States Code, is amended to read as follows:

**“§ 654. Arbitration**

**(a) REFERRAL OF ACTIONS TO ARBITRATION.**—Notwithstanding any provision of law to the contrary and except as provided in subsections (a), (b), and (c) of section 652 and subsection (d) of this section, a district court may allow the referral to arbitration of any civil action (including any adversary proceeding in bankruptcy) pending before it when the parties consent, except that referral to arbitration may not be made where—

“(1) the action is based on an alleged violation of a right secured by the Constitution of the United States;

“(2) jurisdiction is based in whole or in part on section 1343 of this title; or

"(3) the relief sought consists of money damages in an amount greater than \$150,000.

"(b) SAFEGUARDS IN CONSENT CASES.—Until such time as rules are adopted under chapter 131 of this title relating to procedures described in this subsection, the district court shall, by local rule adopted under section 2071(a), establish procedures to ensure that any civil action in which arbitration by consent is allowed under subsection (a)—

"(1) consent to arbitration is freely and knowingly obtained; and

"(2) no party or attorney is prejudiced for refusing to participate in arbitration.

"(c) PRESUMPTIONS.—For purposes of subsection (a)(3), a district court may presume damages are not in excess of \$150,000 unless counsel certifies that damages exceed such amount.

"(d) EXISTING PROGRAMS.—Nothing in this chapter is deemed to affect any program in which arbitration is conducted pursuant to section title IX of the Judicial Improvements and Access to Justice Act (Public Law 100-702), as amended by section 1 of Public Law 105-53."

#### SEC. 7. ARBITRATORS.

Section 655 of title 28, United States Code, is amended to read as follows:

##### “§ 655. Arbitrators

"(a) POWERS OF ARBITRATORS.—An arbitrator to whom an action is referred under section 654 shall have the power, within the judicial district of the district court which referred the action to arbitration—

"(1) to conduct arbitration hearings;

"(2) to administer oaths and affirmations; and

"(3) to make awards.

"(b) STANDARDS FOR CERTIFICATION.—Each district court that authorizes arbitration shall establish standards for the certification of arbitrators and shall certify arbitrators to perform services in accordance with such standards and this chapter. The standards shall include provisions requiring that any arbitrator—

"(1) shall take the oath or affirmation described in section 453; and

"(2) shall be subject to the disqualification rules under section 455.

"(c) IMMUNITY.—All individuals serving as arbitrators in an alternative dispute resolution program under this chapter are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.”.

#### SEC. 8. SUBPOENAS.

Section 656 of title 28, United States Code, is amended to read as follows:

##### “§ 656. Subpoenas

"Rule 45 of the Federal Rules of Civil Procedure (relating to subpoenas) applies to subpoenas for the attendance of witnesses and the production of documentary evidence at an arbitration hearing under this chapter.”.

**SEC. 9. ARBITRATION AWARD AND JUDGMENT.**

Section 657 of title 28, United States Code, is amended to read as follows:

**“§ 657. Arbitration award and judgment**

**“(a) FILING AND EFFECT OF ARBITRATION AWARD.**—An arbitration award made by an arbitrator under this chapter, along with proof of service of such award on the other party by the prevailing party or by the plaintiff, shall be filed promptly after the arbitration hearing is concluded with the clerk of the district court that referred the case to arbitration. Such award shall be entered as the judgment of the court after the time has expired for requesting a trial de novo. The judgment so entered shall be subject to the same provisions of law and shall have the same force and effect as a judgment of the court in a civil action, except that the judgment shall not be subject to review in any other court by appeal or otherwise.

**“(b) SEALING OF ARBITRATION AWARD.**—The district court shall provide, by local rule adopted under section 2071(a), that the contents of any arbitration award made under this chapter shall not be made known to any judge who might be assigned to the case until the district court has entered final judgment in the action or the action has otherwise terminated.

**“(c) TRIAL DE NOVO OF ARBITRATION AWARDS.**—

**“(1) TIME FOR FILING DEMAND.**—Within 30 days after the filing of an arbitration award with a district court under subsection (a), any party may file a written demand for a trial de novo in the district court.

**“(2) ACTION RESTORED TO COURT DOCKET.**—Upon a demand for a trial de novo, the action shall be restored to the docket of the court and treated for all purposes as if it had not been referred to arbitration.

**“(3) EXCLUSION OF EVIDENCE OF ARBITRATION.**—The court shall not admit at the trial de novo any evidence that there has been an arbitration proceeding, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding, unless—

- “(A) the evidence would otherwise be admissible in the court under the Federal Rules of Evidence; or
- “(B) the parties have otherwise stipulated.”

**SEC. 10. COMPENSATION OF ARBITRATORS AND NEUTRALS.**

Section 658 of title 28, United States Code, is amended to read as follows:

**“§ 658. Compensation of arbitrators and neutrals**

**“(a) COMPENSATION.**—The district court shall, subject to regulations approved by the Judicial Conference of the United States, establish the amount of compensation, if any, that each arbitrator or neutral shall receive for services rendered in each case under this chapter.

**“(b) TRANSPORTATION ALLOWANCES.**—Under regulations prescribed by the Director of the Administrative Office of the United States Courts, a district court may reimburse arbitrators and other neutrals for actual transportation expenses necessarily incurred in the performance of duties under this chapter.” Regulations.

28 USC 651 note. SEC. 11. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out chapter 44 of title 28, United States Code, as amended by this Act.

SEC. 12. CONFORMING AMENDMENTS.

(a) LIMITATION ON MONEY DAMAGES.—Section 901 of the Judicial Improvements and Access to Justice Act (28 U.S.C. 652 note), is amended by striking subsection (c).

(b) OTHER CONFORMING AMENDMENTS.—(1) The chapter heading for chapter 44 of title 28, United States Code, is amended to read as follows:

**"CHAPTER 44—ALTERNATIVE DISPUTE RESOLUTION".**

(2) The table of contents for chapter 44 of title 28, United States Code, is amended to read as follows:

"Sec.  
"651. Authorization of alternative dispute resolution.  
"652. Jurisdiction.  
"653. Neutrals.  
"654. Arbitration.  
"655. Arbitrators.  
"656. Subpoenas.  
"657. Arbitration award and judgment.  
"658. Compensation of arbitrators and neutrals."

(3) The item relating to chapter 44 in the table of chapters for Part III of title 28, United States Code, is amended to read as follows:

"44. Alternative Dispute Resolution ..... 651".

Approved October 30, 1998.

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**LEGISLATIVE HISTORY—H.R. 3528:**

HOUSE REPORTS: No. 105-487 (Comm. on the Judiciary).  
CONGRESSIONAL RECORD, Vol. 144 (1998):

Apr. 21, considered and passed House.  
Oct. 7, considered and passed Senate, amended.  
Oct. 10, House concurred in Senate amendments.

FEDERAL RULES  
OF  
CIVIL PROCEDURE

WITH FORMS

DECEMBER 1, 2013



Printed for the use  
of  
THE COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES

113TH CONGRESS  
1st Session

COMMITTEE PRINT

No. 3

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## FOREWORD

This document contains the Federal Rules of Civil Procedure together with forms, as amended to December 1, 2013. The rules and forms have been promulgated and amended by the United States Supreme Court pursuant to law, and further amended by Acts of Congress. This document has been prepared by the Committee in response to the need for an official up-to-date document containing the latest amendments to the rules.

For the convenience of the user, where a rule has been amended a reference to the date the amendment was promulgated and the date the amendment became effective follows the text of the rule.

The Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure, Judicial Conference of the United States, prepared notes explaining the purpose and intent of the amendments to the rules. The Committee Notes may be found in the Appendix to Title 28, United States Code, following the particular rule to which they relate.



*Chairman, Committee on the Judiciary.*

DECEMBER 1, 2013.

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(12)

**RULES OF CIVIL PROCEDURE  
FOR THE  
UNITED STATES DISTRICT COURTS<sup>1</sup>**

**Effective September 16, 1938, as amended to December 1, 2013**

**TITLE I. SCOPE OF RULES; FORM OF ACTION**

**Rule 1. Scope and Purpose**

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 30, 2007, eff. Dec. 1, 2007.)

**Rule 2. One Form of Action**

There is one form of action—the civil action.

(As amended Apr. 30, 2007, eff. Dec. 1, 2007.)

**TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS,  
PLEADINGS, MOTIONS, AND ORDERS**

**Rule 3. Commencing an Action**

A civil action is commenced by filing a complaint with the court.

(As amended Apr. 30, 2007, eff. Dec. 1, 2007.)

**Rule 4. Summons**

**(a) CONTENTS; AMENDMENTS.**

- (1) *Contents.* A summons must:
- (A) name the court and the parties;
  - (B) be directed to the defendant;
  - (C) state the name and address of the plaintiff's attorney or—if unrepresented—of the plaintiff;
  - (D) state the time within which the defendant must appear and defend;
  - (E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;
  - (F) be signed by the clerk; and
  - (G) bear the court's seal.

- (2) *Amendments.* The court may permit a summons to be amended.

<sup>1</sup>Title amended December 29, 1948, effective October 20, 1949.

Amendment  
of Civil Procedure  
Committee

**Rule 16****TITLE 28, APPENDIX—RULES OF CIVIL PROCEDURE**

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15(c)(3) of the Federal Rules of Civil Procedure as transmitted to Congress by the Supreme Court to become effective on Dec. 1, 1991, is amended. See 1991 Amendment note below.

**NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT**

The amendment conforms the cross reference to Rule 4 to the revision of that rule.

**COMMITTEE NOTES ON RULES—2007 AMENDMENT**

The language of Rule 15 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 15(c)(3)(A) called for notice of the "institution" of the action. Rule 15(c)(3)(C)(i) omits the reference to "institution" as potentially confusing. What counts is that the party to be brought in have notice of the existence of the action, whether or not the notice includes details as to its "institution."

**COMMITTEE NOTES ON RULES—2009 AMENDMENT**

Rule 15(a)(1) is amended to make three changes in the time allowed to make one amendment as a matter of course.

Former Rule 15(a) addressed amendment of a pleading to which a responsive pleading is required by distinguishing between the means used to challenge the pleading. Serving a responsive pleading terminated the right to amend. Serving a motion attacking the pleading did not terminate the right to amend, because a motion is not a "pleading" as defined in Rule 7. The right to amend survived beyond decision of the motion unless the decision expressly cut off the right to amend.

The distinction drawn in former Rule 15(a) is changed in two ways. First, the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f). This provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim. It also should advance other pretrial proceedings.

Second, the right to amend once as a matter of course is no longer terminated by service of a responsive pleading. The responsive pleading may point out issues that the original pleader had not considered and persuade the pleader that amendment is wise. Just as amendment was permitted by former Rule 15(a) in response to a motion, so the amended rule permits one amendment as a matter of course in response to a responsive pleading. The right is subject to the same 21-day limit as the right to amend in response to a motion.

The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period.

Finally, amended Rule 15(a)(1) extends from 20 to 21 days the period to amend a pleading to which no responsive pleading is allowed and omits the provision that cuts off the right if the action is on the trial calendar. Rule 40 no longer refers to a trial calendar, and many courts have abandoned formal trial calendars. It is more effective to rely on scheduling orders or other pretrial directions to establish time limits for amendment in the few situations that otherwise might allow one amendment as a matter of course at a time that would disrupt trial preparations. Leave to amend still can be sought under Rule 15(a)(2), or at and after trial under Rule 16(b).

Abrogation of Rule 13(f) establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim.

Amended Rule 15(a)(3) extends from 10 to 14 days the period to respond to an amended pleading.

**AMENDMENT BY PUBLIC LAW**

1991—Subd. (c)(3). Pub. L. 102-198 substituted "Rule 4(j)" for "Rule 4(m)".

**Rule 16. Pretrial Conferences; Scheduling; Management**

(a) **PURPOSES OF A PRETRIAL CONFERENCE.** In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

- (1) expediting disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation; and
- (5) facilitating settlement.

**(b) SCHEDULING.**

(1) **Scheduling Order.** Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—must issue a scheduling order:

- (A) after receiving the parties' report under Rule 26(f); or
- (B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.

(2) **Time to Issue.** The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

**(3) Contents of the Order.**

**(A) Required Contents.** The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

**(B) Permitted Contents.** The scheduling order may:

- (i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);
- (ii) modify the extent of discovery;
- (iii) provide for disclosure or discovery of electronically stored information;
- (iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;
- (v) set dates for pretrial conferences and for trial; and
- (vi) include other appropriate matters.

(4) **Modifying a Schedule.** A schedule may be modified only for good cause and with the judge's consent.

**(c) ATTENDANCE AND MATTERS FOR CONSIDERATION AT A PRETRIAL CONFERENCE.**

(1) **Attendance.** A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its rep-

representative be present or reasonably available by other means to consider possible settlement.

(2) *Matters for Consideration.* At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(o);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) **PRETRIAL ORDERS.** After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) **FINAL PRETRIAL CONFERENCE AND ORDERS.** The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

#### (f) SANCTIONS.

(1) *In General.* On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate—or does not participate in good faith—in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) *Imposing Fees and Costs.* Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007.)

#### NOTES OF ADVISORY COMMITTEE ON RULES—1937

1. Similar rules of pre-trial procedure are now in force in Boston, Cleveland, Detroit, and Los Angeles, and a rule substantially like this one has been proposed for the urban centers of New York state. For a discussion of the successful operation of pre-trial procedure in relieving the congested condition of trial calendars of the courts in such cities and for the proposed New York plan, see *A Proposal for Minimizing Calendar Delay in Jury Cases* (Dec. 1936—published by The New York Law Society); *Pre-Trial Procedure and Administration*, Third Annual Report of the Judicial Council of the State of New York (1937), pp. 297-343; *Report of the Commission on the Administration of Justice in New York State* (1934), pp. (288)-(290). See also *Pre-Trial Procedure in the Wayne Circuit Court*, Detroit, Michigan, Sixth Annual Report of the Judicial Council of Michigan (1936), pp. 63-75; and Sunderland, *The Theory and Practice of Pre-Trial Procedure* (Dec. 1937) 36 Mich.L.Rev. 215-226, 21 J.Am.Jud.Soc. 125. Compare the English procedure known as the "summons for directions," *English Rules Under the Judicature Act* (*The Annual Practice* 1937) O. 38a; and a similar procedure in New Jersey, N.J.Comp.Stat. (2 Cum.Supp. 1911-1924); N.J. Supreme Court Rules, 2 N.J.Mis.R. (1924) 1230, Rules 94, 92, 93, 95 (the last three as amended 1933); 11 N.J.Mis.R. (1933) 655.

2. Compare the similar procedure under Rule 56(d) (Summary Judgment—Case Not Fully Adjudicated on Motion), Rule 12(g) (Consolidation of Motions), by requiring to some extent the consolidation of motions dealing with matters preliminary to trial, is a step in the same direction. In connection with clause (5) of this rule, see Rules 53(h) (Matters: Reference) and 53(e)(3) (Master's Report; In Jury Actions).

#### NOTES OF ADVISORY COMMITTEE ON RULES—1983

##### AMENDMENT

##### *Introduction*

Rule 16 has not been amended since the Federal Rules were promulgated in 1938. In many respects, the rule has been a success. For example, there is evidence that pretrial conferences may improve the quality of justice rendered in the federal courts by sharpening the preparation and presentation of cases, tending to eliminate trial surprises, and improving, as well as facilitating, the settlement process. See G Wright & Miller, *Federal Practice and Procedure: Civil* §1522 (1971). However, in other respects particularly with regard to case management, the rule has not always been as helpful as it

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might have been. Thus there has been a widespread feeling that amendment is necessary to encourage pretrial management that meets the needs of modern litigation. See *Report of the National Commission for the Review of Antitrust Laws and Procedures* (1979).

Major criticism of Rule 16 has centered on the fact that its application can result in over-regulation of some cases and under-regulation of others. In simple, run-of-the-mill cases, attorneys have found pretrial requirements burdensome. It is claimed that over-administration leads to a series of mini-trials that result in a waste of an attorney's time and needless expense to a client. Pollack, *Pretrial Procedures More Effectively Handled*, 65 F.R.D. 475 (1974). This is especially likely to be true when pretrial proceedings occur long before trial. At the other end of the spectrum, the discretionary character of Rule 16 and its orientation toward a single conference late in the pretrial process has led to under-administration of complex or protracted cases. Without judicial guidance beginning shortly after institution, these cases often become mired in discovery.

Four sources of criticism of pretrial have been identified. First, conferences often are seen as a mere exchange of legalistic contentions without any real analysis of the particular case. Second, the result frequently is nothing but a formal agreement on minutiae. Third, the conferences are seen as unnecessary and time-consuming in cases that will be settled before trial. Fourth, the meetings can be ceremonial and ritualistic, having little effect on the trial and being of minimal value, particularly when the attorneys attending the sessions are not the ones who will try the case or lack authority to enter into binding stipulations. See generally *McCargo v. Hedrick*, 545 F.2d 393 (4th Cir. 1976); Pollack, *Pretrial Procedures More Effectively Handled*, 65 F.R.D. 475 (1974); Rosenberg, *The Pretrial Conference and Effective Justice* 45 (1964).

There also have been difficulties with the pretrial orders that issue following Rule 16 conferences. When an order is entered far in advance of trial, some issues may not be properly formulated. Counsel naturally are cautious and often try to preserve as many options as possible. If the judge who tries the case did not conduct the conference, he could find it difficult to determine exactly what was agreed to at the conference. But any insistence on a detailed order may be too burdensome, depending on the nature or posture of the case.

Given the significant changes in federal civil litigation since 1938 that are not reflected in Rule 16, it has been extensively rewritten and expanded to meet the challenges of modern litigation. Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices. Flanders, *Case Management and Court Management in United States District Courts* 17, Federal Judicial Center (1977). Thus, the rule mandates a pretrial scheduling order. However, although scheduling and pretrial conferences are encouraged in appropriate cases, they are not mandated.

*Discussion*

**Subdivision (a); Pretrial Conferences; Objectives.** The amended rule makes scheduling and case management an express goal of pretrial procedure. This is done in Rule 16(a) by shifting the emphasis away from a conference focused solely on the trial and toward a process of judicial management that embraces the entire pretrial phase, especially motions and discovery. In addition, the amendment explicitly recognizes some of the objectives of pretrial conferences and the powers that many courts already have assumed. Rule 16 thus will be a more accurate reflection of actual practice.

**Subdivision (b); Scheduling and Planning.** The most significant change in Rule 16 is the mandatory scheduling order described in Rule 16(b), which is based in part on

Wisconsin Civil Procedure Rule 802.10. The idea of scheduling orders is not new. It has been used by many federal courts. See, e.g., Southern District of Indiana, Local Rule 19.

Although a mandatory scheduling order encourages the court to become involved in case management early in the litigation, it represents a degree of judicial involvement that is not warranted in many cases. Thus, subdivision (b) permits each district court to promulgate a local rule under Rule 83 exempting certain categories of cases in which the burdens of scheduling orders exceed the administrative efficiencies that would be gained. See Eastern District of Virginia, Local Rule 12(1). Logical candidates for this treatment include social security disability matters, habeas corpus petitions, forfeitures, and reviews of certain administrative actions.

A scheduling conference may be requested either by the judge, a magistrate when authorized by district court rule, or a party within 120 days after the summons and complaint are filed. If a scheduling conference is not arranged within that time and the case is not exempted by local rule, a scheduling order must be issued under Rule 16(b), after some communication with the parties, which may be by telephone or mail rather than in person. The use of the term "judge" in subdivision (b) reflects the Advisory Committee's judgment that it preferable that this task should be handled by a district judge rather than a magistrate, except when the magistrate is acting under 28 U.S.C. §636(c). While personal supervision by the trial judge is preferred, the rule, in recognition of the impracticality or difficulty of complying with such a requirement in some districts, authorizes a district by local rule to delegate the duties to a magistrate. In order to formulate a practicable scheduling order, the judge, or a magistrate when authorized by district court rule, and attorneys are required to develop a timetable for the matters listed in Rule 16(b)(1)-(3). As indicated in Rule 16(b)(4)-(5), the order may also deal with a wide range of other matters. The rule is phrased permissively as to clauses (4) and (5), however, because scheduling these items at an early point may not be feasible or appropriate. Even though subdivision (b) relates only to scheduling, there is no reason why some of the procedural matters listed in Rule 16(e) cannot be addressed at the same time, at least when a scheduling conference is held.

Item (1) assures that at some point both the parties and the pleadings will be fixed, by setting a time within which joinder of parties shall be completed and the pleadings amended.

Item (2) requires setting time limits for interposing various motions that otherwise might be used as stalling techniques.

Item (3) deals with the problem of procrastination and delay by attorneys in a context in which scheduling is especially important—discovery. Scheduling the completion of discovery can serve some of the same functions as the conference described in Rule 26(f).

Item (4) refers to setting dates for conferences and for trial. Scheduling multiple pretrial conferences may well be desirable if the case is complex and the court believes that a more elaborate pretrial structure, such as that described in the *Manual for Complex Litigation*, should be employed. On the other hand, only one pretrial conference may be necessary in an uncomplicated case.

As long as the case is not exempted by local rule, the court must issue a written scheduling order even if no scheduling conference is called. The order, like pretrial orders under the former rule and those under new Rule 16(c), normally will "control the subsequent course of the action." See Rule 16(e). After consultation with the attorneys for the parties and any unrepresented parties—a formal motion is not necessary—the court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension. Since the scheduling order is entered early in the litigation, this standard seems

more appropriate than a "manifest injustice" or "substantial hardship" test. Otherwise, a fear that extensions will not be granted may encourage counsel to request the longest possible periods for completing pleading, joinder, and discovery. Moreover, changes in the court's calendar sometimes will oblige the judge or magistrate when authorized by district court rule to modify the scheduling order.

The district courts undoubtedly will develop several prototype scheduling orders for different types of cases. In addition, when no formal conference is held, the court may obtain scheduling information by telephone, mail, or otherwise. In many instances this will result in a scheduling order better suited to the individual case than a standard order without taking the time that would be required by a formal conference.

Rule 16(b) assures that the judge will take some early control over the litigation, even when its character does not warrant holding a scheduling conference. Despite the fact that the process of preparing a scheduling order does not always bring the attorneys and judge together, the fixing of time limits serves

to stimulate litigants to narrow the areas of inquiry and advocacy to those they believe are truly relevant and material. Time limits not only compress the amount of time for litigation, they should also reduce the amount of resources invested in litigation. Litigants are forced to establish discovery priorities and thus to do the most important work first.

*Report of the National Commission for the Review of Antitrust Laws and Procedures* 28 (1979).

Thus, except in exempted cases, the judge or a magistrate when authorized by district court rule will have taken some action in every case within 180 days after the complaint is filed that notifies the attorneys that the case will be moving toward trial. Subdivision (b) is reinforced by subdivision (f), which makes it clear that the sanctions for violating a scheduling order are the same as those for violating a pretrial order.

*Subdivision (c); Subjects to be Discussed at Pretrial Conferences.* This subdivision expands upon the list of things that may be discussed at a pretrial conference that appeared in original Rule 16. The intention is to encourage better planning and management of litigation. Increased judicial control during the pretrial process accelerates the processing and termination of cases. Flanders, *Case Management and Court Management in United States District Courts*, Federal Judicial Center (1977). See also *Report of the National Commission for the Review of Antitrust Laws and Procedures* (1979).

The reference in Rule 16(c)(1) to "formulation" is intended to clarify and confirm the court's power to identify the litigable issues. It has been added in the hope of promoting efficiency and conserving judicial resources by identifying the real issues prior to trial, thereby saving time and expense for everyone. See generally *Meadow Gold Prods. Co. v. Wright*, 278 F.2d 867 (D.C. Cir. 1960). The notion is emphasized by expressly authorizing the elimination of frivolous claims or defenses at a pretrial conference. There is no reason to require that this await a formal motion for summary judgment. Nor is there any reason for the court to wait for the parties to initiate the process called for in Rule 16(c)(1).

The timing of any attempt at issue formulation is a matter of judicial discretion. In relatively simple cases it may not be necessary or may take the form of a stipulation between counsel or a request by the court that counsel work together to draft a proposed order.

Counsel bear a substantial responsibility for assisting the court in identifying the factual issues worthy of trial. If counsel fail to identify an issue for the court, the right to have the issue tried is waived. Although an order specifying the issues is intended to be binding, it may be amended at trial to avoid manifest injustice. See Rule 16(e). However, the rule's effectiveness depends on the court employing its discretion sparingly.

Clause (6) acknowledges the widespread availability and use of magistrates. The corresponding provision in

the original rule referred only to masters and limited the function of the reference to the making of "findings to be used as evidence" in a case to be tried to a jury. The new text is not limited and broadens the potential use of a magistrate to that permitted by the Magistrate's Act.

Clause (7) explicitly recognizes that it has become commonplace to discuss settlement at pretrial conferences. Since it obviously saves crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible. Although it is not the purpose of Rule 16(b)(7) to impose settlement negotiations on unwilling litigants, it is believed that providing a neutral forum for discussing the subject might foster it. See Moore's *Federal Practice* ¶16.17; 6 Wright & Miller, *Federal Practice and Procedure: Civil* §1522 (1971). For instance, a judge to whom a case has been assigned may arrange, on his own motion or at a party's request, to have settlement conferences handled by another member of the court or by a magistrate. The rule does not make settlement conferences mandatory because they would be a waste of time in many cases. See Flanders, *Case Management and Court Management in the United States District Courts*, 39. Federal Judicial Center (1977). Requests for a conference from a party indicating a willingness to talk settlement normally should be honored, unless thought to be frivolous or dilatory.

A settlement conference is appropriate at any time. It may be held in conjunction with a pretrial or discovery conference, although various objectives of pretrial management, such as moving the case toward trial, may not always be compatible with settlement negotiations, and thus a separate settlement conference may be desirable. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* §1522, at p. 751 (1971).

In addition to settlement, Rule 16(c)(7) refers to exploring the use of procedures other than litigation to resolve the dispute. This includes urging the litigants to employ adjudicatory techniques outside the courthouse. See, for example, the experiment described in Green, Marks & Olson, *Settling Large Case Litigation: An Alternative Approach*, 11 Loyola of L.A. L.Rev. 493 (1978).

Rule 16(c)(10) authorizes the use of special pretrial procedures to expedite the adjudication of potentially difficult or protracted cases. Some district courts obviously have done so for many years. See Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy and Inexpensive Determination of Civil Cases in Federal Courts*, 4 Just. Sys. J. 135 (1976). Clause 10 provides an explicit authorization for such procedures and encourages their use. No particular technique have been described; the Committee felt that flexibility and experience are the keys to efficient management of complex cases. Extensive guidance is offered in such documents as the *Manual for Complex Litigation*.

The rule simply identifies characteristics that make a case a strong candidate for special treatment. The four mentioned are illustrative, not exhaustive, and overlap to some degree. But experience has shown that one or more of them will be present in every protracted or difficult case and it seems desirable to set them out. See Kendig, *Procedures for Management of Non-Routine Cases*, 3 Holstra L.Rev. 701 (1975).

The last sentence of subdivision (c) is new. See Wisconsin Civil Procedure Rule 802.11(2). It has been added to meet one of the criticisms of the present practice described earlier and insure proper preconference preparation so that the meeting is more than a ceremonial or ritualistic event. The reference to "authority" is not intended to insist upon the ability to settle the litigation. Nor should the rule be read to encourage the judge conducting the conference to compel attorneys to enter into stipulations or to make admissions that they consider to be unreasonable, that touch on matters that could not normally have been anticipated to arise at the conference, or on subjects of a dimension that normally require prior consultation with and approval from the client.

**Subdivision (d): Final Pretrial Conference.** This provision has been added to make it clear that the time between any final pretrial conference (which in a simple case may be the *only* pretrial conference) and trial should be as short as possible to be certain that the litigants make substantial progress with the case and avoid the inefficiency of having that preparation repeated when there is a delay between the last pretrial conference and trial. An optimum time of 10 days to two weeks has been suggested by one federal judge. Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy and Inexpensive Determination of Civil Cases in Federal Courts*, 4 Just. Sys. J. 135, 141 (1976). The Committee, however, concluded that it would be inappropriate to fix a precise time in the rule, given the numerous variables that could bear on the matter. Thus the timing has been left to the court's discretion.

At least one of the attorneys who will conduct the trial for each party must be present at the final pretrial conference. At this late date there should be no doubt as to which attorney or attorneys this will be. Since the agreements and stipulations made at this final conference will control the trial, the presence of lawyers who will be involved in it is especially useful to assist the judge in structuring the case, and to lead to a more effective trial.

**Subdivision (e): Pretrial Orders.** Rule 16(e) does not substantially change the portion of the original rule dealing with pretrial orders. The purpose of an order is to guide the course of the litigation and the language of the original rule making that clear has been retained. No compelling reason has been found for major revision, especially since this portion of the rule has been interpreted and clarified by over forty years of judicial decisions with comparatively little difficulty. See 8 Wright & Miller, *Federal Practice and Procedure: Civil* §§ 1521-30 (1971). Changes in language therefore have been kept to a minimum to avoid confusion.

Since the amended rule encourages more extensive pretrial management than did the original, two or more conferences may be held in many cases. The language of Rule 16(e) recognizes this possibility and the corresponding need to issue more than one pretrial order in a single case.

Once formulated, pretrial orders should not be changed lightly; but total inflexibility is undesirable. See, e.g., *Clark v. Pennsylvania R.R. Co.*, 328 F.2d 591 (2d Cir. 1964). The exact words used to describe the standard for amending the pretrial order probably are less important than the meaning given them in practice. By not imposing any limitation on the ability to modify a pretrial order, the rule reflects the reality that in any process of continuous management what is done at one conference may have to be altered at the next. In the case of the final pretrial order, however, a more stringent standard is called for and the words "to prevent manifest injustice," which appeared in the original rule, have been retained. They have the virtue of familiarity and adequately describe the restraint the trial judge should exercise.

Many local rules make the plaintiff's attorney responsible for drafting a proposed pretrial order, either before or after the conference. Others allow the court to appoint any of the attorneys to perform the task, and others leave it to the court. See Note, *Pretrial Conference: A Critical Examination of Local Rules Adopted by Federal District Courts*, 64 Va.L.Rev. 457 (1978). Rule 16 has never addressed this matter. Since there is no consensus about which method of drafting the order works best and there is no reason to believe that nationwide uniformity is needed, the rule has been left silent on the point. See *Handbook for Effective Pretrial Procedure*, 37 F.R.D. 225 (1964).

**Subdivision (f): Sanctions.** Original Rule 16 did not mention the sanctions that might be imposed for failing to comply with the rule. However, courts have not hesitated to enforce it by appropriate measures. See, e.g., *Link v. Wabash R. Co.*, 370 U.S. 628 (1962) (district court's dismissal under Rule 41(b) after plaintiff's at-

torney failed to appear at a pretrial conference upheld); *Admiral Theatre Corp. v. Douglas Theatre*, 585 F.2d 877 (8th Cir. 1978) (district court has discretion to exclude exhibits or refuse to permit the testimony of a witness not listed prior to trial in contravention of its pretrial order).

To reflect that existing practice, and to obviate dependence upon Rule 41(b) or the court's inherent power to regulate litigation, cf. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958), Rule 16(f) expressly provides for imposing sanctions on disobedient or recalcitrant parties, their attorneys, or both in four types of situations. Rodes, Ripple & Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 65-67, 80-84, Federal Judicial Center (1981). Furthermore, explicit reference to sanctions reinforces the rule's intention to encourage forceful judicial management.

Rule 16(f) incorporates portions of Rule 37(b)(2), which prescribes sanctions for failing to make discovery. This should facilitate application of Rule 16(f), since courts and lawyers already are familiar with the Rule 37 standards. Among the sanctions authorized by the new subdivision are: preclusion order, striking a pleading, staying the proceeding, default judgment, contempt, and charging a party, his attorney, or both with the expenses, including attorney's fees, caused by noncompliance. The contempt sanction, however, is only available for a violation of a court order. The references in Rule 16(f) are not exhaustive.

As is true under Rule 37(b)(2), the imposition of sanctions may be sought by either the court or a party. In addition, the court has discretion to impose whichever sanction it feels is appropriate under the circumstances. Its action is reviewable under the abuse-of-discretion standard. See *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

#### NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

#### NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

**Subdivision (b).** One purpose of this amendment is to provide a more appropriate deadline for the initial scheduling order required by the rule. The former rule directed that the order be entered within 120 days from the filing of the complaint. This requirement has created problems because Rule 4(m) allows 120 days for service and ordinarily at least one defendant should be available to participate in the process of formulating the scheduling order. The revision provides that the order is to be entered within 90 days after the date a defendant first appears (whether by answer or by a motion under Rule 12) or, if earlier (as may occur in some actions against the United States or if service is waived under Rule 4), within 120 days after service of the complaint on a defendant. The longer time provided by the revision is not intended to encourage unnecessary delays in entering the scheduling order. Indeed, in most cases the order can and should be entered at a much earlier date. Rather, the additional time is intended to alleviate problems in multi-defendant cases and should ordinarily be adequate to enable participation by all defendants initially named in the action.

In many cases the scheduling order can and should be entered before this deadline. However, when setting a scheduling conference, the court should take into account the effect this setting will have in establishing deadlines for the parties to meet under revised Rule 26(f) and to exchange information under revised Rule 26(a)(1). While the parties are expected to stipulate to additional time for making their disclosures when warranted by the circumstances, a scheduling conference held before defendants have had time to learn much about the case may result in diminishing the value of the Rule 26(f) meeting, the parties' proposed discovery plan, and indeed the conference itself.

New paragraph (4) has been added to highlight that it will frequently be desirable for the scheduling order to include provisions relating to the timing of disclosures under Rule 26(a). While the initial disclosures required by Rule 26(a)(1) will ordinarily have been made before entry of the scheduling order, the timing and sequence for disclosure of expert testimony and of the witnesses and exhibits to be used at trial should be tailored to the circumstances of the case and is a matter that should be considered at the initial scheduling conference. Similarly, the scheduling order might contain provisions modifying the extent of discovery (e.g., number and length of depositions) otherwise permitted under these rules or by a local rule.

The report from the attorneys concerning their meeting and proposed discovery plan, as required by revised Rule 26(f), should be submitted to the court before the scheduling order is entered. Their proposals, particularly regarding matters on which they agree, should be of substantial value to the court in setting the timing and limitations on discovery and should reduce the time of the court needed to conduct a meaningful conference under Rule 16(b). As under the prior rule, while a scheduling order is mandated, a scheduling conference is not. However, in view of the benefits to be derived from the litigants and a judicial officer meeting in person, a Rule 16(b) conference should, to the extent practicable, be held in all cases that will involve discovery.

This subdivision, as well as subdivision (c)(8), also is revised to reflect the new title of United States Magistrate Judges pursuant to the Judicial Improvements Act of 1990.

**Subdivision (c).** The primary purposes of the changes in subdivision (c) are to call attention to the opportunities for structuring of trial under Rules 42, 50, and 52 and to eliminate questions that have occasionally been raised regarding the authority of the court to make appropriate orders designed either to facilitate settlement or to provide for an efficient and economical trial. The prefatory language of this subdivision is revised to clarify the court's power to enter appropriate orders at a conference notwithstanding the objection of a party. Of course settlement is dependent upon agreement by the parties and, indeed, a conference is most effective and productive when the parties participate in a spirit of cooperation and mindful of their responsibilities under Rule 1.

Paragraph (4) is revised to clarify that in advance of trial the court may address the need for, and possible limitations on, the use of expert testimony under Rule 702 of the Federal Rules of Evidence. Even when proposed expert testimony might be admissible under the standards of Rules 403 and 702 of the evidence rules, the court may preclude or limit such testimony if the cost to the litigants—which may include the cost to adversaries of securing testimony on the same subjects by other experts—would be unduly expensive given the needs of the case and the other evidence available at trial.

Paragraph (5) is added (and the remaining paragraphs renumbered) in recognition that use of Rule 56 to avoid or reduce the scope of trial is a topic that can, and often should, be considered at a pretrial conference. Renumbered paragraph (11) enables the court to rule on pending motions for summary adjudication that are ripe for decision at the time of the conference. Often, however, the potential use of Rule 56 is a matter that arises from discussions during a conference. The court may then call for motions to be filed.

Paragraph (6) is added to emphasize that a major objective of pretrial conferences should be to consider appropriate controls on the extent and timing of discovery. In many cases the court should also specify the times and sequence for disclosure of written reports from experts under revised Rule 26(a)(2)(B) and perhaps direct changes in the types of experts from whom written reports are required. Consideration should also be given to possible changes in the timing or form of the disclosure of trial witnesses and documents under Rule 26(a)(3).

Paragraph (9) is revised to describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits. The rule acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties. See 28 U.S.C. § 473(a)(6), 473(b)(4), 651-58; Section 104(b)(2), Pub. L. 101-650. The rule does not attempt to resolve questions as to the extent a court would be authorized to require such proceedings as an exercise of its inherent powers.

The amendment of paragraph (9) should be read in conjunction with the sentence added to the end of subdivision (c), authorizing the court to direct that, in appropriate cases, a responsible representative of the parties be present or available by telephone during a conference in order to discuss possible settlement of the case. The sentence refers to participation by a party or its representative. Whether this would be the individual party, an officer of a corporate party, a representative from an insurance carrier, or someone else would depend on the circumstances. Particularly in litigation in which governmental agencies or large amounts of money are involved, there may be no one with on-the-spot settlement authority, and the most that should be expected is access to a person who would have a major role in submitting a recommendation to the body or board with ultimate decision-making responsibility. The selection of the appropriate representative should ordinarily be left to the party and its counsel. Finally, it should be noted that the unwillingness of a party to be available, even by telephone, for a settlement conference may be a clear signal that the time and expense involved in pursuing settlement is likely to be unproductive and that personal participation by the parties should not be required.

The explicit authorization in the rule to require personal participation in the manner stated is not intended to limit the reasonable exercise of the court's inherent powers, e.g., *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989), or its power to require party participation under the Civil Justice Reform Act of 1990. See 28 U.S.C. § 473(b)(5) (civil justice expense and delay reduction plans adopted by district courts may include requirement that representatives "with authority to bind [parties] in settlement discussions" be available during settlement conferences).

New paragraphs (13) and (14) are added to call attention to the opportunities for structuring of trial under Rule 42 and under revised Rules 50 and 52.

Paragraph (15) is also new. It supplements the power of the court to limit the extent of evidence under Rules 403 and 61(a) of the Federal Rules of Evidence, which typically would be invoked as a result of developments during trial. Limits on the length of trial established at a conference in advance of trial can provide the parties with a better opportunity to determine priorities and exercise selectivity in presenting evidence than when limits are imposed during trial. Any such limits must be reasonable under the circumstances, and ordinarily the court should impose them only after receiving appropriate submissions from the parties outlining the nature of the testimony expected to be presented through various witnesses, and the expected duration of direct and cross-examination.

#### COMMITTEE NOTES ON RULES—2006 AMENDMENT

The amendment to Rule 16(b) is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur. Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information if such discovery is contemplated in the action. Form 35 is

amended to call for a report to the court about the results of this discussion. In many instances, the court's involvement early in the litigation will help avoid difficulties that might otherwise arise.

Rule 16(b) is also amended to include among the topics that may be addressed in the scheduling order any agreements that the parties reach to facilitate discovery by minimizing the risk of waiver of privilege or work-product protection. Rule 26(l) is amended to add to the discovery plan the parties' proposal for the court to enter a case-management or other order adopting such an agreement. The parties may agree to various arrangements. For example, they may agree to initial provision of requested materials without waiver of privilege or protection to enable the party seeking production to designate the materials desired or protection for actual production, with the privilege review of only those materials to follow. Alternatively, they may agree that if privileged or protected information is inadvertently produced, the producing party may by timely notice assert the privilege or protection and obtain return of the materials without waiver. Other arrangements are possible. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

An order that includes the parties' agreement may be helpful in avoiding delay and excessive cost in discovery. See *Manual for Complex Litigation* (4th) §11.446. Rule 16(b)(6) recognizes the propriety of including such agreements in the court's order. The rule does not provide the court with authority to enter such a case-management or other order without party agreement, or limit the court's authority to act on motion.

*Changes Made After Publication and Comment.* This recommendation is of a modified version of the proposal as published. Subdivision (b)(6) was modified to eliminate the references to "adopting" agreements for "protection against waiving" privilege. It was feared that these words might seem to promise greater protection than can be assured. In keeping with changes to Rule 26(b)(6)(B), subdivision (b)(6) was expanded to include agreements for asserting claims of protection as trial-preparation materials. The Committee Note was revised to reflect the changes in the rule text.

The proposed changes from the published rule are set out below. [Omitted]

#### COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 16 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

When a party or its representative is not present, it is enough to be reasonably available by any suitable means, whether telephone or other communication device.

*Changes Made After Publication and Comment.* See Note to Rule 1, *supra*.

#### TITLE IV. PARTIES

##### Rule 17. Plaintiff and Defendant; Capacity; Public Officers

###### (a) REAL PARTY IN INTEREST.

(1) *Designation in General.* An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

- (A) an executor;
- (B) an administrator;
- (C) a guardian;
- (D) a bailee;
- (E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(2) *Action in the Name of the United States for Another's Use or Benefit.* When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

(3) *Joinder of the Real Party in Interest.* The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

(b) CAPACITY TO SUE OR BE SUED. Capacity to sue or be sued is determined as follows:

(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

(2) for a corporation, by the law under which it was organized; and

(3) for all other parties, by the law of the state where the court is located, except that:

(A) a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and

(B) 28 U.S.C. §§754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.

###### (c) MINOR OR INCOMPETENT PERSON.

(1) *With a Representative.* The following representatives may sue or defend on behalf of a minor or an incompetent person:

- (A) a general guardian;
- (B) a committee;
- (C) a conservator; or
- (D) a like fiduciary.

(2) *Without a Representative.* A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.

(d) PUBLIC OFFICER'S TITLE AND NAME. A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1949, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1967, eff. Aug. 1, 1967; Apr. 25, 1988, eff. Aug. 1, 1988; Pub. L. 100-690, title VII, §7049, Nov. 16, 1988, 102 Stat. 4401; Apr. 30, 2007, eff. Dec. 1, 2007.)

###### NOTES OF ADVISORY COMMITTEE ON RULES—1937

*Note to Subdivision (a).* The real party in interest provision, except for the last clause which is new, is taken

**Note.** The operation of Rule 55(b) (Judgment) is directly affected by the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. [App.] §501 *et seq.*). Section 200 of the Act [50 U.S.C. Appendix, §520] imposes specific requirements which must be fulfilled before a default judgment can be entered (e.g., *Ledwith v. Storkan* (D.Neb. 1942) 6 Fed.Rules Serv. 60b.24, Case 2, 2 F.R.D. 539, and also provides for the vacation of a judgment in certain circumstances. See discussion in Commentary, *Effect of Conscription Legislation on the Federal Rules* (1940) 3 Fed.Rules Serv. 725; 3 *Moore's Federal Practice* (1938) Cum. Supplement §55.02.

**Notes of Advisory Committee on Rules—1987 Amendment**

The amendments are technical. No substantive change is intended.

**Committee Notes on Rules—2007 Amendment**

The language of Rule 55 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 55(a) directed the clerk to enter a default when a party failed to plead or otherwise defend "as provided by these rules." The implication from the reference to defending "as provided by these rules" seemed to be that the clerk should enter a default even if a party did something showing an intent to defend, but that act was not specifically described by the rules. Courts in fact have rejected that implication. Acts that show an intent to defend have frequently prevented a default even though not connected to any particular rule. "[A]s provided by these rules" is deleted to reflect Rule 55(a)'s actual meaning.

Amended Rule 55 omits former Rule 55(d), which included two provisions. The first recognized that Rule 55 applies to described claimants. The list was incomplete and unnecessary. Rule 55(a) applies Rule 55 to any party against whom a judgment for affirmative relief is requested. The second provision was a redundant reminder that Rule 54(c) limits the relief available by default judgment.

**Committee Notes on Rules—2009 Amendment**

The time set in the former rule at 3 days has been revised to 7 days. See the Note to Rule 6.

**Rule 56. Summary Judgment**

(a) **Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) **Time to File a Motion.** Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) **Procedures.**

(1) **Supporting Factual Positions.** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) *When Facts Are Unavailable to the Nonmovant.* If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

(e) *Failing to Properly Support or Address a Fact.* If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;
- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or
- (4) issue any other appropriate order.

(f) *Judgment Independent of the Motion.* After giving notice and a reasonable time to respond, the court may:

- (1) grant summary judgment for a nonmovant;
- (2) grant the motion on grounds not raised by a party; or
- (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) *Failing to Grant All the Requested Relief.* If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) *Affidavit or Declaration Submitted in Bad Faith.* If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 28, 2010, eff. Dec. 1, 2010.)

**Notes of Advisory Committee on Rules—1937**

This rule is applicable to all actions, including those against the United States or an officer or agency thereof.

Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York county alone show 5,600 applications for summary judgments. *Report of the Commission on the Administration of Justice in New York State* (1934), p. 383. See also *Third Annual Report of the Judicial Council of the State of New York* (1937), p. 30.

In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage. *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 3, r. 6; Orders 14, 14A, and 15; see also O. 32, r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (3 Comp.Laws (1929) §14260) and Illinois (Ill.Rev.Stat. (1937) ch. 110, §§181, 259.15, 259.16), it is not limited to liquidated demands. New York (N.Y.R.C.P. (1937) Rule 113; see also Rule 107) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice in New York State (1934) recommend that all restrictions be removed and that the remedy be available "in any action" (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, *The Summary Judgment* (1929), 38 Yale L.J. 423.

*Note to Subdivision (d).* See Rule 16 (PreTrial Procedure; Formulating Issues) and the *Note thereto*.

*Note to Subdivisions (e) and (f).* These are similar to rules in Michigan. Mich.Court Rules Ann. (Searl, 1933) Rule 30.

#### Notes of Advisory Committee on Rules—1946 Amendment

*Subdivision (a).* The amendment allows a claimant to move for a summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase "at any time after the pleading in answer thereto has been served" operates to prevent a claimant from moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Thus in *Peoples Bank v. Federal Reserve Bank of San Francisco* (N.D.Cal. 1944) 58 F.Supp. 25, the plaintiff's counter-motion for a summary judgment was stricken as premature, because the defendant had not filed an answer. Since Rule 12(a) allows at least 20 days for an answer, that time plus the 10 days required in Rule 56(c) means that under original Rule 56(a) a minimum period of 30 days necessarily has to elapse in every case before the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents unnecessary delay. See *United States v. Adler's Creamery, Inc.* (C.C.A.2d, 1939) 107 F.(2d) 987. The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant

himself serves a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

*Subdivision (c).* The amendment of Rule 56(c), by the addition of the final sentence, resolves a doubt expressed in *Sartor v. Arkansas Natural Gas Corp.* (1944) 321 U.S. 620. See also *Commentary, Summary Judgment as to Damages* (1944) 7 Fed.Rules Serv. 974; *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.* (C.C.A.2d, 1945) 147 F.(2d) 399, cert. den. (1945) 325 U.S. 861. It makes clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary order, interlocutory in character, and the precise amount of recovery left for trial.

*Subdivision (d).* Rule 54(a) defines "judgment" as including a decree and "any order from which an appeal lies." Subdivision (d) of Rule 56 indicates clearly, however, that a partial summary "judgment" is not a final judgment, and, therefore, that it is not appealable, unless in the particular case some statute allows an appeal from the interlocutory order involved. The partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact. See *Leonard v. Socony-Vacuum Oil Co.* (C.C.A.7th, 1942) 130 F.(2d) 535; *Biggins v. Oltmer Iron Works* (C.C.A.7th, 1946) 154 F.(2d) 214; 3 *Moore's Federal Practice* (1938). 3190-3192. Since interlocutory appeals are not allowed, except where specifically provided by statute (see 3 *Moore, op. cit. supra*, 3155-3156) this interpretation is in line with that policy, *Leonard v. Socony-Vacuum Oil Co., supra*. See also *Audi Vision Inc., v. RCA Mfg. Co.* (C.C.A.2d, 1943) 136 F.(2d) 621; *Toomey v. Toomey* (App.D.C. 1945) 149 F.(2d) 19; *Biggins v. Oltmer Iron Works, supra*; *Catlin v. United States* (1945) 324 U.S. 229.

#### Notes of Advisory Committee on Rules—1963 Amendment

*Subdivision (c).* By the amendment "answers to interrogatories" are included among the materials which may be considered on motion for summary judgment. The phrase was inadvertently omitted from the rule, see 3 Barron & Holtzoff, *Federal Practice and Procedure* 159-60 (Wright ed. 1958), and the courts have generally reached by interpretation the result which will hereafter be required by the text of the amended rule. See Annot., 74 A.L.R.2d 984 (1960).

*Subdivision (e).* The words "answers to interrogatories" are added in the third sentence of this subdivision to conform to the amendment of subdivision (c).

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matters sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well-pleaded," and not suppositional, conclusory, or ultimate. See *Frederick Hart & Co., Inc. v. Recordgraph Corp.*, 169 F.2d 580 (3d Cir. 1948); *United States ex rel. Kolton v. Halpern*, 260 F.2d 590 (3d Cir. 1958); *United States ex rel. Nobles v. Ivey Bros. Constr. Co., Inc.*, 191 F.Supp. 383 (D.Del. 1961);

*Jamison v. Pennsylvania Salt Mfg. Co.*, 22 F.R.D. 238 (W.D.Pa. 1958); *Bunny Bear, Inc. v. Dennis Mitchell Industries*, 139 F.Supp. 542 (E.D.Pa. 1956); *Levy v. Equitable Life Assur. Society*, 18 F.R.D. 164 (E.D.Pa. 1955).

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 *Moore's Federal Practice* 2069 (2d ed. 1953); 3 Barron & Holtzoff, *supra*, §1235.1.

It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary.

Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example: Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. And summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.

#### **Notes of Advisory Committee on Rules—1987 Amendment**

The amendments are technical. No substantive change is intended.

#### **Committee Notes on Rules—2007 Amendment**

The language of Rule 56 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 56(a) and (b) referred to summary-judgment motions on or against a claim, counterclaim, or crossclaim, or to obtain a declaratory judgment. The list was incomplete. Rule 56 applies to third-party claimants, intervenors, claimants in interpleader, and others. Amended Rule 56(a) and (b) carry forward the present meaning by referring to a party claiming relief and a party against whom relief is sought.

Former Rule 56(c), (d), and (e) stated circumstances in which summary judgment "shall be rendered," the court "shall if practicable" ascertain facts existing without substantial controversy, and "if appropriate, shall" enter summary judgment. In each place "shall" is changed to "should." It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256–257 (1948). Many lower court decisions are gathered in 10A Wright, Miller & Kane, *Federal Practice & Procedure: Civil* 3d, §2728. "Should" in amended Rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact. Similarly sparing exercise of this discretion is appropriate under Rule

56(e)(2). Rule 56(d)(1), on the other hand, reflects the more open-ended discretion to decide whether it is practicable to determine what material facts are not genuinely at issue.

Former Rule 56(d) used a variety of different phrases to express the Rule 56(c) standard for summary judgment—that there is no genuine issue as to any material fact. Amended Rule 56(d) adopts terms directly parallel to Rule 56(c).

#### **Committee Notes on Rules—2009 Amendment**

The timing provisions for summary judgment are outmoded. They are consolidated and substantially revised in new subdivision (c)(1). The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action. If the motion seems premature both subdivision (c)(1) and Rule 6(b) allow the court to extend the time to respond. The rule does set a presumptive deadline at 30 days after the close of all discovery.

The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule. Scheduling orders are likely to supersede the rule provisions in most cases, deferring summary-judgment motions until a stated time or establishing different deadlines. Scheduling orders tailored to the needs of the specific case, perhaps adjusted as it progresses, are likely to work better than default rules. A scheduling order may be adjusted to adopt the parties' agreement on timing, or may require that discovery and motions occur in stages—including separation of expert-witness discovery from other discovery.

Local rules may prove useful when local docket conditions or practices are incompatible with the general Rule 56 timing provisions.

If a motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is 21 days after the responsive pleading is due.

#### **Committee Notes on Rules—2010 Amendment**

Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts. The standard for granting summary judgment remains unchanged. The language of subdivision (a) continues to require that there be no genuine dispute as to any material fact and that the movant be entitled to judgment as a matter of law. The amendments will not affect continuing development of the decisional law construing and applying these phrases.

*Subdivision (a).* Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word—genuine “issue” becomes genuine “dispute.” “Dispute” better reflects the focus of a summary-judgment determination. As explained below, “shall” also is restored to the place it held from 1938 to 2007.

The first sentence is added to make clear at the beginning that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense. The subdivision caption adopts the common phrase “partial summary judgment” to describe disposition of less than the whole action, whether or not the order grants all the relief requested by the motion.

“Shall” is restored to express the direction to grant summary judgment. The word “shall” in Rule 56 acquired significance over many decades of use. Rule 56 was amended in 2007 to replace “shall” with “should” as part of the Style Project, acting under a convention that prohibited any use

of "shall." Comments on proposals to amend Rule 56, as published in 2008, have shown that neither of the choices available under the Style Project conventions — "must" or "should" — is suitable in light of the case law on whether a district court has discretion to deny summary judgment when there appears to be no genuine dispute as to any material fact. Compare *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 \* (1948)), with *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). Eliminating "shall" created an unacceptable risk of changing the summary-judgment standard. Restoring "shall" avoids the unintended consequences of any other word.

Subdivision (a) also adds a new direction that the court should state on the record the reasons for granting or denying the motion. Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment. The form and detail of the statement of reasons are left to the court's discretion.

The statement on denying summary judgment need not address every available reason. But identification of central issues may help the parties to focus further proceedings.

*Subdivision (b).* The timing provisions in former subdivisions (a) and (c) are superseded. Although the rule allows a motion for summary judgment to be filed at the commencement of an action, in many cases the motion will be premature until the nonmovant has had time to file a responsive pleading or other pretrial proceedings have been had. Scheduling orders or other pretrial orders can regulate timing to fit the needs of the case.

*Subdivision (c).* Subdivision (c) is new. It establishes a common procedure for several aspects of summary-judgment motions synthesized from similar elements developed in the cases or found in many local rules.

Subdivision (c)(1) addresses the ways to support an assertion that a fact can or cannot be genuinely disputed. It does not address the form for providing the required support. Different courts and judges have adopted different forms including, for example, directions that the support be included in the motion, made part of a separate statement of facts, interpolated in the body of a brief or memorandum, or provided in a separate statement of facts included in a brief or memorandum.

Subdivision (c)(1)(A) describes the familiar record materials commonly relied upon and requires that the movant cite the particular parts of the materials that support its fact positions. Materials that are not yet in the record — including materials referred to in an affidavit or declaration — must be placed in the record. Once materials are in the record, the court may, by order in the case, direct that the materials be gathered in an appendix, a party may voluntarily submit an appendix, or the parties may submit a joint appendix. The appendix procedure also may be established by local rule. Pointing to a specific location in an appendix satisfies the citation requirement. So too it may be convenient to direct that a party assist the court in locating materials buried in a voluminous record.

Subdivision (c)(1)(B) recognizes that a party need not always point to specific record materials. One party, without citing any other materials, may respond or reply that materials cited

to dispute or support a fact do not establish the absence or presence of a genuine dispute. And a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact.

Subdivision (c)(2) provides that a party may object that material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. The objection functions much as an objection at trial, adjusted for the pretrial setting. The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated. There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.

Subdivision (c)(3) reflects judicial opinions and local rules provisions stating that the court may decide a motion for summary judgment without undertaking an independent search of the record. Nonetheless, the rule also recognizes that a court may consider record materials not called to its attention by the parties.

Subdivision (c)(4) carries forward some of the provisions of former subdivision (e)(1). Other provisions are relocated or omitted. The requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to the affidavit or declaration is omitted as unnecessary given the requirement in subdivision (c)(1)(A) that a statement or dispute of fact be supported by materials in the record.

A formal affidavit is no longer required. 28 U.S.C. § 1746 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

*Subdivision (d).* Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).

A party who seeks relief under subdivision (d) may seek an order deferring the time to respond to the summary-judgment motion.

*Subdivision (e).* Subdivision (e) addresses questions that arise when a party fails to support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c). As explained below, summary judgment cannot be granted by default even if there is a complete failure to respond to the motion, much less when an attempted response fails to comply with Rule 56(c) requirements. Nor should it be denied by default even if the movant completely fails to reply to a nonmovant's response. Before deciding on other possible action, subdivision (e)(1) recognizes that the court may afford an opportunity to properly support or address the fact. In many circumstances this opportunity will be the court's preferred first step.

Subdivision (e)(2) authorizes the court to consider a fact as undisputed for purposes of the motion when response or reply requirements are not satisfied. This approach reflects the "deemed admitted" provisions in many local rules. The fact is considered undisputed only for purposes of the motion; if summary judgment is denied, a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings. And the court may choose not to consider the fact as undisputed, particularly if the court knows of record materials that show grounds for genuine dispute.

Subdivision (e)(3) recognizes that the court may grant summary judgment only if the motion and supporting materials — including the facts considered undisputed under subdivision (e)(2) — show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed.

Once the court has determined the set of facts — both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply — it must determine the legal consequences of these facts and permissible inferences from them.

*Subdivision (e)(4)*. Subdivision (e)(4) recognizes that still other orders may be appropriate. The choice among possible orders should be designed to encourage proper presentation of the record. Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an adequate response is not filed. And the court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant.

*Subdivision (f)*. Subdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time to respond the court may grant summary judgment for the nonmoving party; grant a motion on legal or factual grounds not raised by the parties; or consider summary judgment on its own. In many cases it may prove useful first to invite a motion; the invited motion will automatically trigger the regular procedure of subdivision (c).

*Subdivision (g)*. Subdivision (g) applies when the court does not grant all the relief requested by a motion for summary judgment. It becomes relevant only after the court has applied the summary-judgment standard carried forward in subdivision (a) to each claim, defense, or part of a claim or defense, identified by the motion. Once that duty is discharged, the court may decide whether to apply the summary-judgment standard to dispose of a material fact that is not genuinely in dispute. The court must take care that this determination does not interfere with a party's ability to accept a fact for purposes of the motion only. A nonmovant, for example, may feel confident that a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of detailed response to all facts stated by the movant. This position should be available without running the risk that the fact will be taken as established under subdivision (g) or otherwise found to have been accepted for other purposes.

If it is readily apparent that the court cannot grant all the relief requested by the motion, it may properly decide that the cost of determining whether some potential fact disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial. Even if the court believes that a fact is not genuinely in dispute it may refrain from ordering that the fact be treated as established. The court may conclude that it is better to leave open for trial facts and issues that may be better illuminated by the trial of related facts that must be tried in any event.

*Subdivision (h)*. Subdivision (h) carries forward former subdivision (g) with three changes. Sanctions are made discretionary, not mandatory, reflecting the experience that courts seldom invoke the independent Rule 56 authority to impose sanctions. See Cecil & Cort, Federal Judicial Center Memorandum on Federal Rule of Civil Procedure 56 (g) Motions for Sanctions (April 2, 2007). In addition, the rule text is expanded to recognize the need to provide notice and a reasonable time to respond. Finally, authority to impose other appropriate sanctions also is recognized.

#### *Changes Made After Publication and Comment*

*Subdivision (a)*: “[S]hould grant” was changed to “shall grant.”

“[T]he movant shows that” was added.

Language about identifying the claim or defense was moved up from subdivision (c)(1) as published.

*Subdivision (b)*: The specifications of times to respond and to reply were deleted.

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Words referring to an order "in the case" were deleted.

**Subdivision (c):** The detailed "point-counterpoint" provisions published as subdivision (c)(1) and (2) were deleted.

The requirement that the court give notice before granting summary judgment on the basis of record materials not cited by the parties was deleted.

The provision that a party may accept or dispute a fact for purposes of the motion only was deleted.

**Subdivision (e):** The language was revised to reflect elimination of the point-counterpoint procedure from subdivision (c). The new language reaches failure to properly support an assertion of fact in a motion.

**Subdivision (f):** The provision requiring notice before denying summary judgment on grounds not raised by a party was deleted.

**Subdivision (h):** Recognition of the authority to impose other appropriate sanctions was added.

**Other changes:** Many style changes were made to express more clearly the intended meaning of the published proposal.

### Rule 57. Declaratory Judgment

These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. §2201. Rules 38 and 39 govern a demand for a jury trial. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.

#### Notes

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 30, 2007, eff. Dec. 1, 2007.)

Notes of Advisory Committee on Rules—1937

The fact that a declaratory judgment may be granted "whether or not further relief is or could be prayed" indicates that declaratory relief is alternative or cumulative and not exclusive or extraordinary. A declaratory judgment is appropriate when it will "terminate the controversy" giving rise to the proceeding. Inasmuch as it often involves only an issue of law on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding, justifying docketing the case for early hearing as on a motion, as provided for in California (Code Civ. Proc. (Deering, 1937) §1062a), Michigan (3 Comp.Laws (1929) §13904), and Kentucky (Codes (Carroll, 1932) Civ.Pract. §639a-3).

The "controversy" must necessarily be "of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 325, 56 S.Ct. 466, 473, 80 L.Ed. 688, 699 (1936). The existence or nonexistence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status, may be declared. The petitioner must have a practical interest in the declaration sought and all parties having an interest therein or adversely affected must be made parties or be cited. A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case, but general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings.

## Improving the Administration of Civil Justice

By EDSON R. SUNDERLAND

THE administration of justice is the function of government which most closely affects the security of the individual, and for that reason is a subject of perpetual interest to every member of society. That interest has developed an almost universal attitude of adverse criticism. The public has never been satisfied with the manner in which justice has been administered. Almost no feature, either of our judicial institutions or of the processes which they employ, has met with popular approval. The result has been an insistent and long continued demand for reform.

But the established practice of governmental agencies presents an enormous resistance to change, particularly when reinforced by the tradition of conservatism which is characteristic of the courts. Success can be reached only gradually and at great cost, and for that reason it is important that efforts to improve should be directed toward those parts of the system which exhibit the most injurious defects, and that the reforms which are sought to be introduced should be such as to afford reasonable assurance that their adoption will result in substantial benefit to the public.

The present study is an attempt to survey the field of judicial administration with a view to determining to what extent its major purposes have failed of accomplishment either through lack of judicial vision or through the maintenance of an inadequate organization or through the use of defective machinery, and to suggest in what way such shortcomings may be corrected. The precise scope of

the inquiry will be more clearly indicated by stating the problem in the form of three specific questions, as follows:

1. Do the courts undertake to perform all types of service within their power which would be of substantial benefit to the public, and if not, how can they successfully enlarge the field of their usefulness?
2. Are the courts organized in the most effective way, and if not, what changes ought to be made?
3. Are the procedural methods employed adequate and satisfactory, and if not, what can be done to improve them?

Each of these questions will be separately considered.

### I. TYPES OF SERVICE RENDERED BY THE COURTS

According to the political theory which dominated American thought at the time when our state and national governments were being organized, all governmental functions were deemed to fall into three classes; namely, executive, legislative, and judicial. To enable it to perform these three kinds of functions it was deemed advisable for the government to be divided into three corresponding departments, each of which should confine its activities within its own distinctive field. This scheme of separation of governmental powers was embodied in our constitutions and became a part of our fundamental law.

The courts, which constitute the judicial department of government, are accordingly charged with the exercise of the judicial powers of the

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state, but they are precluded from exercising any powers of an executive or legislative nature. In considering, therefore, whether the courts are rendering the fullest service within their powers, it must be recognized that they cannot pass beyond the limits of the judicial field. The question therefore narrows itself to this: Are there any services of a judicial nature which the courts do not now perform, which would result in substantial advantage to the public?

There are two such services, both strictly judicial, which the courts either do not render at all or render in only a limited or reluctant way, and both of them contain possibilities of great public benefit. One falls within the jurisdiction of trial courts, the other within that of courts of review. I refer to declaring the rights of parties and to reviewing cases on their merits.

#### (A) DECLARING THE RIGHTS OF PARTIES

There are two kinds of possible remedies—those which prevent trouble and those which ameliorate or cure it. The first are much the more effective.

Judicial remedies have been largely of the latter type. The law would not enforce or protect a right except against one who had actually violated it, or who had gone so far as actually to threaten to do so. Justice was administered only against wrongdoers. Thus, if two persons having made a contract were in doubt as to its meaning or application, and neither wished to violate its provisions, there was no way in which they could obtain a decision of the court upon which they could rely for an amicable settlement of their difficulty. It was first necessary for one of them to break the contract and thereby injure the other,

before the controversy would be considered and passed upon by the courts.

There is, however, no inherent reason for any such restriction upon the exercise of judicial power. If the courts are to render maximum service within their proper field, they should be able and willing to take hold of controversies in their early stages, before they have resulted in injury to any one, and to make such decrees determining and declaring the rights of the parties as may be necessary for their safety and protection. Controversies involving the construction of deeds, wills, franchises, contracts, statutes, and ordinances are all adapted to this kind of treatment. Taken in time, the issues may be kept simple and held within very narrow limits, and the decision will almost amount to a friendly adjustment under the advice of the court.

The theory of the declaratory judgment is strictly in accord with our modern conception of the function of a civilized state. In early times the basis of jurisdiction was the constant assertion of physical power over the parties to the action, and the only remedies offered were those which the sheriff could execute. But as civilization advances, the mere existence of governmental power tends to make its exercise unnecessary, and a mere declaration may serve every purpose of an order.

#### Reduction of animosity—

Every case may by this means become, in appearance at least, a friendly suit. There is no doubt that the personal animosities developed by litigation are serious drawbacks to the usefulness of the courts. To sue is to fight, and fights make endless feuds. Parties hesitate to resort to the courts because they shrink from a state of war with their neighbors or business

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associates. But if the courts could operate as diplomatic instead of belligerent agencies, less hesitation would be felt over recourse to them, and less strain would be put upon the friendly relations of the parties.

To ask the court merely to say whether you have certain contract rights against the defendant is a very different thing from demanding damages or an injunction against him. When you ask for a declaration of right only, you treat him as a gentleman. When you ask coercive relief, you treat him as a wrongdoer. That is the whole difference between diplomacy and war. The former assumes that both parties wish to do right; the latter is based on an accusation of wrong. A request for a declaration of right plainly implies full confidence that the defendant will promptly and voluntarily do his duty as soon as the court points it out to him. It makes the lawsuit a cooperative proceeding, in which the court merely assists the parties to settle their own differences by stating to them the rules of law which govern them.

These considerations alone are enough to recommend the practice in any country where respect for the rights of others is considered a virtue. The force behind the court is not at all weakened by it, for if it appears that the plaintiff's confidence in the defendant's readiness to do right is misplaced, the coercive decree of the court is always ready to be promptly issued in support of its declaration.

#### *Hostility of the courts—*

Now the attitude of our law has not been wholly friendly to the development of declaratory relief. The Supreme Court of Michigan a few years ago undertook to destroy it root and branch by holding that declaring the rights of parties was not the exercise of

judicial power, and hence was not a function which could be performed by the courts.<sup>1</sup> No other American courts, however, have followed so extreme a doctrine, and during the last fifteen years more than twenty states have adopted and sustained the practice as a legitimate and proper exercise of the judicial power. Even the Michigan court has recently reversed its earlier holding.<sup>2</sup>

In about half the states, however, the courts have not yet been authorized to render this important judicial service. Even the Supreme Court of the United States has taken a number of occasions during recent years to announce its hostility to the practice, but when the question was squarely raised in an appeal from a state declaratory judgment, the validity of the practice was recognized.<sup>3</sup>

Furthermore, in the states where it is used, the courts are frequently reluctant to treat declaratory judgments as a normal form of relief. Applications for such judgments are viewed with more or less suspicion, and the courts have sought to protect themselves against the supposed dangers involved in granting this kind of relief by exercising a discretionary power to refuse it. Lack of information among the members of the bar regarding the possibilities for profitably employing this remedy has also played an important part in restricting its use.

#### *Declaratory relief in England—*

In England, where the bench and the bar are fully alive to the advantages of declaratory relief, a large part of the judicial business is carried on by that means. In the English Judicial

<sup>1</sup> *Anway v. Grand Rapids Ry. Co.* (1920), 211 Mich. 582.

<sup>2</sup> *Washington-Detroit Theatre Co. v. Moore* (1930), 249 Mich. 673.

<sup>3</sup> *Nashville, Chattanooga & St. Louis Ry. v. Waller* (Feb. 6, 1933)—U. S.—77 L. Ed. 444.

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Statistics for 1890 it appears that in the Chancery Division there were 584 Originating Summons, most of which represented applications for declaratory relief, as compared with 302 Witness Actions. No similar statistics are published for the King's Bench Division, but a glance through the reports will show that perhaps one third of the business of that division involves declarations of rights.

No state in this country has approached such a record. But our experience has already been sufficiently extensive to demonstrate the advantages inherent in this simple and effective practice, and to show the great possibilities which it offers for enlarging the usefulness of our courts.

#### (B) REVIEWING CASES ON THEIR MERITS

There was nothing known to the common law which was, or could properly be called, a true appeal from one court to another, and this was so in England until the Judicature Act of 1873.<sup>2</sup> America inherited the English practice as it existed a hundred and fifty years ago, and we have not yet reached the point of providing for an appeal on the merits of the case.

Common law cases were reviewed by a method known as a proceeding in error. This was in its origin a semi-criminal action against the judge, and Holdsworth tells us that even to the present day a proceeding in error is deemed to commence a new suit, for no better reason than because six hundred years ago it really was a new proceeding directed against the judge, and was based upon a new cause of action arising out of the wrongful act committed by him in rendering his false judgment. To this day, also, we em-

ploy assignments of error, because six hundred years ago the judge was held to be entitled to know what were the charges against him.<sup>3</sup>

Obviously, if the proceeding only amounted to a review of the action of the judge, it did not relate to the merits of the judgment. It only raised the question whether the judgment had been vitiated by any error committed by the judge. The inquiry never arose as to whether the judgment was just or unjust, nor did the proceeding involve the question as to what the true judgment ought to be. The sole issue in the reviewing court was, Did the judge commit an error? If so, the judgment was reversed. This has always been, and still is, the theory upon which actions at law are reviewed in the United States. It imposes two serious restrictions upon the usefulness of our courts of review in protecting parties from injustice.

#### *Exclusion of new points—*

In the first place, the review is confined to those matters which the trial judge has actually passed upon, for it could not be successfully claimed that he had made an erroneous ruling upon any matter regarding which he had not ruled at all. Therefore no question can be raised for the first time in the higher court, no matter how important it may be.

Thus, in *State v. Garcia* (1914), 10 N. M. 414, a conviction for manslaughter was sustained against a defendant notwithstanding the record conclusively showed, as the court itself admitted, that it was physically impossible for him to have committed any crime at all; and the reason assigned for such an extraordinary decision was that this point had not been specifically passed upon below, and hence

<sup>2</sup> Pollock and Maitland, *Hist. of Eng. Law* (4<sup>th</sup> Ed.) 684; 1 Holdsworth, *Hist. of Eng. Law* (3<sup>rd</sup> Ed.) 814.

<sup>3</sup> 1 Holdsworth, *Hist. of Eng. Law* (3<sup>rd</sup> Ed.) 814.

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could not be dealt with on review. Although on rehearing, this decision was somewhat modified, the principle was fully adhered to that there can ordinarily be no relief on appeal from an unjust judgment unless the injustice is due to an erroneous ruling of the trial judge. If a ruling is not obtained on the point in question there is nothing to present to the court of error, no matter how great a miscarriage of justice may have resulted in the case.

This narrow conception of the function of a court of review in an action at law has frequently been held to have the compulsory sanction of those constitutions which grant only appellate power to their highest courts. It is said that if new points were to be considered, that would be the exercise of original rather than appellate jurisdiction.

But the argument begs the question. What, it may be asked, is being reviewed? The judgment, or the rulings which became merged in it? Obviously it is the judgment with which the appellant is dissatisfied, and the correctness of that judgment is equally under review whether new points or old points are being considered. The argument confuses appellate power with the manner of its exercise, and seeks to place upon modern courts a constitutional restriction against using any data for testing the justice of a judgment which were not available to courts of error in the Middle Ages.

#### *Errors of fact excluded—*

In the second place, only questions of law can be raised in the appellate court, because the trial judge deals only with matters of law. He cannot commit errors of fact, for questions of fact are left to the jury and are never determined by the judge.

In accordance with this principle, it can never be argued in the appellate

court that the evidence ought to have led to a different verdict, or that this or that item of proof was given too much weight, or that one witness ought to have been believed rather than another. Such objections relate to the verdict, which was found by the jury, not by the judge, and the only theory upon which those errors can be fastened upon the judge is for the losing party to ask him to set aside the verdict because of such mistakes of the jury, and upon his refusal to do so, claim that his refusal is an error of law.

But is it an error of law for a trial judge to refuse to set aside a verdict merely because his opinion as to the facts differs from that of the jury? Clearly not. Otherwise, trial by jury would become a mere sham. So long as reasonable persons may differ regarding the force of the evidence, it can hardly be claimed that the trial judge has committed error in point of law by allowing it to stand. It is only when the mistake of the jury is so clear and obvious as to be beyond reasonable dispute, that the law can impose on the trial judge the positive legal duty to set the verdict aside. Therefore, in any but the plainest cases of mistake on the part of the jury, the discretionary power of the trial judge is the only recourse of the parties against perverse verdicts, and no relief can be obtained in the higher court.

When the jury is waived and the case is tried before the judge alone, it might be supposed that his decisions on the facts could be reviewed in a higher court, as well as his decisions on the law. But such is not the case under prevailing rules. The tradition of the common law has been too strong, and the decision of the judge on the facts has merely been substituted for that of the jury, and all the incidents of the verdict, including its exemption from appellate review, have been pre-

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served. To review the facts as found by the judge has been held to be "unwarranted by law, . . . and a dangerous assumption of power."<sup>3</sup>

Even when the public, incensed at the stubbornness of the courts in refusing to render a much needed service, has secured legislation requiring the courts to review findings of fact in cases tried without juries, most courts have sought for and found specious grounds for holding the legislation invalid.<sup>4</sup>

#### *Review of equity cases—*

Suits in equity were reviewed in a manner quite different from the proceeding in error, because courts of chancery from the beginning adopted the theory of the Roman law that an appeal was substantially a rehearing of the case before a higher court, and involved a review of everything, both fact and law, which entered into the judgment. Furthermore, the view was taken that the purpose of the appeal was not merely to identify errors but to determine the true judgment. Hence cases were not sent back for new trials, but the reviewing court itself entered the decree that ought to have been made.

In one respect, however, the English chancery appeal fell short of a full review of the whole case on its merits. It was so far influenced by the tradition of the proceeding in error that its scope was limited to a review of the rulings and decisions of the trial judge. Therefore new questions could not be considered. New evidence was never admitted in the House of Lords in a chancery appeal, and if evidence introduced below had been improperly

rejected, the House would not receive it but would remit the whole case to be reheard below.<sup>5</sup>

#### *English appellate practice—*

The Judicature Acts in England swept away all restrictions on the power of appellate courts to review cases on their merits, subject only to the protection of the right of trial by jury. Appeals at law and in equity follow exactly the same course where no jury is involved, and the case is finally disposed of on its merits. New questions may be raised and new evidence may be introduced in the appellate court, so that the court of appeal may be enabled to render the final judgment or decree which the trial court should have rendered if it had properly dealt with the case on a full showing of the merits as of the date of the hearing on appeal.<sup>6</sup>

English appellate judges have courageously assumed the duties which the public imposed upon them, and they review the facts fully and freely, without recourse to that easy presumption, so dear to the hearts of American appellate tribunals, that the decision of the trial judge is probably correct because he saw the witnesses and heard them testify.<sup>7</sup>

In the United States we have made no such advance in our theory or practice of appellate review. A few courts, encouraged by liberal statutes, have found it possible to escape from the strangling common law tradition that law and not facts, and the conduct of the judge rather than the merits of the case, are the proper subjects of review. But in general it is safe to say that in no other important civilized country in the world do appellate courts oper-

<sup>3</sup> *State Bank v. Connally* (1855) 13 Ark. 346.

<sup>4</sup> *Styles v. Tyler* (1894) 64 Conn. 432; *Land Mtg. Co. v. Faulkner* (1895) 45 S. C. 603; *Hudson v. Hudson* (1906) 164 Ind. 694; *Frederick v. Bond* (1913) 66 Ore. 269.

<sup>5</sup> *t. Daniell Chan. Proc. (5th Ed.)* 1432.

<sup>6</sup> *Order* 36, 58.

<sup>7</sup> *Murray Docks & Harbour Board v. Proctor* (1928) A. C. 255.

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ate under such technical restrictions as in the United States.

## II. THE EFFECTIVENESS OF COURT ORGANIZATION

The problem of effective court organization naturally divides itself into two aspects, namely, the internal organization of the court and the external organization which establishes the relations of different courts to each other.

### (A) INTERNAL COURT ORGANIZATION

The chief officers of the trial court are the judge, the clerk, and the sheriff, or similar officers known by other names. Every case requires the participation of all of them. The judge conducts the public hearings, makes orders, decides issues, and renders judgments. The clerk issues writs, files papers, makes, preserves, and certifies records, prepares dockets, draws juries, and in general takes care of the administrative work of the court. The sheriff serves process and other notices, summons witnesses and jurors, and executes the orders and judgments of the court.

It is obvious that all of these functions are interrelated, and can be well performed only if the different officers work together in close coöperation. This requires unity of direction, which in turn depends upon unity of responsibility. But as a fact there is in most courts no such unity. Ordinarily each of these officers has an independent title to his office, derived from the voters of the district. No one of them has any authority over the others, nor is he responsible for what the others do, and there is no other officer or official body with power to coördinate their actions in the interest of an efficient administration of justice.

If the court is a large one, with a number of judges, the same want of

united control is apparent among its members. As courts are commonly organized, no judge is subject to the direction of any other nor of all the others together. Each is separately elected and has an individual status, which renders him independent of the rest. Coöperation between them is purely a matter of personal choice and voluntary consent, and it varies from time to time in accordance with changes in personnel and current views of political expediency.

No organization so destitute of centralized responsibility could be expected to function vigorously.

So far as the judges are concerned, it is impossible to maintain or equalize loads, eliminate duplications of effort, assign cases to those best qualified to deal with them, or develop expert performance through specialization, unless all the members of the court are subject to some administrative direction. This could be exercised through a presiding judge whose selection and tenure of office are not under the control of the judges whose work he directs, and who is sufficiently relieved of judicial duties to be able to devote an adequate amount of time and attention to the management of the business of the court.

So far as the clerks are concerned, their independence of the judiciary is an equally serious obstacle to an effective administration of justice. In every line of human endeavor, a full and accurate record of past experience is an indispensable basis for future improvement. The records of a court of justice ought to show how much and what kinds of business come into the court, how it is carried on, what obstacles are encountered, and what results follow from the use of this or that expedient. They should indicate where the greatest opportunities for desirable reform are to be looked for.

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and how they may be accomplished. They should include an adequate collection and compilation of judicial statistics, prepared in such a way as to show the operating results in every department and phase of the court's business.

#### *Coöperation necessary—*

To devise methods for preparing and keeping the records of the courts in this thoroughgoing manner is a task calling for the joint efforts of judges and clerks. The judges should not only know what kind of information is needed to exhibit the effectiveness of the procedure employed, but should also interpret the data obtained by the clerks, and devise new lines of investigation from time to time as old problems are solved and new problems arise. The clerks, on the other hand, should know how to organize their offices in such a way as to facilitate the collection of needed data and make it available.

This kind of coöoperative effort between the judges and the clerks would enable the courts, without interfering in any way with their regular duties, to serve as laboratories for the study of ways and means for improving the administration of justice.

But it is quite certain that without a centralized organization which includes all the court officers, no unity of effort in developing court procedure will be possible. A presiding judge, appointed to carry the responsibility for coöordinating the work of the judges, might well be made the directing head of the entire court organization, so that his administrative authority would extend also over the clerks, the sheriffs, and all other subordinate officers or employees.

Doubtless the precise form of unified administrative direction for the court would depend on local condi-

tions. What would work well in one state might be entirely unsuited to another. The important thing is to establish the principle of centralized organization for the judicial establishment, and let the details work themselves out as they may. If the experience of mankind with other social and political institutions is to be deemed significant of possibilities in the judicial field, important improvements in the administration of justice may be expected to result from the development of effective administrative unity in court organization.

#### (B) RELATIONS OF THE COURTS TO ONE ANOTHER

Throughout the history of English law it has been customary to divide judicial power among a considerable number of courts, each of which was authorized to deal with certain kinds of controversies only.

This tradition has been followed in the United States. We apportion the jurisdiction in various ways and upon the basis of various distinctions. In practically all states, for example, we have separate courts for large and small cases, with an arbitrary line of division between them. We usually have separate courts of first instance and of review. We frequently have separate courts of probate, separate criminal courts, separate courts of equity, and separate courts for causes arising in certain localities. We often apportion jurisdiction of the same kind among several different courts, each exercising only a designated and restricted part of it, as where certain appeals must be taken to one reviewing court and other appeals to another. Sometimes we establish different courts with concurrent jurisdiction in certain classes of cases and exclusive jurisdiction in others. It is not uncommon to find a large number of

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municipal courts in the various cities of the same state, hardly any two of which exercise the same jurisdiction. And as a final complication, the legislature is constantly shifting and changing the jurisdiction of the various courts, every change involving more or less litigation to construe the meaning and ascertain the effect of the legislative act.

*Jurisdictional errors—*

Now, it is a principle of our law that whenever a case gets into a court which lacks jurisdiction to deal with it, every act done in connection with the case is a nullity, and any order or judgment which may have been rendered is utterly void because beyond the power of the court. The parties may have tried in good faith to take their case to the proper court and may believe they have done so, and the judge may suppose that he is authorized to proceed with it. Statutes relating to jurisdiction are often vague, uncertain, and difficult to apply, and in spite of the greatest caution, the best lawyers and judges make mistakes. But neither good faith nor diligence, nor even the precedent of established practice, will ordinarily be of any avail, nor can anything be done to correct the error. The mistake is fatal. It has even been held that if the plaintiff has once demanded a larger sum than the court has authority to grant, he cannot save his case by reducing the claim to an amount within the competence of the court. The case has been irrevocably ruined by the original error, and no amendment can save it.<sup>14</sup>

Such serious consequences of an error in selecting the court in which relief is sought are by no means necessary. Cases ought never to fail at

<sup>14</sup> *Pacific & North Texas Ry. Co. v. Canyon Coal Co.* (1908) 108 Tex. 478.

any stage by reason of jurisdictional errors, if there is power anywhere to deal with them. They should simply be transferred into the proper tribunal when the error is discovered, with no loss as to any proceedings already had. If the mistake is not discovered before judgment, that judgment should be just as valid for all purposes as though it had been rendered by the proper court.

In other words, statutory provisions as to the distribution of business should be made directory only, and never mandatory. There are safeguards enough against confusion of the legislative plan for doing judicial business, because either party can raise the point at will, and the judges would be expected to allow no general breakdown of the scheme of distribution. Such a rule for saving jurisdiction would prevent many accidental miscarriages of justice, and reduce the risk which now makes litigation one of the most hazardous of occupations.

*English Judicature Acts—*

England took hold of this problem half a century ago. The first provision of the English Judicature Act of 1873 was to unite and consolidate seven separate superior courts into one supreme court of Judicature (Sec. 3), and the next was to make the trial court and the court of appeal merely two permanent divisions of one supreme court, so that the court of appeal could, in the furtherance of justice, be given authority by rule of court to do any of the things which a trial court could do (Sec. 4). And the trial court division was subsequently subdivided into three subordinate divisions—King's Bench, Chancery and Probate, and Divorce and Admiralty—for the more convenient dispatch of business.

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The statute then proceeded to declare that any cause or matter might at any time and at any stage, with or without application of any party, be transferred from one division to any other division, or might be retained by any division in which it happened to be, although that should not be the proper division to which it ought in the first instance to have been assigned (Sec. 36).

To save any possible jurisdictional question as to the validity of proceedings had before transfer from an improper division, the Judicature Act of 1873 provided that all steps and proceedings whatsoever taken by the plaintiff or petitioner or by any other party to the cause, and all orders made therein before transfer, should be valid and effectual to all intents and purposes in the same manner as though taken or made in the proper division of the court (Section 11 (2)). Whenever an action of any kind is commenced in the High Court, the plaintiff simply marks his summons with the name of the division to which he wishes the case to be assigned, and the only result of an erroneous assignment is a subsequent transfer to another division.

*United States attitude—*

In the United States we have made a perceptible beginning in freeing ourselves from the tradition that getting into the wrong court is a monstrous sort of error which ruins the case beyond redemption, and that nothing remains but to hold the entire proceeding null and void from the beginning. Thus, in New Jersey an act was passed in 1912 prohibiting the dismissal of any action pending in any of the four superior courts on the ground of want of jurisdiction over the subject matter, but requiring instead that the cause should be transferred, to-

gether with the record and files, to the proper court, to be proceeded with as though originally begun there.<sup>11</sup> And two years later an amendment provided that on any appeal taken in a cause that had not been transferred, the judgment should not be affected thereby, but the appellate court should decide the appeal and direct the appropriate decree or judgment to be entered by the court to which it should have been transferred.<sup>12</sup> In Michigan such a transfer is authorized between the law and chancery divisions of the circuit court.<sup>13</sup>

But most of our states have done nothing to ameliorate the absurd and frightful consequences flowing from a want of jurisdiction over the subject matter. The concept of jurisdiction has assumed an almost superstitious significance, and want of jurisdiction has become a judicial taboo. There must be no trifling with its sinister power. Economic advantage, social benefit, convenience—all these count for nothing in the face of its devastating logic. An act done without jurisdiction is no act at all, an absolute nullity. Orders made without jurisdiction are merely blank paper. They cannot be vitalized by any subsequent act, for you cannot make something out of nothing. The vocabulary of negation has been exhausted in describing proceedings in excess of jurisdiction.

The real difficulty is that want of jurisdiction in any case has been treated as though it were due to the fault of the litigating parties. They were presumed to know the law and they failed to observe its rules. Therefore they should take the consequences, and if the penalty is severe it will perhaps teach them to be more circum-

<sup>11</sup> Laws 1912, Ch. 233.

<sup>12</sup> Laws 1914, Ch. 18.

<sup>13</sup> C. L. 1929, Sec. 16008.

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spect next time. But one who looks more deeply might well inquire whether the real fault is not with the state which forces the litigant to face a jurisdictional dilemma which never ought to exist. The courts are established to render service; but every obstacle placed in the path of those wishing to use them diminishes their value to the public which they serve.

Jurisdictional difficulties are so easily avoidable that no reasonable excuse can be offered for their existence. There should be a single unified court in the state, organized in three divisions, such as a county court division for small causes, a district court division for other causes, and a Supreme Court division for appeals. Any administrative arrangement which would meet local conditions could be employed for the geographical distribution of the facilities of the court, and for the use of specialized judges to hear particular classes of cases. But with such a court the suitor would not be obliged to gamble on his choice of a tribunal, and the terrible burden of the jurisdictional objection would disappear.

A post-office department organized into a half dozen separate forwarding agencies, with intricate regulations as to the character of the mail which each would carry, and an absolute rule of practice that any mail deposited in the wrong office should be forfeited and destroyed, would be no greater anomaly than the present American system of regulating the jurisdiction of courts.

#### III. ADEQUACY OF COURT PROCEDURE

A court of first instance has a normal routine in three steps. It must obtain jurisdiction over the defendant, it must ascertain the character of the dispute between the parties, and it must try (that is, decide) the dispute.

A higher court may then review proceedings below. These are the four essential stages of a litigated case.

Each of these proceedings involves a somewhat elaborate technique, and it will be necessary to consider in what way and to what extent that technique, as currently employed in the United States, is substantially inadequate to meet the demands of a satisfactory administration of justice.

##### (A) OBTAINING JURISDICTION OVER THE DEFENDANT

Due process of law requires that any one against whom court action is sought shall be given notice of the proceeding and an opportunity to be heard. How shall one be notified so that a fair opportunity to be heard will be afforded him?

The simplest case is where the defendant is personally present within the territorial jurisdiction of the court, and is personally notified of the suit against him. This has always been considered sufficient to give him a fair opportunity to be heard in his defense.

The next step would be represented by a case where the defendant was a resident of the state but was temporarily absent. Could a notice be sent after him into a foreign jurisdiction to compel him to return to the state of his residence to answer a complaint in court?

It is quite clear that such a notice would offer the defendant a reasonable and fair opportunity to be heard. As a resident of the state he could not properly claim that it was unjust to ask him to return to his own home in order to permit the courts of his own state to pass upon his case. The Texas statute authorizing exactly this procedure was sustained in *Becker v. Becker*, 218 S. W. 541. The English practice provides by rule for service

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outside the jurisdiction in similar cases.<sup>14</sup>

Is there any tie beside that of residence which is proper to employ as a fair basis for requiring one to come from a foreign land to defend himself in a judicial proceeding?

*English foreign service—*

England and her dominions have developed a well-defined system of service out of the jurisdiction based on the existence of various affiliating circumstances calculated to connect the defendant with the local court, so as to remove the charge of unfairness in the demand that he shall appear therein and defend.

Under Order XI, rule 1, of the present English practice, it is competent for an English court to order service of summons out of the jurisdiction whenever the action is one based upon a breach of a contract which was (1) made within the jurisdiction, or (2) made by an agent trading or residing within the jurisdiction on behalf of a foreign principal, or (3) by its terms to be governed by English law, or (4) broken within the jurisdiction, without regard to where it was made. Such an order for service outside the jurisdiction may also be made when the plaintiff seeks an injunction against acts to be done within the jurisdiction, or when any person outside the jurisdiction is a necessary or proper party to an action brought against some one served within the jurisdiction.

It will be noted that the English courts are asserting no general right to compel parties to travel from distant lands to appear in defense of actions brought in England. If foreign parties keep clear of English entanglements, and do not bring themselves into English transactions, they will be

<sup>14</sup>Order II, R. 1 (c).

entirely free of any obligation to appear in English courts. But the English theory of due process apparently considers it fair and reasonable to hold that people who have voluntarily become parties to dealings in England must stay by those dealings until they are wound up, where necessary, by English court action. If they do not want to become subject to call into an English court, they should refrain from entering into such business transactions; just as we say that if a foreign corporation does not want to be sued in a state court, it should refrain from doing business in that state.

*European foreign service—*

This theory of jurisdiction over foreigners who become involved in domestic transactions is almost universal among European nations. In Belgium, service on a foreigner outside the state is good in cases where the cause of action arises in Belgium, or where necessary parties are partly within and partly without the jurisdiction. In France, service on foreigners outside the state is good in cases brought to enforce the execution of engagements made in France, or made outside of France with a Frenchman. In Germany, service may be made on foreigners abroad in actions on contracts to be performed in Germany or for torts committed there. In Italy, such service is good in actions on contracts made or to be performed within the kingdom. In Norway, foreign service is allowed on causes of action arising in Norway. The British dominions follow the English practice.<sup>15</sup>

*United States foreign service—*

In the United States no such method of obtaining jurisdiction is recognized,

<sup>15</sup>See Piggott on *Foreign Judgments*, Chap. XIII.

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and since each of the states of the Union is judicially a foreign nation, it results that state lines constitute a much more serious restriction upon American courts than do international boundaries upon the courts of Europe.

Furthermore, we place our own citizens at a disadvantage in their dealings with citizens of other nations. An Englishman or a Canadian can sue an American for breach of a contract to be performed in his own country, by service of an English or Canadian writ in the United States, and the judgment obtained will be valid where rendered and may be enforced against the person or property of the defendant if either should ever be found within the jurisdiction of the court. But an American cannot enjoy the reciprocal privilege, and will be denied the right to sue the Englishman or Canadian in an American court under similar circumstances.

*Constructive service—*

However, while nonresidents who have no property within reach of the court are entirely exempt from judicial molestation, the situation is reversed when the nonresident has property within the court's jurisdiction, whether such property is involved in the controversy or is merely subject to seizure. In such a case we proceed quite ruthlessly against the property on what we call "constructive service," without regard to whether or not the owner has any actual notice of the proceeding.

Constructive service is merely the observance of a statutory formula, which usually requires a notice of suit to be posted in a public place or published in a newspaper. Its availability is in no way dependent either upon the actual necessity for resorting to it or upon its probable effectiveness. It may be used with full effect notwithstanding the defendant's whereabouts

is well known and a personal notice could easily be given to him, and its validity is not impaired by the circumstance that there is no reasonable probability that the posting or publication will ever come to the defendant's attention.

English law proceeds on a wholly different theory. It requires that personal service shall always be made where possible, no matter where the defendant may be. Substituted service of any kind is not, as with us, a regularly authorized method which is available as of course merely because the defendant is a nonresident, but it must be specially ordered on an application pointing out reasons why it ought to be allowed under the particular circumstances of the case. The Annual Practice states that "an order for service by advertisement will not be made save in an exceptional case where there is good reason to believe that the advertisement will be seen by the defendant."<sup>15</sup>

In England, when an order for substituted service is made, "the primary consideration is as to how the matter can be best brought to the personal attention of the person in question himself."<sup>17</sup> In the United States, on the other hand, "this manner of serving process depends for its validity more on its strict conformity to the statute by which it is authorized than upon any inherent probability of its conveying intelligence of the impending suit to the party whose rights are to be affected."<sup>18</sup>

Fundamental principles of justice seem to have become distorted in the development of our methods for dealing with judicial process. We have failed to appreciate the inherent soundness and desirability of actual

<sup>15</sup> 1032, p. 85.

<sup>17</sup> *Re McLaughlin* (1905) A.C. 347.

<sup>18</sup> *Wade on Law of Notice* (2<sup>nd</sup> Ed.) sec. 1690.

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personal service as a basis for judicial action, and we have been blind to the essential unfairness of statutory substitutes which provide no reasonable guaranty that a nonresident defendant will have a real opportunity to be heard.

Perhaps the necessity for prompt action so keenly felt in frontier communities explains both the reluctance of American courts to send their writs abroad and their readiness to assert jurisdiction over nonresidents through the publication of a notice which, as a means of conveying information, is often no more than a plausible pretense. But the frontier has gone, with its summary ways, and we find it necessary to justify our judicial methods by the standards of a settled civilization. To do this will require a reexamination of the whole problem of notice as an essential element of due process of law.

#### (B) ASCERTAINING AND DEFINING THE DISPUTE

It has been the traditional theory of our law that the nature and the scope of the controversy should appear in the pleadings. These were to contain statements of the facts which each party relied upon to support his own side of the case, and were to indicate how far he admitted or denied the statements of his adversary. By this means the precise issues were to be exhibited in advance of the trial, as a limitation upon the scope of the inquiry to be conducted before the court. Each party would thereby be enabled to prepare his case with full confidence that he would neither be surprised at the trial by his opponent's proof nor be burdened, on his own part, with the expense of proving or preparing to prove facts which his opponent really conceded.

This desirable aim, however, has

never been fully realized, because it has been commonly believed by the profession to be an advantage to each party to conceal his true position as long as possible, so that his opponent may be less able to attack or defend. Accordingly, the art of pleading has quite largely developed into a technique for stating enough of one's position to meet the minimum demands of the rules, and at the same time giving as little aid as possible to one's opponent in enabling him to anticipate and prepare to meet the evidence which the pleader expects to introduce at the trial.

The rules of pleading require only ultimate facts to be stated, and not evidence or conclusions; but it has never been found possible to define an ultimate fact so as clearly to distinguish it from evidentiary facts and conclusions of law. Furthermore, many allegations which fully meet the requirements of good pleading are nevertheless so general that it is impossible to anticipate what the pleader will contend they really mean when he comes to use them as a basis for introducing evidence. And in regard to the denials which appear in the pleadings, the other party can never know in advance whether his opponent really intends to contest the truth of the facts denied, or whether the denials are made without serious purpose and merely to force him to go to useless expense and trouble in preparing his proof.

#### *Weakness of ex parte showings—*

The essential weakness in our system of pleading is its *ex parte* character. As long as each litigant draws his own statements of his position, he will endeavor to do so in such a way as to give himself the widest freedom of action at the trial and at the same time convey as little information as

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possible to his adversary. The pleadings serve both as a screen behind which the pleader seeks to conceal his own position, and as an ambush from which to surprise his opponent.

It has been sought to remedy these defects by various devices, such as requiring more detailed allegations, abolishing general issues, providing for specific denials, penalizing parties for raising fictitious issues, and requiring pleadings to be supported by an oath of the truth of the allegations.

None of these remedies, however, meets the real difficulty, which is the *ex parte* character of the proceeding. *Ex parte* showings can never be relied upon as a full and satisfactory means of disclosing the positions which adversaries take toward one another. If such a showing is unsatisfactory on its face, it can, of course, be attacked and an order obtained to correct it; but the amendment will be only another *ex parte* statement in which it will be possible merely to shift to another form of ambiguity, uncertainty, or subterfuge. Successive attacks can be met by successive evasions, until patience and resources are exhausted and the attempt is abandoned.

A showing fair on its face may be even more harmful, if substantially misleading, for its true character may be discovered only when it is too late to take measures for protection against it.

Only by a preliminary proceeding in which each party may call upon the other to submit himself and his witnesses to interrogation under oath, can the true nature of the controversy be satisfactorily ascertained. The *ex parte* pleadings will serve well enough as suggestions regarding the general nature of the dispute, but they must be supplemented by an actual or possible adverse examination if the elements of surprise are to be removed at

a sufficiently early stage so that the trial may be expected to bring out fully the real merits of the controversy.

*Advantages of preliminary discovery—*

Although the elimination of surprise is the main purpose to be served by pre-trial discovery, several other highly beneficial results follow.

By taking the sworn testimony of witnesses in advance of the trial, the evidence can be preserved and is available in the event of the death or removal of the witness prior to the trial. This is extremely important in view of the long delays in bringing cases to trial and the modern shifting of populations.

✓ The use of discovery before trial greatly diminishes the importance of the pleadings and eliminates a large part of the technical procedure relating thereto which now consumes so much of the time of lawyers and judges and involves so much expense to clients.

✓ When it is disclosed by the discovery that the defendant has no defense to a claim by the plaintiff for a sum of money, a judgment for the plaintiff may be rendered at once. This is in essence merely a summary judgment rendered upon preliminary discovery. Our ordinary summary judgment procedure is based upon a restricted sort of discovery by affidavit or testimony in court on motion for such a judgment. An effective general system of discovery would greatly increase the effectiveness of the summary judgment.

✓ Again, a trial which follows an effective preliminary discovery gains much in efficiency. With the facts on each side understood by both parties when the trial opens, leading questions lose their objectionable character, the witnesses can be brought at once to the

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main points in controversy with no waste of time over formal matters, the necessity for cross-examination is greatly reduced, and the actual introduction of proof may often be dispensed with altogether. With the element of surprise out of the case at the opening of the trial, there is no occasion for that elaborate maneuvering for advantage, that vigilant and tireless eagerness to insist on every objection, which not only prolongs and complicates the trial but makes the outcome turn more upon the skill of counsel than upon the merits of the case.

Furthermore, where uncertainty as to the facts of the case has been removed by discovery proceedings, each party is able to see how he stands in relation to his adversary. The points of strength and of weakness are largely brought out, and each can estimate with considerable accuracy his chances of success. In such a situation there will be little to gain by continuing the litigation, and a just and satisfactory settlement can often be reached. Discovery before trial may thus make unnecessary the trial itself.

But the beneficial results will extend still further. Disputes between parties often develop into litigation because of misunderstanding of the facts in the preliminary stages of private negotiation. Discovery at that time might make it unnecessary to bring a suit at all. Now, if each party knows that he can eventually be forced to make a full disclosure if the case is taken into court, he may be interested to save himself trouble and expense by disclosing at once. "If eventually, why not now?" This is exactly the way the matter works out in practice, and settlements are frequently made with satisfaction to all parties, without any actual resort to litigation.

In England and the British domin-

ions a great deal of progress has been made since the passage of the Judicature Acts in developing a convenient and effective procedure for discovery before trial.

#### *Divergent practice re discovery—*

In America the experiences of our several states with the subject of discovery before trial have been extraordinarily divergent.

In some states discovery may be used in any type of action; in others it is limited to certain types. Some states allow discovery to be had only from adverse parties, others from co-parties; some permit only parties to the record to be examined, others include real parties in interest; various statutes specify the officers or employees who may be examined on behalf of corporations, and almost no two of them are alike; some states allow the corporation to select the person to be examined, others allow the examining party to make the selection; some states permit the examination of ordinary witnesses, while others prohibit it. Many states permit a party to resort to discovery only after he has filed his pleading, but others allow it before pleading.

In some jurisdictions the examination for discovery may relate to all matters relevant to the controversy, while in others it is strictly limited to those matters upon which the examining party has the burden of proof on the pleadings; in some states a party may be compelled to disclose the evidence by which he expects to establish his case, in others this is not allowed; some states allow examination of person or property before trial, others do not.

Most of the restrictions upon the free use of discovery are not only unnecessary but cause an enormous amount of trouble to the parties and

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to the courts in construing and applying them. They are a result of the traditional feeling on the part of lawyers that discovery is a dangerous practice which encourages the production of framed-up cases and of fictitious evidence to meet the facts which the examination has brought out.

The confusing variety of American restrictions and limitations are all intended as safeguards against this supposed danger. But experience has demonstrated that the effect of discovery is quite the reverse, where it is fully available to both parties. The witnesses are examined when their recollection is fresh and when there are the best opportunities for testing the truth of their statements. After both sides have committed themselves under such circumstances, it is exceedingly difficult for either one to shift his position by manufacturing evidence.

In those jurisdictions where discovery before trial is most freely allowed, as in Wisconsin and Ontario, it is most highly regarded by both the profession and the public. Lawyers who constantly employ it in their practice find it an exceedingly valuable aid in promoting justice. Discovery procedure serves much the same function in the field of law as the X-ray in the field of medicine and surgery; and if its use can be sufficiently extended and its methods simplified, litigation will largely cease to be a game of chance.

## (c) TRYING THE DISPUTE

Under our system of law there have been developed two agencies for the trial of issues—the single judge and the jury. In the field of civil justice neither is much used among the nations of continental Europe, and both may be considered characteristic of English jurisprudence. Continental practice employs a bench of judges,

usually three, who try the facts as well as determine the law. The advantages of such a tribunal are obvious, and it is remarkable that we have never experimented with it. However, the English tradition of lodging the full judicial power of the court of first instance in a single judge in all cases where no jury is used, has been received and followed in the United States with complete acquiescence, and there seems to be no demand from any source for a departure from that tradition.

It is the jury that offers the chief problem in the trial of issues of fact.

Wholly aside from the question of its ability to deal with issues of fact, the civil jury as an institution contains a serious infirmity. Its decisions cannot be revised and corrected by a court of review; they can only be set aside entirely and the case sent back for retrial before another jury. Even when the case ought never to have been submitted to a jury at all, for the reason that it presented no material issue of fact and should have been decided by the court for one or the other of the parties on points of law, nevertheless, if it has been erroneously submitted to the jury and the verdict is rendered for the wrong party, neither the trial court nor a reviewing court can order the entry of a judgment for the party who is conceded to be entitled to it, but the case must be tried again.

In a few states this absurd situation has been cured by statute, but the Supreme Court of the United States has held that, under the provision of the Federal Constitution preserving trial by jury, no cure is possible.<sup>10</sup>

On the other hand, when a judge tries the case, his decision on the facts may be reviewed by a higher court, his

<sup>10</sup> *Slocum v. New York Life Ins. Co.* (1912) 228 U. S. 364.

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conclusions may be reversed, and a judgment based on a different view of the facts may be then and there entered, thus finally disposing of the litigation without the expense or delay of a new trial and without the possibility of a subsequent appeal.

Aside from the inescapable burden of new trials which accompanies the use of the jury, the chief weaknesses of that mode of trial are quite easy to avoid if the trial judge is given sufficient power in conducting the trial. Those weaknesses are: first, the inexperience of the ordinary juror, his lack of training in dealing with complicated legal situations, and his unfamiliarity with court-room methods and the technique of evidence; and second, the extent to which the average juror is subject to the influence of his own opinions, prejudices, and preconceptions.

#### *Judge advising jury—*

If the judge were to review the evidence in the presence of the jury, comment on its various features, indicate the points likely to mislead and confuse them, and give them the benefit of his own views of the case, without attempting in any way to control or coerce them, the verdict would represent the combined wisdom of both judge and jury, and would perhaps be better than either alone could render.

This is the historic method of the common law, and has been preserved unchanged in England and in some American jurisdictions. But in most of our states we have abandoned it by prohibiting judges from commenting on the weight of the evidence, thereby leaving juries without needed guidance. In some states this has been done by provisions introduced into the constitution, in some it has been effected by statutes, and in a large number the supreme courts themselves

have laid this restriction upon the power of trial judges.

There is no sound basis for this novel doctrine, so contrary to the spirit of the common law. So long as the ultimate decision rests with the jury, there can be no serious encroachment by the judge. His advice will be taken when it appears to be justified by the evidence; otherwise it will fail of effect. The jury will be quick to see and resent any attempt on the part of the judge to be unfair to either party, and the concurrence of the jury in the advice of the court will be good evidence that his advice was sound. Even so radical an antagonist of judicial usurpation as Bentham recognized this when he said:

In so far as upon what he does or says depends the decision given by the jury—only in so far as what he does and says, has in their eyes the appearance of justice, can he hope to exercise any influence upon the decision they are about to pronounce.<sup>20</sup>

The doctrine that a final decision on the facts from the judge alone is entirely proper and just in a so-called "equity case," while the slightest intimation of the court's opinion on any part of the facts is a monstrous and fatal error in a so-called "law case," is a phase of legal legerdemain which ought not to be perpetuated. There is no esoteric virtue in the chancellor which fails in the judge. Facts are facts, whether they are investigated on the law or the equity side of the court.

But aside from the obvious advantages which the jury would gain from the impartial advice of the judge based upon his experience, skill, and technical training, the full recognition of not only the right but the duty of the judge to advise the jury on the facts would produce amazing results in diminishing the costs, the delays, and the tech-

<sup>20</sup> *Principles of Judicial Procedure*, § 4.

nicalities of jury trials. Among the most striking of these advantages, the following may be named:

1. *It would reduce time, strain, and scandal in impanning juries.* Nowhere else in the English-speaking world are there such exhibitions of judicial ataxia in obtaining juries as in the United States. Why should a judge sit helpless for days and weeks while lawyers wrangle and struggle over the selection of a jury? Why should the court be paralyzed at the whim of contentious counsel, piling up expense on the taxpayers, congesting dockets, delaying justice, and bringing the law into disrepute?

Chiefly because the jury is an irresponsible and uncontrolled subject for the lawyer's manipulation. In many cases he does not try to get an impartial jury, but a jury which he can handle. He wants jurors having prejudices which he can play upon, sympathies which he can appeal to, foibles which he can capitalize for his own profit. He investigates their personal histories, their political inclinations, their religious affiliations, their social habits.

All this would tend to disappear at once if the judge were a real adviser to the jury. The appeals to passion, sympathy, and prejudice, the distortion of the evidence, the confusing of the issues, the clever and insidious emphasis upon the things which should not count, would lose their potency.

2. *It would facilitate the introduction of evidence.* The science of special pleading is usually pointed to as the climax of legal refinement, but the science of evidence pays a much greater tribute to the microscopic discrimination of the legal mind. It is an elaborate and comprehensive system for excluding evidence from the jury, based upon the fundamental idea that the jury cannot be trusted with

all the facts of the case, but only with such as the courts think are not likely to mislead. Fearful that the jury will draw false conclusions or will become confused in regard to the issues submitted to it, the law devises a protective scheme which is so complex and so infinitely refined that the labors of a lifetime are hardly sufficient to master it.

It is a labyrinth set with pitfalls at every turn. No lawyer fully understands it; no judge can accurately administer it. Errors in the admission and exclusion of evidence are not only common but inevitable, and they bring with them appeals, reversals, and retrials. No such rules are necessary to protect the judge when he tries the facts, for he is deemed to have sufficient knowledge, judgment, and experience to understand the probative force of whatever is presented to him. But the juror is presumed to be an easy prey to illegal influences and suggestions, and if he might have gone wrong by reason of such an error, it is usually presumed that he did go wrong.

If the case is carefully analyzed for the benefit of the jury by the judge, and the force and effect of the various parts of the evidence are fully explained to the jury, and the judge suggests to them what appear to him to be proper conclusions to draw from it, it is certain that the chance of the jury being misled will be so reduced as to make it practicable greatly to simplify the rules of evidence and their administration.

3. *It would enable the judge to exercise much more effective control over the conduct of the trial.* The prevailing American rule prohibits any remarks from the judge, as well during the prior course of the trial as during the giving of instructions, which intimate any opinion he may hold as to

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whether any fact has or has not been established, as to whether any piece of evidence is entitled to much or little weight, or as to whether any witness or class of witnesses is to be deemed more or less credible. In just so far as he is an active participant in the trial, he is likely, by word or act, to give the jury some inkling as to his own impressions. A word used, a suggestive phrase dropped, an inadvertent failure to balance his statements properly, even a perfectly valid reason given for a ruling, might reveal an opinion. In every sound he utters there lurks the possibility of reversible error.

Is it strange, then, that the judge inclines to hold himself aloof from the contest, to sit as an umpire or moderator rather than as a participant in the proceeding, to let things take their own course as far as he can, and to throw the responsibility for a proper decision of the case upon the parties, the lawyers, and the jury?

4. *It would simplify the task of instructing the jury on the law.* It is very difficult to prepare a set of instructions which will not be suggestive of matters of fact on the one hand, or too abstract on the other. The judge must give the jury the law, but he must not intimate opinions on the facts; and yet the rules of law which he gives must be concrete and applicable to the precise facts in evidence. The court must not assume the existence of any controverted fact, must not put in doubt any uncontroversial fact, must not emphasize by special reference nor minimize by silence any particular facts, must not call special attention to particular witnesses, must not use ambiguous forms of grammatical expression which may or may not carry suggestive inferences as to the existence of facts. The whole doctrine of cautionary instructions is in a state

of chaos because of the possible tendency of such instructions to transgress the rule we are considering.

If the court should be permitted really to explain and elucidate the evidence for the jury's benefit, most of these baffling rules and restrictions would at once disappear. There would still be the possibility that inadvertent phrases in the instructions might be construed as binding charges on the law instead of mere opinions on the facts, but in the face of a sound analysis and commentary on the evidence, showing fully the problems which were presented for the jury to solve, the liability to error would be reduced to a minimum.

5. *It would reduce the frequency of resort to that expensive remedy for bad verdicts—the new trial.* Some of the grounds for new trial are not based upon the conduct of the case in open court. Such are disqualification of jurors, accident or surprise, misconduct of the party or jury outside the court room, and newly discovered evidence. But others are based upon the manner in which the trial was conducted and upon the justness of the verdict as related to the evidence. Thus, the admission of improper evidence, the misconduct of counsel in improperly appealing to passion or prejudice or in bringing to the attention of the jury facts which are not proper for their consideration, excessive or insufficient verdicts, and verdicts which are against the weight of the evidence, all constitute grounds of this nature.

If the judge, on motion for a new trial, can, for reasons such as these, properly set aside a wrong verdict after it has been rendered, it would certainly constitute no greater interference with the prerogative of the jury for him to advise them in advance, with a view to obtaining a verdict

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which could be allowed to stand. Why must the court sit mute, allow the verdict to be rendered without a word of warning, and then destroy it? A supervising architect does not stand silent and allow a building to go up in a manner he cannot approve, and when it is completed at much cost, order it demolished and built over from the beginning. An executive having the veto power on legislation, if he felt any interest in obtaining needed laws, would not refrain from all comment upon pending bills until after the legislature had completed its task and adjourned, and then veto its work and force another legislature to attack the same problem without any information as to why the veto had been exercised. The rule which we impose upon our courts is not based on common sense.

## (D) OBTAINING A REVIEW

Appellate processes have not kept pace with modern needs. They are confusing, technical, slow, and expensive.

There are two mechanical functions which must be performed in every case of appeal: (1) Control over the case must be transferred to the reviewing court, and (2) the questions for review must be presented for adjudication.

*Transfer of jurisdiction—*

The transfer of jurisdiction is inherently the simplest possible process, and essentially involves nothing more than a formal notice of, or request for, a transfer. But the historical development of appellate jurisdiction in England followed an unsystematic course not unusual with social and political institutions, and instead of employing an existing device for additional uses, created new devices for each new use. In this way a large number of different methods came into operation to bring

up different kinds of questions for review. All of them have come down to us, and they all contribute to confuse American appellate procedure.

It is familiar knowledge that one of the most serious objections to the common law system of pleading was the variety of forms of action and the technical distinctions to be observed in their use, and it is probable that this was the primary cause for the abandonment of common law pleading and the adoption of the code in the majority of American states. Forms of action were a product of historical causes which had long ceased to have any practical significance. Their use entailed both the risk of a wrong choice and familiarity with a large body of technical rules which would otherwise have had no reason for existence. The typical American Code begins with the legislative announcement that forms of action are hereby abolished and hereafter there shall be in this state but one form of action to be known as a civil action.

The situation is practically identical in regard to forms of appeal. The writ of error, the writ of certiorari, the writ of prohibition, and the writ of mandamus were developed by the common law of England in exactly the same way as the forms of action, and equity developed another form of review by appeal to meet its own peculiar requirements. Every form has its own special use and its own special procedure.

If you choose the wrong form you will entirely fail in your effort to review the case, for no form can by amendment be changed to another. When you have chosen you must strictly follow the technique which for some reason, probably historical, belongs to that form of review, whether there is any present advantage in it or not.

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The choice bristles with perplexing dilemmas. The writ of error should be used to review proceedings following the course of the common law, but there is no authoritative test to determine what is the course of the common law.

The writ of certiorari is available only if a writ of error or an appeal or some other remedy is not available, or, if available, is not adequate, and it is employed to review the acts of inferior courts and of tribunals, commissions, magistrates, boards, or offices acting in a judicial capacity not according to the course of the common law; but there is no authentic test as to what public bodies or proceedings the writ is applicable to, and no safe rule as to when the other methods of review are sufficiently inadequate to justify resort to this one.

The writ of mandamus is an extraordinary remedy and is granted only when no other adequate relief can be granted. This refers us back to all the other remedies.

Prohibition is said to be the means of keeping inferior courts of every description within their proper jurisdictional limits, but not of preventing an erroneous exercise of their jurisdictional power. But where is the line between these shadowy concepts?

As for appeals, they are statutory proceedings adopted from equity, and are subject to a multitude of statutory limitations, express and implied. When authorized, are they additional remedies, or are they deemed to be exclusive of all others? If employed in legal actions, do they operate only as writs of error under another name, or do they convert proceedings in error into rehearings on the facts as well as the law?

The volume of litigation which has involved the scope, the purpose, and the proper limitations of these various

appellate remedies has been appalling, and our appellate practice has become such a prolific source of litigation over purely procedural questions that *Corpus Juris* devotes more space to Appeal and Error than to any other subject in the whole field of law.

#### Suggested appellate procedure—

The first step toward a rational appellate procedure should be the total abolition of all these forms and the substitution of a single form for appeal, consisting of a simple notice. The problem of obtaining the various kinds of appellate relief on a single form of notice would be the same sort of problem as that of obtaining various kinds of trial court relief on a single form of complaint. In the ordinary jury case, the appellant would give notice of a demand for a reversal or a new trial, in whole or in part, and the form should be identically the same whether it is an appeal from an inferior court or from a superior court of record. In a law case without a jury, or an equity case, or any other proceeding where the judge tries the facts, notice of request for a rehearing on the law or the facts or both would be given. Where an order to the lower court or tribunal directing it to act or desist from acting is desired, corresponding to the command of the writ of mandamus or prohibition, the notice would specify it.

As in the case of a pleading, such relief ought to be given by the appellate court as the case presented calls for, whether asked for or not, and no appeal should ever fail because of any error on the part of the appellant as to what relief he is entitled to, if he is entitled to any relief. The analogy between a case of review and a case of first instance is complete, and both are capable of reduction to the same de-

gree of simplicity according to identical principles.

*Presentation of questions for review—*

The presentation of the questions for review in the appellate court is also an essentially simple process which we have made unnecessarily complex, technical, and expensive. The two necessary features are the record showing the proceedings in the trial court and a specification of the objections taken to the decision of that court.

The record of the proceedings at the trial is already in existence when the trial closes. It consists of the pleadings and other papers filed in the cause and the stenographer's record of what took place at the trial. It should pass directly to the court of review, without any attempt to reduce its scope or change its form, for the labor involved in eliminating irrelevant portions and in reducing the testimony from questions and answers to narrative form is out of all proportion to the advantages sought. Briefs or abstracts of counsel may be employed to summarize the facts and point out the essential parts of the evidence, with such references to the pages of the transcript as may be necessary, but the original report of the stenographer is the simplest, cheapest, and most authentic record of the trial that can be prepared for review. The mere reduction of the testimony to narrative form as required in the common law bill of exceptions and its modern substitutes probably doubles the cost and the delay of an appeal.

The objections to be urged in the reviewing court to the action of the court below can be made directly in the briefs of counsel, and the pompous, diffuse, repetitious, and formal assignments of error, which have long served chiefly as pitfalls for parties, should be

absolutely abandoned. With the entire trial record carried up to the reviewing court, there will no longer be any need for using assignments of error for the purpose of indicating in advance, as a guide for the preparation of the record, what points are to be argued on appeal.

English appellate practice is based on the theory above outlined, and involves no technical difficulties whatever. The record is a mere copy of existing documents, and can be prepared mechanically by any typist. To perfect an appeal the appellant serves a notice that he will move the Court of Appeal in fourteen days to reverse the judgment, and files with the clerk of that court three typewritten copies of the notice of appeal, the pleadings, the evidence, and the opinion below. That is absolutely all. The record is not even printed, unless a second appeal to the House of Lords is taken.

#### CONCLUSION

In regard to the foregoing discussion it must be remembered that the United States has no single system of judicial administration, but operates under forty-nine different and independent systems. All have had a common origin and all have been developed to meet essentially similar social and economic conditions, so that all of them embody broadly uniform fundamental principles; but in the details of practice they exhibit many variations.

In undertaking to discuss American legal practice as such, it is only possible, therefore, to deal with prevailing tendencies and more or less common features found among the many systems in use. A number of the defects noted above are almost universally present; in respect to others, a few states have been able to accomplish substantial reforms. Nevertheless, the



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picture above drawn may be taken fairly to represent the present situation in the United States, and there is hardly a state in which the administration of justice could not be greatly improved in the manner here suggested.

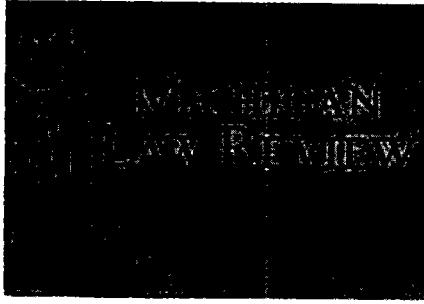
The diversity in the judicial procedure of our various state and Federal jurisdictions might appear at first sight to be in itself a serious evil, producing nation-wide complexity and confusion, and it has sometimes been suggested that the United States ought to have a single system of procedural law. But the establishment of a uniform practice, if it could ever be accomplished, would have seriously damaging consequences.

It is difficult enough under present

conditions to bring about changes in the practice of any state, but if, to the inertia which now exists, there should be added the resistance produced by a desire to make no change anywhere unless and until the same change could be agreed upon and introduced simultaneously in all the states, so as to preserve the uniformity in procedure, our legal practice would become absolutely fossilized and impervious to reform. The very diversity which now exists presents opportunities for experimentation with procedural devices which cannot fail to stimulate widespread interest in other states and to develop a feeling and a tradition of cordiality toward efforts to improve the administering of justice.

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The Theory and Practice of Pre-Trial Procedure

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## PRE-TRIAL PROCEDURE

THE THEORY AND PRACTICE OF PRE-TRIAL  
PROCEDURE \**Edson R. Sunderland †**Traditional Theory of Defining Issues For Trial*

MORE than a hundred years ago Henry J. Stephen, serjeant at law, published his celebrated treatise on the *Principles of Pleading in Civil Actions*. The book opened with the following statement:

"In the course of administering justice between litigating parties there are two successive objects,—to ascertain the subject for decision, and to decide. It is evident that, towards the attainment of the first of these results, there is, in a *general* point of view, only one satisfactory mode of proceeding; and that this consists in making each of the parties state his own case, and collecting, from the opposition of their statements, the points of the legal controversy."<sup>1</sup>

This was an accurate statement of the controlling principle which had characterized civil procedure in England, and indeed throughout western continental Europe, since the Norman conquest. It was the principle of party-presentation. The parties themselves framed their own controversies, and laid them before the court for decision. The judges were in no way concerned with what the parties brought forward. A plaintiff's case might have no substantial basis whatever. A defense might be purely fictitious. Whatever the parties asserted or denied was taken at its face value as a basis for the trial. The judges never sought to protect themselves or the parties from the useless trial of issues based upon allegations or denials which had no colorable existence in fact. It was their business to try the cases as the parties presented them, and if a case lacked substance the trial would disclose it.

There was a certain economic extravagance in this theory. A trial is an elaborate and expensive proceeding. It is designed to bring out and sift and weigh substantial and conflicting evidence. Its machinery is

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<sup>1</sup> STEPHEN, PRINCIPLES OF PLEADING IN CIVIL ACTIONS, 2d. Am. ed., 1 (1831).

designed for heavy duty. The burden of proof must be maintained, the witnesses and the documents must be marshaled in due order, the case in chief must be supported and sustained by proper rebuttal, examination must be tested by cross examination, objections must be made at once or they are waived forever. Every ounce of strength possessed by each of the parties must be available for instant use, for no preliminary skirmishes within the field of maneuvers marked out by the pleadings have disclosed the resources of the contestants. Prudence requires that each shall be prepared for a major engagement no matter how probable it may appear that his opponent has nothing with which to support an attack or to maintain a defense.

This wasteful method of litigation was perhaps the more remarkable because criminal procedure provided a very effective means for promptly eliminating apparent controversies which had no merit. It was not enough that someone charged another with crime. There must first be a preliminary finding that there was reasonable ground upon which to bring the defendant to trial. Unless the examining magistrate or the grand jury were convinced that there was evidence upon which substantial issues could be framed, the case never came on for trial at all.

Pre-trial civil procedure under the English common-law system consisted only of pleading. Whatever the rules of pleading could accomplish in the way of defining and restricting issues contributed to the efficiency of the trial. What could not be done by the rules of pleading could not be done at all.

The great weakness of pleading as a means for developing and presenting issues of fact for trial lay in its total lack of any means for testing the factual basis for the pleader's allegations and denials. They might rest upon the soundest evidence, or they might rest upon nothing at all. The parties could assert or deny whatever they chose. But whether the pleadings represented fact or fancy was something with which the rules of pleading had nothing to do. That was a matter to be dealt with at the trial, not at a preliminary stage.

This total incapacity of the system of pleading to differentiate between issues which were genuine and those which were sham finds striking confirmation in Stephen's famous rules set forth in the classic treatise already referred to. The principles of pleading are there reduced to about fifty rules. They deal with the methods employed for producing issues, for insuring their materiality and singleness, for securing certainty, for avoiding obscurity and confusion, and for

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preventing prolixity and delay. They are developed and discussed in some five hundred pages of text. The last rule alone deals with the truth of pleadings, and to it the author devotes one page. The rule reads as follows: "All pleadings ought to be true." But it is a rule without a sanction. It expresses only a pious admonition, for the author says of it:

"While this rule is recognized, it is at the same time to be observed, that in general there is no way of *enforcing* it, as a rule of pleading, because in general there is no way of proving the falsehood of an allegation till issue has been taken, and trial had, upon it."<sup>2</sup>

Truth in pleading means, of course, the existence of a reasonable basis in fact. Every issue involves contradictory assertions which cannot both be true. But if the pleader alleges nothing which he cannot substantially support by evidence, and denies only that which he has substantial ground for controverting, the issues will be true issues.

False issues may not be due to bad faith. They may result from ignorance or bad judgment, or merely from the desire to profit from the turns of fortune which have always been inherent in litigation under our traditional system of procedure. But whatever their cause, the burden which such issues place on the parties, the witnesses, the court and the public is a serious one.

There was little difference in this regard between cases at common law and cases in equity. In each type the development of the issues was in the hands of the parties, and in neither did the system of pleading provide any means for a preliminary test of truth by which fictitious issues could be summarily eliminated.

A limited control over the framing of issues was traditionally exercised by chancery judges in cases where they wished to obtain an advisory verdict from a jury. These issues were directed at the hearing after sufficient proofs had been adduced to disclose the advisability of obtaining the opinion of a jury upon the matter in controversy.<sup>3</sup> So far as the issue to be tried was concerned, the proceeding was strictly a pre-trial determination of its existence and substantial importance. But the decision of the jury was not binding on the court, and it was perhaps for that reason that this practice was never looked upon as a

<sup>2</sup> STEPHEN, PRINCIPLES OF PLEADING IN CIVIL ACTIONS, 2d Am. ed., 493 (1831).

<sup>3</sup> 2 DANIELL, CHANCERY PRACTICE, 2d Am. ed., 1285 (1851) (feigned issues).

convincing precedent for the pre-trial examination and framing of issues in ordinary cases.

The oath as an incentive to truthful pleading was never employed by the common law courts, nor even by the courts of chancery, although provisional remedies were often granted only on sworn bills of complaint. Modern experience in England seems to have confirmed this lack of belief in the effectiveness of the oath, for it is not employed. In this country the great reform of the New York code involved a resort to verified pleadings. David Dudley Field expressed extraordinary confidence in their efficacy, saying of the simplified pleadings of the code: "Of course, all the undisputed facts are admitted on both sides, if each party is required, as he should be, to verify his pleadings by his oath."<sup>1</sup> But the matter is really not so simple as that, and there has been no general requirement of an oath even among those states which adopted the code. The oath where used has tended to become a mere formality, and in some states it has so completely lost all meaning that sworn general denials of each and every allegation in the complaint are regularly employed with the sanction of the courts. No such oath could be seriously made unless the plaintiff's case was a complete fabrication,—a situation not easy to imagine.

Since the fundamental problem is to ascertain before trial what needs to be tried, and for that purpose to determine whether or not there is a *prima facie* foundation for the various assertions and denials of the pleadings, there is no direct solution except to make a preliminary examination of the evidence which the parties have at their disposal. If this can be done conveniently and inexpensively it will supply a basis for the elimination of issues which are so insubstantial as to deserve no consideration at the trial, and may even bring about an immediate and final disposition of the whole case.

Proceedings for discovery before trial offer possibilities of this kind. If parties and witnesses are subject to liberal discovery examinations as soon as the issues are presented by the pleadings, any party to the record has it within his power to test for himself the substantial basis for the positions asserted by his adversaries. Information so obtained will indicate the real points of controversy, in spite of pleadings which confuse or mislead.

But there is no reason why the court should not itself take a hand in the investigation, supplementing the pleadings and the discovery

<sup>1</sup> FIELD, SPEECHES, etc., 233 (1884).

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which the parties have obtained, by direct interrogation of counsel or parties in the presence of each other, with a view to eliminating issues through admissions or through the withdrawal of allegations or denials, or by obtaining the consent of the parties to the limitation or simplification of proof.

What an efficient trial judge frequently does on his own initiative during the opening stages of the trial, by interrogating counsel, may be done with better effect at a preliminary judicial hearing before trial, and all matters not really in dispute may thus be withdrawn by express admissions or by court order after an exposure of the want of any evidence sufficient to sustain or refute the claims made in the pleadings.

Every issue which can in this way be withdrawn from the trial agenda will result in a net gain for all parties concerned. It will save time for the court and jury, save expense for the parties to the action, save trouble for the witnesses, diminish the risk of error by simplifying the proceedings, and reduce the labor and cost of an appeal by curtailing the size of the record. If the admissions go far enough, or the evidence is clear enough, no trial at all may be necessary.

It is quite obvious that the traditional principle of party-presentation of issues must undergo some slight modification if the court is to make an effective pre-trial test of the actual existence of alleged points of controversy between the parties. And in view of the almost superstitious veneration with which the legal profession looks upon the familiar systems of pleading as an adequate mechanism for presenting issues, slow progress in developing a pre-trial technique would be expected. Such has been the case.

*Development of Pre-Trial Procedure in England and Scotland*

In England the first attempt to provide for a pre-trial defining of issues appears to have been made on a very limited scale in 1831. This occurred in an act to authorize and regulate interpleader in common-law actions. The statute provided that when a defendant was sued for money or property in which he had no interest and a third person also made claim to it, the court might order the third party claimant to appear and state the nature and particulars of his claim, and maintain or relinquish it, and the court should hear the allegations of the rival claimants and frame the issues between them and proceed to the trial of the same.<sup>5</sup>

<sup>5</sup> 1 & 2 Wm. 4, c. 58, par. 1 (1831).

There was no reason why this authority given to the court to determine and frame the issues between the parties should not have been extended to cases of all kinds.<sup>6</sup> It was a principle of universal validity. But the broad implications of the statute passed unnoticed at the time.

No other attempt to provide a pre-trial hearing in the English courts to ascertain and fix the issues was made for forty years, but in 1868 Parliament revised the practice of the Court of Session of Scotland and introduced a requirement that in every case, after the pleadings were in, there should be a hearing before the judge, at which the pleadings should be adjusted and the record be closed. At that time the judge was to require the parties to state whether they were ready to dispense with any proof, and, if not, they were to submit the issue or issues which they proposed to try. These were to be discussed with the judge on a day to be fixed, and he was to determine whether proof should be allowed and, if so, how it should be taken.<sup>7</sup>

This has continued to be the practice in Scotland. The issues are definite statements of the precise questions which the jury is to answer, and when adjusted and approved by the judge they are signed and authenticated by him.<sup>8</sup>

It is probable that this Scottish practice suggested the summons for directions which was introduced in the English practice in 1883. It was more extensive in its scope than the Scottish adjustment of the issues, and in its original form was designed to supplement the rules of pleading by providing the parties and the court with additional information regarding the true nature of the controversy. The rule authorized but did not require any party, at any time, to take out a general summons for obtaining directions from the court as to all interlocutory proceedings in the action, including particulars of claim or defense, statement of a special case, discovery, mode and place of trial, and any other matter or proceeding in the cause or matter previous to the trial.<sup>9</sup> It was a short summons, which might be returnable in four days, and was heard by a judge or a master.<sup>10</sup>

Ten years later, in 1893, the procedure was strengthened by making it obligatory upon the plaintiff in every action to take out a sum-

<sup>6</sup> FINLASON, *OUR NEW JUDICIAL SYSTEM* 295 (1877).

<sup>7</sup> 31 & 32 Vict., c. 100, § 27 (1868).

<sup>8</sup> BALFOUR, *HANDBOOK OF THE COURT OF SESSION PRACTICE* 84 (1922).

<sup>9</sup> RULES OF THE ENGLISH SUPREME COURT, Order 30 (1935).

<sup>10</sup> 12 STATUTORY RULES AND ORDERS 367, Appendix K, No. 32 (1904); RULES OF THE SUPREME COURT, Order 54 (1935).

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mons for directions after appearance but before pleading, and the judge or master was authorized to make any order that might be just, regarding all interlocutory proceedings, whether the parties requested it or not. The enumeration of matters to be dealt with on the hearing for directions was extended to include pleadings, which might or might not be ordered, admissions, examination of witnesses, inspection of documents and inspection of real or personal property.<sup>11</sup>

In 1902 the provision restricting the scope of the summons for directions to interlocutory proceedings was removed, and the court or judge was authorized to make any order that might be just with respect to all the proceedings to be taken in the action, whether such order was interlocutory or final.

In 1932 in the so-called "New Procedure" cases,<sup>12</sup> and in 1933 in all other cases,<sup>13</sup> a radical change was made in the sequence of the summons for directions. Prior to the amendments of those years, directions were asked and given before the pleadings were filed. After those amendments, the hearing for directions followed rather than preceded the filing of the pleadings, and it was based thereon.

It is obvious that if the hearing on the summons for directions takes place after the nature of the controversy has been disclosed by the pleadings, and after each party and the judge has seen what positions the adversaries have asserted on the record, the orders made are much more likely to be definite, detailed and adapted to the specific problems presented. Hearings prior to 1932 in fact tended to become a matter of routine. Since they preceded the filing of pleadings, there was likely to be no barrister at that time employed in the case, and a solicitor's clerk usually represented the plaintiff before the master. A dozen or more summonses per hour were ground through the mill, and it was inevitable that the procedure became formal and rather barren. By means of this shift in the position of the hearing for directions, its effectiveness was immensely increased.

At the same time an important change was made in judicial personnel. For fifty years summonses for directions had been returnable before the masters. After 1932 all law cases except a few torts based on malice or fraud, false imprisonment, seduction and breach of promise of marriage, were to be dealt with on a summons for directions heard

<sup>11</sup> RULES OF THE SUPREME COURT, Order 30 (1935). See notes to Rule 1 of this Order, Annual Practice (1937).

<sup>12</sup> RULES OF THE SUPREME COURT, Order 38 A (1935).

<sup>13</sup> RULES OF THE SUPREME COURT, Order 30, rules 1 and 2 (1935).

by one of the judges, and the judge who heard the summons was expected, if possible, to ultimately try the case. This was the so-called "New Procedure."<sup>14</sup>

Each judge assigned to the "New Procedure" list, when hearing a summons for directions, is given all the powers conferred on the court or judge in dealing with directions in ordinary cases. These, as already pointed out, include orders regarding pleadings, particulars, admissions, discovery, interrogatories, inspection of documents or of real or personal property, commissions, examination of witnesses, place and mode of trial, and, by amendment made in 1933, "the mode by which particular facts may be proved at the trial."<sup>15</sup>

In addition to these general powers regarding directions, the judge hearing the "New Procedure" list is authorized to make any of the following orders:<sup>16</sup>

(1) Orders for further and better particulars. These orders are made with great liberality,<sup>17</sup> with a view to forcing a disclosure of what will be brought up at the trial, so as to avoid expense and surprise. The judge usually directs each party to write forthwith to the other for any particulars he may require, such particulars to be given on the same or the following day, or within two days.<sup>18</sup>

(2) Orders for discovery and inspection of documents and for admission of facts and documents.

(3) Orders that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the trial under such conditions as the judge may think reasonable, or that any witness may be examined before a commissioner instead of being required to appear in court, or that no more than a specified number of expert witnesses may be called.

(4) Orders that any question involving expert knowledge shall be referred to a special referee for inquiry and report, including the nature and extent of personal injuries.

It is evident from this glance at the development of pre-trial procedure in England that for half a century there has been a continuous expansion in its scope. And there has been a corresponding increase in its use. One would assume from this that the principle upon which

<sup>14</sup> RULES OF THE SUPREME COURT, Order 38 A (1935).

<sup>15</sup> RULES OF THE SUPREME COURT, Order 30, rule 2 (1935).

<sup>16</sup> RULES OF THE SUPREME COURT, Order 38 A, rule 8 (2) (1935).

<sup>17</sup> OGDRS, PLEADING AND PRACTICE, 11th ed., 172 (1934).

<sup>18</sup> ANNUAL PRACTICE (1934), note to Order 38a, rule 8 (2); 175 L. T. 41 (k) (1933).

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it rested had proved to be sound, and that the public had become convinced of its value as a device for facilitating litigation.

Fortunately speculation upon this point is unnecessary. In 1934 a royal commission was appointed in Great Britain to consider "The Despatch of Business at Common Law," under the chairmanship of Lord Peel and with a distinguished membership from the bench and bar. It held twenty-six public sittings over a period of six months and heard seventy-one witnesses, including the Lord Chief Justice and many judges of the High Court and Court of Appeal, official referees, registrars, masters and other officers of the Supreme Court, judges of the county courts, and many barristers, solicitors and laymen. Its report, together with a large volume of the minutes of testimony taken, was published in 1936. Pre-trial procedure formed an important part of the subject matter of its investigation, and its conclusions regarding that practice may well be taken to represent the most enlightened public opinion. Those conclusions present an unqualified indorsement of the pre-trial hearing and a strong recommendation for widening its scope.

The Commission was of opinion that the great length of trials was the most serious cause of expense and delay, and that this could be most effectively reduced in two ways,—restricting the issues to those seriously contested, and simplifying proof.

"The rules of pleading," say the Commission, "are supposed to define the issues and to prevent surprise, but they have a very limited effect. Pleadings being delivered at an early stage of the action when the facts may be imperfectly known, the object of the pleader is to put his case with sufficient vagueness and with such suitable alternatives that however the facts turn out his client will not be hampered. Consequently most pleadings contain many allegations of fact which are untrue or impossible to prove. At the trial a great part of these allegations is thrown overboard, but the opponent cannot risk being unprepared to meet them. . . .

"Much could be done to alleviate the defects above mentioned . . . by a summons for directions of a wider character. The object of this summons would be a general stock-taking of the case with the object of arriving at the essentials of the dispute and arranging for proof of the necessary facts in the shortest and cheapest manner. . . .

"The master should intervene actively and should use his influence on the parties to be reasonable and accommodating. A note for the judge at the trial should be made of any respect in which the master thinks a party has been unreasonable, so that

the judge can, if he sees fit, penalize such action by way of costs. . . .

"It would be the endeavor of the master in the first place to get the parties to admit all facts not really disputed and to abandon any allegations they had no expectations of proving. He would record, if requested, any admissions asked for and refused. He would next consider any application to prove facts otherwise than by oral testimony in court and any request for the admission of documents. . . . The case should be gone into sufficiently to enable the master to form fairly reliable judgment as to whether a particular order was essential or whether some simpler alternative would not do. In all cases the master would make an order estimating the length of the trial. . . .

"We have assumed that this summons would be taken before a master and not before a judge. There would, of course, be a considerable advantage if such a summons could be taken before the judge who would try the case. But we do not think this could be secured as a general rule. . . .

"If the action of the master on the summons for directions is to be made effective, it will have to be supported by a closer examination of costs by the judge at the trial than is now usual. At present it is rare for the judges to consider in any detail whether or not a party has caused unnecessary expense by not making or not asking for admissions or by unreasonable conduct in other ways. It is said that little use has been made of Order 32, rule 4, under which admissions of fact may be asked for and which provides penalties in costs if they are not made. . . . Without this sanction any efforts of the masters will be ineffective."<sup>19</sup>

#### *Progress Toward Pre-Trial Procedure in the United States*

In the United States the movement for the reform of judicial procedure became active about the middle of last century, but it did not follow the English plan. There was a general belief that it was the technicalities of pleading, not its inherent weakness due to its provisional and *ex parte* character, which accounted for its ineffectiveness in laying a foundation for the trial. Hence the great reform inaugurated by the New York code was directed to a simplified pleading system, not to an interlocutory procedure to supplement the pleadings. In other states reform took the same course, whether they adopted the newly invented code or developed special systems of their own.

In 1912 New Jersey adopted a rule very similar to the English

<sup>19</sup> REPORT OF THE ROYAL COMMISSION TO CONSIDER THE DESPATCH OF BUSINESS AT COMMON LAW 77-81 (1936).

rules authorizing a summons for directions.<sup>20</sup> But it went back to the original English draft which made the use of the summons optional with the parties. That feature had made the rule quite ineffective, and had been abandoned in England twenty years before it was taken up in New Jersey. The complete absence, in the New Jersey law reports, of any adjudication regarding the operation of this rule for any purpose except striking out pleadings, would seem to indicate that the rule has been largely a dead letter.

No other definite attempt to provide a pre-trial procedure, supplementary to the pleadings, for laying a proper foundation for the trial, seems to have been made in the United States prior to the remarkable effort of the Circuit Court of Wayne County, Michigan, sitting in Detroit, which began in 1929.<sup>21</sup>

In that year the law calendar was forty-five months in arrears. Finding on investigation that fifty per cent of the cases set for trial were eventually disposed of by settlement, the judges concluded that if a pre-trial examination of the cases could be had and an effort made to facilitate settlement, a large number of them would never be called for trial at all and those which were called would be likely to have many issues eliminated.

Events proved that they were right. Pre-trial dockets at law and in chancery were established for all cases at final issue. Appearance of counsel before the pre-trial judge was made compulsory. Hearings were informal, and inquiry was made as to what amendments of the pleadings, if any, were necessary to state the true issues, whether any matters formally in dispute could not be eliminated from the controversy by admissions, whether a settlement of the case might be effected, and if a trial was to be held how long it would probably take to try the case.

This procedure in Detroit was developed by the trial court itself, without any legislation, and without any reference to the English plan. It is much simpler than that used in England and yet it enjoys the chief advantages now found in the English system, namely, that it is compulsory, that it is employed after the pleadings are closed, and that the hearing is held before one of the judges.

A large number of cases are finally disposed of on the pre-trial hearing. These constitute about twelve per cent of all cases noticed

<sup>20</sup> N. J. Laws (1912), c. 231 [Practice Act], Schedule A, Rule 63, amended in 1926 as rule 94.

<sup>21</sup> "Pre-trial Procedure in the Wayne County Circuit Court, Detroit, Michigan," SIXTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF MICHIGAN 61-75 (1936).

for trial. The effect of the pre-trial hearing in limiting the scope of those cases which are tried cannot be ascertained statistically, but it is doubtless substantial. Law cases waited forty-five months for trial before the practice was adopted; they are now reached in twelve to fifteen months,<sup>22</sup> with no increase in the number of judges.

The Detroit system of pre-trial procedure was adopted in 1935 by the Superior Court of Suffolk County, sitting in Boston, Massachusetts and has apparently been very successful.<sup>23</sup>

In the proposed new rules of civil procedure for the federal courts, pre-trial hearings are provided which are not obligatory on the parties, nor optional with them, but which may be ordered in special cases or by general rule in the discretion of the district judge. They will relate to the simplification of the issues, amendments, admissions of fact or of documents, limitations of the number of expert witnesses, references, and any other matters which may aid in the disposition of the action.<sup>24</sup>

Doubtless the effectiveness of any pre-trial system in eliminating unsubstantial and fictitious issues would be greatly enhanced if the court had the power and were willing to penalize parties by the imposition of costs when they unreasonably refuse to admit facts or to abandon issues which ought not to be contested. As pointed out by Lord Peel in his report for the Royal Commission, the English courts have this power but they are loath to exercise it. In this country such power has not commonly been conferred, but there would certainly be small risk of abuse if it were granted to our courts as an aid in the administration of the pre-trial settlement of issues.

The value of pre-trial procedure is by no means limited to metropolitan courts with crowded calendars. It is proportionally as valuable in a small court as in a large one, for it operates upon each separate case to eliminate all those matters which ought not to be permitted to take up time and cause expense at the trial. It substitutes an open, business-like and efficient presentation of real issues for the traditional strategy of concealment and disguise. Its general adoption and use might do much to restore the confidence of the public in litigation as a desirable method of settling disputes.

<sup>22</sup> SIXTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF MICHIGAN 56 (1936).

<sup>23</sup> THIRD ANNUAL REPORT OF THE JUDICIAL COUNCIL OF NEW YORK 227 (1937).

<sup>24</sup> REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE (District Cts. of U. S.), Rule 16 (April, 1937).

**Scope and Method of Discovery before Trial: Inadequacy of the Pleadings as a Basis for Trial**

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## SCOPE AND METHOD OF DISCOVERY BEFORE TRIAL

EDSON R. SUNDERLAND †

### *Inadequacy of the Pleadings as a Basis for Trial.*

IT has been the traditional theory of our law that the pleadings constitute a necessary, and at the same time a sufficient and satisfactory, basis for the trial or hearing of the case. Their function is to set forth the contentions of the parties in such a way as to fully disclose the nature and scope of the controversy.

In the system of pleading employed at common law there were a number of glaring departures from this ideal, such as the rule which permitted affirmative defenses to be shown under general issues without the slightest warning to the plaintiff, and the rule authorizing the use of the vague conclusions of the common counts which gave no intimation of the real issues. But it nevertheless was the general design that every assertion of either party should be met by an admission or denial from the other, so that an inspection of the pleadings would make it possible to ascertain exactly what each party would be required to prove in order to prevail. By confining the trial within the issues raised in the pleadings, the law sought to enable each party to prepare his case with full confidence that he would neither be surprised by unexpected evidence from his adversary nor be burdened with the expense of assembling unnecessary proof. But this highly desirable aim has never been possible of realization, and pleadings have never offered and never can offer a satisfactory basis for the trial. There are two reasons for this.

In the first place, allegations in pleadings are required to deal with facts of a generalized type, known as material or ultimate facts, and not with evidence. How these ultimate facts will be proved at the trial cannot be determined from the pleadings. If proof of one kind were to be offered, certain evidence would be necessary to meet it, whereas to oppose proof of another kind an entirely different line of evidence might be necessary. For example, the allegation of a promise by the defendant might be proved in any one of a dozen different ways—by letters, by telegrams, by oral conversations, through the act of an agent, by ratification; but the defendant can form no idea from the pleading which kind of evidence will be used, and the less the claim rests upon a founda-

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tion of fact, the more difficult will be the task of preparing evidence to meet it.

In the second place, since he is free to claim what he will, a pleader may allege many things that he knows may not or cannot be proved. This may be due either to abundant caution in asserting every possible fact in behalf of his client, or to a more or less definite design, well understood and highly regarded in military circles, of concealing the real point of attack by a show of activity on a wide front. But whatever the motive, the effect is the same. The other party has no way of determining from the pleadings what facts will actually become the subjects of proof and what will be merely ignored at the trial.

The same double uncertainty inheres, for obvious reasons, in the denials which the pleader employs. In the first place, denials are no more concrete than the allegations to which they are directed, and it is therefore impossible to know in advance what sort of evidence will be employed in their support. In the second place, they may or may not be used for the bona fide purpose of contesting the truth of all the allegations denied. Whether general or specific in terms they are likely to present numerous issues which, although material on their face, will be found at the trial to be entirely fictitious. In such a case the party having the burden of proof will be loaded with the useless expense of proving or preparing to prove facts which his adversary has no actual intention of disputing.

Because of these characteristics of pleading, by virtue of which assertions and denials may be set up with no indication either as to the manner in which they will be supported by proof nor even as to which of them will be supported at all, counsel are faced with a disagreeable dilemma in preparing for trial with no guide but the pleadings.

If a lawyer undertakes so to prepare his case as to meet all the possible items of proof which his adversary may bring out at the trial, or to meet all the assertions and denials which his adversary has spread upon the record, much of his effort will inevitably be misdirected and will result only in futile expense. If, on the other hand, he restricts his preparation to such matters as he thinks his adversary will be likely to rely upon, he will run the risk of being a victim of surprise.

Furthermore, from the beginning until the end, the question of settlement is always involved in a litigated case. Indeed, one of the greatest uses of judicial procedure is to bring parties to a point where they will seriously discuss settlement. But the pleadings seldom disclose a basis upon which a settlement can be reached. It is not what a party asserts, but what he can establish by proof,

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that determines the strength of his position, and so long as each party is ignorant of what his opponent will be able to prove, their negotiations have nothing substantial to rest upon. Many a case would be settled, to the advantage of the parties and to the relief of the court, if the true situation could be disclosed before the trial begins.

Is there any way of bridging this gap between what is set up in the pleadings and what will come out in evidence? It is of course important to know in advance the nature and extent of your adversary's claims. This knowledge is given by the pleadings. But it is equally important, in preparing your proof, to know what proof your adversary will be able to present in support of his claims and in opposition to yours. This knowledge the pleadings do not give. The allegations and denials in the pleadings point only to the results which the pleader may wish to establish by his proof. They give little or no notice of the nature of that proof. How can one effectively prepare to meet the proof to be offered by his adversary if he has no reliable knowledge as to what that proof will be?

As a contribution toward the solution of this difficulty, the common law, after six or seven centuries of indifference or incompetence, came forward with the feeble and restricted bill of particulars. Through this device it proposed, in a limited class of cases, to prevent surprise at the trial by forcing the pleader to give such additional information as a "reasonable man" would require for the adequate preparation of his defense.

But although the bill of particulars was not strictly considered a part of the pleadings, neither was it strictly considered an exhibit of evidence. It was necessary, as learned judges said, for the bill of particulars to "fairly apprise the opposite party . . . of the nature of the evidence to be offered", but at the same time, as learned judges also said, it was not necessary for the particulars "to disclose the specific evidence upon which a party relies for recovery."<sup>1</sup> The bill of particulars supplemented the pleading with details which the pleading failed to give, but it fell short of a real disclosure of evidence and to that extent it furnished an inadequate basis for preparation for trial.

There was also the ancient practice of profert and oyer, with its counterpart of exhibits in equity, which compelled the pleader to disclose the deeds or other documents upon which his action was founded. But this kind of disclosure, although it was good as far as it went and has been preserved by many modern statutes, is obviously too restricted in scope to offer any general relief to parties who are in doubt as to what they must prepare to meet on the trial.

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1. 3 ENCYC. PL. AND PRAC. (1895) 532, 520.

*Discovery in Equity*

Equity, which ought to have done better, refused even to recognize the problem as a legitimate subject of judicial concern. Bills in equity were, it is true, designed for the purpose of obtaining discovery as well as relief, and bills of discovery were used in aid of actions at law. In bills of both kinds interrogatories were set forth to which the defendant was required to make specific answers. But the discovery which was sought in equity was not of the type now under consideration. It was discovery of evidence which the pleader wished to obtain in support of his own case, not discovery regarding the case which his opponent might put up against him. Such discovery was not sought in order to protect himself from surprise at the trial, nor to enable him to avoid futile preparation to meet anticipated proof which the other party might never present. The discovery provided by equity was nothing but a method by which the pleader obtained admissions from his adversary regarding matters which he himself, and not the adversary, was required to prove.

In answering the various interrogatories set up in the bill, it sometimes happened that the defendant gave incidental information from which the plaintiff could determine what the defendant's evidence would probably be. And the charging part of the bill is said to have been sometimes employed as a sort of fishing device in which the pleader, by way of anticipation, set up defensive matters which he supposed the defendant might rely upon, together with the circumstances by which he himself expected to meet such matters, in the hope that the answer of the defendant regarding these anticipated defenses would disclose something useful regarding the defendant's case.<sup>2</sup> But all of this was outside the purpose of the discovery in which equity was interested. That purpose was to aid a party in assembling his own evidence, not in meeting the evidence of his adversary.

This theory, that discovery should be available only for attack but never for defense, was no inadvertence on the part of the chancery judges. It was the result of a definite purpose, and every effort to extend the scope of the remedy was met by a judicial opposition which never relaxed.

Sir John Wigram, who made the first notable study of Discovery a hundred years ago, stated the case quite clearly. He said:

"If it were now, for the first time, to be determined, whether, in the investigation of disputed facts, truth would best be elicited by allowing each of

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2. MITFORD, PLEADINGS IN CHANCERY (5th Am. ed. 1844) 43.

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the contending parties to know, before the trial, in what manner, and by what evidence, his adversary proposed to establish his own case; arguments of some weight might *a priori* be adduced in support of the affirmative of this important question. Experience, however, has shown—or (at least) courts of justice in this country act upon the principle—that the possible mischiefs of surprise at the trial are more than counterbalanced by the danger of perjury, which must inevitably be incurred, when either party is permitted, *before* a trial, to know the precise evidence against which he had to contend; and, accordingly by the settled rules of courts of justice in this country (approved as well as acknowledged) each party has thrown upon him the onus of supporting his own case, and meeting that of his adversary, without knowing beforehand by what evidence the case of his adversary is to be established or his own opposed.”<sup>3</sup>

This statement throws much light on the chancery attitude toward a broader discovery. It is obvious that Wigram wants to say, and indeed attempts to suggest, that experience has shown the impracticability of extending discovery so as to cover the evidence which one's opponent is to use in his own behalf. But since English courts never had any experience at all in the matter, he is able to go no farther than the assertion that they have not so extended it. The mischiefs of surprise at the trial he admits, but he takes comfort in the reflection that, by enduring those ills, we have escaped the far more serious and sinister dangers of perjury which would overwhelm us if parties were permitted to know what their adversaries were prepared to prove.

Perjury is one of the great bugaboos of the law. Every change in procedure by which the disclosure of the truth has been made easier has raised the spectre of perjury to frighten the profession. It was only in 1851 that Lord Brougham's Act for the first time made the parties to civil actions competent to testify in the higher courts of England.<sup>4</sup> There was great dread of the Act, lest the interest of the parties should prove too powerful an incentive to false swearing. Lord Campbell wrote in his journal on June 19, 1851:

“It [the bill] is opposed, as might be expected, by the lord chancellor. If it passes, it will create a new era in the administration of justice in this country. I support it, and I think it will be carried, although all the common law judges, with one exception, are hostile to it.”<sup>5</sup>

But the fear that the temptation to perjury would ruin the value of the testimony of interested parties has so completely vanished that no one would seriously think of restoring the disqualification.

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3. WIGRAM ON DISCOVERY (1842) § 347.

4. 14 & 15 VICT. c. 99 (2) (1851).

5. 2 HARDCASTLE'S LIFE OF LORD CAMPBELL (1881) 292.

The exclusion of the testimony of an interested survivor has been based on the fear of perjury. Courts have repeatedly and solemnly declared that where death has closed the lips of one party the law will close the lips of the other, for the tendency to perjury would be so great, were the survivor permitted to speak, that public sentiment would not tolerate the resulting peril to the estates of the dead.<sup>6</sup> But Connecticut,<sup>7</sup> Massachusetts<sup>8</sup> and Rhode Island<sup>9</sup> have all removed the disqualification, and the estates of the dead seem to be in no more danger in those states than elsewhere.

The true safeguard against perjury is not to refuse to permit any inquiry at all, for that will eliminate the true as well as the false, but the inquiry should be so conducted as to separate and distinguish the one from the other, where both are present. That task, however, chancery refused to undertake. The possibility of perjury was thought to be enough to condemn any attempt to extend the field of discovery so as to inform the respective parties what they would be called upon to meet at the trial.

If one were critically to examine this legal hobgoblin of perjury he might perhaps find reason to believe that it was not actually so terrifying to the profession as they pretended. It is easy for those who are interested in opposing change to conjure up visions of calamities which the change will precipitate, and to persuade themselves of the reality of the dangers which serve so useful a purpose as a deterrent from the course which they disapprove.

It may well be doubted whether the chancery bar really wanted to liberalize the practice. An acquired technique always develops resistance to change. But it is also to be observed, in the present instance, that the restrictions upon discovery not only produced an enormous amount of lucrative litigation over the application of the rules, which the reported cases abundantly show, but they preserved enough uncertainty in the trial of cases so that a lawyer might always feel confident of having a fighting chance of success no matter what side of any case he might be employed to represent.

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6. *Harris v. Bank of Jacksonville*, 22 Fla. 501, 506-7, 1 So. 140, 143 (1886); *Louis v. Easton*, 50 Ala. 570 (1873); *Owens v. Owens*, 14 W. Va. 88, 95 (1878); *Karns v. Tanner*, 66 Pa. 297, 304-5 (1870).

7. PUB. ACTS (1848) c. 44, which removed the disqualification of witnesses on the ground of interest in the action, was held to permit an interested survivor to testify in an action by or against the decedent's estate. PUB. ACTS (1850) c. 3, undertook to provide a reciprocal protection to the decedent's estate by allowing entries and written memoranda of the decedent to be introduced in evidence. This was later enlarged to include oral declarations. The two statutes are found in CONN. GEN. STAT. (1930) §§ 5582, 5608, and are to be read together. See *Rowland v. Philadelphia, M. & B. Rr.*, 63 Conn. 415, 28 Atl. 102 (1893).

8. MASS. STAT. (1870) c. 393.

9. R. I. GEN. LAWS (1896) c. 244, § 35.

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The ancient restrictions upon discovery have met with much criticism in modern times. The need for better information in advance of the trial has been more and more keenly felt as time and expense have become increasingly important economic factors in litigation. Discovery of one's own evidence seldom requires the aid of a court, although a convenient procedure for that purpose ought always to be available in case of need. But information regarding the course which can or will be taken by one's adversary is an almost universal necessity if the merits of the case are to be fully presented, if preparation is to be facilitated, and if the trial is not to be confused and encumbered with useless matters. Unless litigation can be conducted under such reasonably favorable circumstances as to make it a legitimate business risk instead of a lottery, modern business men will decline to use it, and whenever possible will either arbitrate, settle by direct negotiation, or simply charge off the loss. Efforts to modernize discovery have been directed along two lines, namely, enlarging its scope and improving its mechanics.

*Scope of Modern Discovery*

A wide variation in the scope of discovery is found among American jurisdictions. In some states the ancient chancery tradition has retained so powerful a hold on the profession that discovery has undergone practically no change, and the same restrictions which were enforced by the chancellors a hundred years ago still operate to keep the parties in ignorance of the matters they will be called upon to meet at the trial.

In Connecticut, for example, it was enacted in 1836 that parties in civil actions might on motion obtain such disclosure of facts or documents "as a court of equity might order".<sup>10</sup> In 1889 this was amended to allow discovery of facts or documents "material to the support or defense of the suit",<sup>11</sup> but it was held that this did not enlarge the scope of disclosure, and the equity rule still obtained that a party was entitled to discovery of only such facts as were "necessary to his own title . . . for he is not at liberty to pry into the title of the adverse party".<sup>12</sup> In 1931 the statute was again amended, by permitting the court, on motion of either party, to order disclosure of facts or documents "material to the mover's cause of action or defense".<sup>13</sup> This re-enacts the equity rule in

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10. STAT. OF CONN. (1838) p. 76.
  11. CONN. PUB. ACTS (1889) c. 22.
  12. Downie v. Nettleton, 61 Conn. 593, 595-6, 24 Atl. 977, 978 (1892).
  13. CONN. PUB. ACTS (1931) c. 252, § 601a.

substantially the same language as before, and provides no opportunity whatever for a party to obtain information in advance of the trial regarding any of the matters which his adversary may bring up against him.

A few other states have strictly adhered to the narrow chancery rule. These are New Jersey,<sup>14</sup> New York,<sup>15</sup> South Carolina,<sup>16</sup> and Washington.<sup>17</sup> Perhaps Michigan must also be consigned to this group, subject to possible rescue by Supreme Court interpretation.<sup>18</sup>

Since discovery, under this restriction, is of possible advantage to a party only in so far as he alleges affirmative matters in his pleading, parties are offered a strong inducement to set up fictitious matters by way of claim or defense, in order to obtain the privilege of discovery in fields which would otherwise be closed to inquiry. It was a device well known to the astute practitioners at the English chancery bar, and its effect in diverting the pleadings from their proper function of stating the truth is obviously unfortunate.

Many states, on the other hand, have totally abandoned the chancery restrictions upon discovery, and have made it directly and broadly available as a means of ascertaining from the adverse party what evidence he proposes to bring forward. In other words, these states make discovery available not only for attack but for defense—not merely to aid parties in assembling their own proof but to protect them from surprise and to relieve them from taking unnecessary and useless precautions to meet evidence that will never be offered. These states include Alabama,<sup>19</sup> Indiana,<sup>20</sup> Iowa,<sup>21</sup> Kentucky,<sup>22</sup> Louisiana,<sup>23</sup> Massachusetts,<sup>24</sup> Missouri,<sup>25</sup> Nebraska,<sup>26</sup> New Hampshire,<sup>27</sup> Ohio,<sup>28</sup> Texas,<sup>29</sup> and Wisconsin,<sup>30</sup> and the same

14. N. J. COMP. STAT. (1910) p. 4097. Wolters v. Fidelity Trust Co., 65 N. J. L. 130, 46 Atl. 627 (1900).

15. N. Y. C. P. A. (1920) §§ 288-293.

16. See People's Bank v. Helms, 140 S. C. 107, 138 S. E. 622 (1927).

17. WASH. COMP. STAT. (Remington, 1922) § 1226.

18. MICH. CT. RULES (1931) rule 41.

19. ALA. CODE (Michie, 1928) §§ 7764-7773.

20. IND. ANN. STAT. (Burns, 1926) §§ 383, 465, 564-568.

21. IOWA CODE (1931) § 11185.

22. KY. CODES ANN. (Carroll, 1927) §§ 557, 606(8).

23. LA. CODE OF PRAC. ANN. (Dart, 1932) arts. 347-356.

24. MASS. GEN. LAWS (1932) c. 231, §§ 61-67.

25. MO. REV. STAT. (1929) §§ 1753, 1759.

26. NEB. COMP. STAT. (1929) §§ 20-1246, 20-1247.

27. N. H. PUB. LAWS (1926) c. 337, § 1.

28. OHIO GEN. CODE (Page, 1926) §§ 11497, 11526.

29. TEX STAT. (Vernon, 1928) arts. 3738, 3753, 3769.

30. WIS. STAT. (1931) § 326.12.

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practice prevails in the Canadian provinces of Ontario<sup>31</sup> and Quebec.<sup>32</sup>

Courts have found no difficulty in dealing with unrestricted discovery, and have expressed satisfaction with its results. "There is no objection that I know why each party should not know the other's case," said Judge Taft, afterwards Chief Justice of the Supreme Court of the United States, sitting as a state judge in Ohio.<sup>33</sup>

When the objection was urged before the Supreme Court of Kansas, that unrestricted discovery would permit one to go on a "fishing expedition" to ascertain his adversary's testimony, the court answered, through Justice David Brewer, afterwards a Justice of the Supreme Court of the United States—"This is an equal right of both parties, and justice will not be apt to suffer if each party knows fully beforehand his adversary's testimony."<sup>34</sup> The Supreme Court of Missouri declared that it was "a very wise provision of the code of procedure . . . [which permitted] . . . a party . . . to search the conscience of his adversary" by means of discovery before trial.<sup>35</sup>

Judge Trippet, applying federal equity rule 58 in the United States District Court in California, said:

"To say that the plaintiff shall not inquire about the facts that may relate to the defense is to construe the rule in plain derogation of its language and purpose. . . . The plain object of this rule is to dispose of issues in advance of the trial by compelling the parties to make admissions. . . . There is no reason why the parties should wait until the day of trial and then bring in witnesses to prove facts that the parties may be compelled to admit under oath prior to the trial. The truth is always the truth, and telling the truth will not hurt anyone, except in so far as he ought to be hurt."<sup>36</sup>

The Court of Appeals of Kentucky, referring to the statute authorizing unrestricted examination of the opposite party before trial, said:

"It is earnestly insisted that the right given by subsection 8 of section 606, if interpreted according to the contention of appellant, is liable to great abuse; that it will enable the party to find out his opponent's evidence

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31. ONT. CONSOL. RULES OF PRAC. (1928) rules 327-347.

32. QUE. CODE OF CIV. PROC. (Curran, 1922) §§ 286-290.

33. Shaw v. Ohio Edison Co., 9 Ohio Dec. 809, 812 (1887).

34. *In re Abeles*, 12 Kan. 451, 453 (1874).

35. Tyson v. Farm & Home Savings & Loan Ass'n, 156 Mo. 588, 594, 57 S. W. 740, 741-742 (1900).

36. Quirk v. Quirk, 259 Fed. 597, 598-599 (1919).

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in advance of the trial. As, however, the right is given to each party, they will both be on terms of equality; and as it is to be presumed that neither will offer any evidence other than the exact facts and truth of

in advance of the trial. As, however, the right is given to each party, they will both be on terms of equality; and as it is to be presumed that neither will offer any evidence other than the exact facts and truth of the case, we do not see how either could be prejudiced." <sup>37</sup>

Judge Woolsey, in the United States District Court for the Southern District of New York, criticizing the federal practice as to discovery, said:

"In view of several illuminating experiences which I have had in cases pending in the English courts, I feel hospitable to every form of interlocutory discovery. . . The rationale of this attitude is, of course, not only that the court wants to know the truth, but also that it is good for both parties to learn the truth far enough ahead of the trial not only to enable them to prepare for trial, but also to enable them to decide whether or not it may be futile to proceed to trial." <sup>38</sup>

Far from encouraging perjury, unrestricted mutual discovery has been found by experience to be one of the greatest preventives of perjury.<sup>39</sup> The party is examined early, while his memory is fresh, before he has had time to work out a protective scheme of fictitious circumstances, and while it is still comparatively easy to check up on his testimony to ascertain how far it may vary from the truth. Coaching of the witness by counsel in preparation for the discovery examination is much less common than coaching for the trial, so that the testimony is more spontaneous. After the testimony has once been taken, and a copy filed or lodged with examining counsel, it is impossible for it to be changed to bolster up the case. This has been conspicuously demonstrated in Massachusetts, where the narrow chancery rule was formerly in force but was gradually enlarged under both judicial decisions and liberal legislation until discovery before trial has become as broad as examination at the trial itself—an evolution extending through seventy years, from *Wilson v. Webber*<sup>40</sup> in 1854, to *Cutter v. Cooper*<sup>41</sup> in 1920.

Furthermore, discovery which is restricted to the case of the party asking for it, can never serve as a basis for a summary judgment in cases where there is no defense; whereas unrestricted discovery, by disclosing the want of any defense, offers a most satisfactory method of giving the plaintiff a final judgment without

37. Western Union Telegraph Co. v. Williams, 129 Ky. 515, 521, 112 S. W. 651, 653 (1908).

38. Zolla v. Grand Rapids Store Equipment Corp., 46 F. (2d) 319-320 (1931).

39. Ragland's recent field studies in the use of discovery clearly demonstrated this. See RAGLAND, *DISCOVERY BEFORE TRIAL* (1932) 124-125.

40. 2 Gray 558 (1854).

41. 234 Mass. 307, 125 N. E. 634 (1920).

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sending the case to trial. Summary judgments are of immense value to creditors in collecting liquidated claims, since they reduce the time consumed by litigation to a small fraction of that required when cases follow the regular course. England has demonstrated the great advantages of this practice, for her judicial statistics show about four times as many summary judgments rendered as those rendered after the trial of issues.<sup>42</sup> Their use is rapidly growing in American jurisdictions where the practice has been introduced. In New York the applications for summary judgments rose from 174 to 700 per year during the first three years after they were authorized.<sup>43</sup> On March 14, 1932, the New York summary judgment rule was so greatly enlarged in its scope that it will be possible, in the opinion of officers of the court, to increase by fifty per cent the amount of litigation which the same number of judges are able to dispose of.<sup>44</sup> In the city of Detroit 409 summary judgments were rendered in eight months, from August 1, 1930, to March 31, 1931, as compared with 1834 judgments rendered after trial, showing that about 1 case in 5 was disposed of by summary judgment.<sup>45</sup>

By the general use of unrestricted discovery in cases based on liquidated demands, an immediate identification and segregation would be possible of all claims to which there was no valid defense, and this whole group of cases could be at once disposed of without further time, trouble or expense.

*Methods of Modern Discovery*

It is safe to say that the interrogating part of the equity bill for relief, as well as the entire bill for discovery, has practically disappeared from our system of law.<sup>46</sup> In all but a very few states they have been entirely supplanted by motions or notices for discovery.<sup>47</sup> But the device by which the investigation was prosecuted,

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42. CIVIL JUDICIAL STATISTICS FOR ENGLAND AND WALES (1930) 16.

43. Edward R. Finch, address in 49 AM. BAR ASS'N REP. (1924) 588, 593.

44. Address by Presiding Justice Edward R. Finch, Appellate Division, First Department, New York, delivered before the Association of the Bar of the City of New York on May 14, 1932, p. 1.

45. Figures obtained by the Judicial Council of Michigan (unpublished).

46. 1 POMEROY, EQUITY JURISPRUDENCE (3d ed. 1905) §§ 83, 193, 209; DURFEE, CASES ON EQUITY (1928) 72, n. 10; LANGDELL, EQUITY PLEADING (1877) § 64; VAN ZILE, EQUITY PLEADING AND PRACTICE (1904) § 45.

47. The ancient methods of equity are preserved by statute in Illinois. REV. STAT. (Smith-Hurd, 1931) c. 22, §§ 22-26; Maine, REV. STAT. (1930) c. 91, § 45; MISS. CODE ANN. (1930) § 373. They are doubtless still theoretically available in states which have not abolished the formal distinctions between actions at law and suits in equity.

namely, the written interrogatory, has been somewhat more successful in retaining its reputation of respectability. It is the exclusive method available in about half a dozen states,<sup>48</sup> and is an alternative method in a dozen more.<sup>49</sup>

But a new method, unknown to the chancery practice, has entered the field. This is the oral examination by deposition. It has become permissible in the dozen states last referred to as an alternative to interrogatories, and it has become the exclusive method in about twenty-seven states.<sup>50</sup> It is obvious, therefore, that interrogatories have not been able to withstand the competition of the oral examination.

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48. Delaware, REV. CODE (1915) § 4052; Connecticut, PUB. ACTS (1931) c. 252, § 601a; Illinois, CHICAGO MUNICIPAL COURT ACT (1905) § 32; Louisiana, CODE OF PRAC. ANN. (Dart, 1932) arts. 347-356; Massachusetts, GEN. LAWS (1932) c. 231, §§ 61-67; Texas, STAT. (Vernon, 1928) arts. 3738, 3752, 3769.

49. Alabama, CODE (Michie, 1928) §§ 7764-7773; Arkansas, DIG. STAT. (Crawford & Moses, 1921) § 1248; Florida, COMP. LAWS (1927) §§ 4405-4407; Georgia, CODE ANN. (Michie, 1926) §§ 4543-4554; Indiana, ANN. STAT. (Burns, 1926) §§ 564-568, 383; Iowa, CODE (1931) § 11185; Kentucky, CODE ANN. (Carroll, 1927) §§ 557, 606(8), 140-143; Maine, REV. STAT. (1930) c. 121, § 4; Mississippi, CODE ANN. (1930) § 1538; New Jersey, COMP. STAT. (1910) p. 4097, 4098 (as amended, LAWS (1924) c. 93, p. 193); Tennessee, CODE (Williams, 1932) §§ 9868-9878, 9806; Virginia, CODE ANN. (Michie, 1930) §§ 6225, 6236; Washington, COMP. STAT. (Remington, 1922) §§ 1225-1230, Sup. Ct. rule 18 (150 Wash. xxxvii, 1929); Wisconsin, STAT. (1929) c. 326, § 12; Wyoming, COMP. STAT. ANN. (1920) §§ 5689-5691, 5831-5832.

50. Arizona, CODE (Struckmeyer, 1928) § 4444; California, CODE OF CIV. PROC. (Deering, 1931) § 2021; Colorado, CODE CIV. PROC. (Deering, 1923) § 376; Idaho, COMP. STAT. (1919) § 8006; Kansas, REV. STAT. ANN. (1923) §§ 2819-2821 (but see *In re Davis*, 38 Kan. 408, 16 Pac. 790 (1888), limiting the rule of *In re Abeles*, *supra* note 34, which had allowed this statute to be liberally used for discovery before trial); Maryland, ANN. CODE (Bagby, 1924) art. 35, § 21; Michigan, CT. RULES (1931) rule 41; Minnesota, STAT. (Mason, 1927) § 9820; Missouri, REV. STAT. (1929) §§ 1753, 1759; Montana, REV. CODE (Choate, 1921) § 10645; Nebraska, COMP. STAT. (1929) §§ 20-1246, 20-1247 (liberally construed in *Dodge v. State*, 21 Nebr. 272, 31 N. W. 929 (1887)); Nevada, COMP. LAWS (Hillyer, 1929) § 9001; New Hampshire, PUB. LAWS (1926) c. 337, § 1; New Mexico, STAT. ANN. (Courtright, 1929) c. 45, § 101; New York, CIV. PRAC. ACT (1920) §§ 288-293, 295-296; North Carolina, CODE ANN. (Michie, 1931) §§ 899-907; North Dakota, COMP. LAWS ANN. (1913) §§ 7862-7870; Ohio, CODE Throckmorton, 1930) §§ 11497, 11526; Oklahoma, COMP. STAT. ANN. (Bunn, 1921) §§ 612, 613 (narrowly construed in *Guinan v. Readdy*, 79 Okl. 111, 191 Pac. 602 (1920)); Oregon, CODE ANN. (1930) c. 9, § 1503; Pennsylvania, STAT. ANN. (Purdon, 1930) tit. 28, § 5 (narrowly construed in *International Coal M. Co. v. Pa. Rr. Co.*, 214 Pa. St. 469, 63 Atl. 880 (1906)); Rhode Island, GEN. LAWS (1923) c. 342, § 22; South Carolina, CODE OF LAWS (1932) §§ 690-698, as amended, LAWS (1923) c. 122; South Dakota, COMP. LAWS (1929) §§ 2713-2716; Utah, COMP. LAWS (1917) § 7178; Vermont, GEN. LAWS (1917) § 1910; West Virginia, CODE (1931) c. 57, art. 4, § 1.

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In actual effectiveness interrogatories are far inferior to the oral examination. Their defects are quite obvious. In the first place, they give the party to whom they are addressed more time to study their effect, which furnishes a better opportunity to frame protective answers which conceal or evade. In the next place, as a means of forcing a specific, detailed and thorough disclosure from a reluctant party, there is a tendency for the interrogatories to grow in number, complexity and variety of form, so as to call for as many aspects of the proof as possible, with the result that they often become difficult to administer. Cases have been reported where more than two thousand interrogatories were employed.<sup>51</sup> To meet this sort of abuse, the questions must either be authorized by court order or there must be an arbitrary limit to their number, both of which methods of dealing with the matter are unsatisfactory.

But there is a third and much more serious weakness in the use of written interrogatories. To draw up a series of questions and present them all at once to be answered, is far less searching than to present questions one at a time, framing each succeeding question on the basis of prior answers given. Answers usually suggest lines of further inquiry, which often lead to the most important disclosures. This is, of course, the chief reason for the effectiveness of oral cross-examination. By submitting a complete set of interrogatories, prepared in advance, the party seeking discovery entirely loses this enormous advantage in eliciting the truth.

Bentham long ago pointed out this inherent defect in what he called epistolary interrogation. He says:

"Within the path marked out by this string [of questions] the operations . . . are confined; so that if from the respondent on any occasion an answer happens to come out which has not been foreseen . . . and not having been foreseen . . . cannot have had a correspondent interrogatory deduced from it, . . . the benefit deducible . . . from the oral mode, is . . . lost."<sup>52</sup>

To illustrate his point he presents the well known case from the Apocryphal Scriptures, of Susanna and the Elders,<sup>53</sup> paraphrasing and analysing it as follows:

"Defendant Susanna committed adultery with a man in that garden, said the two mendacious elders. Under what tree? said defendant's counsel, Daniel. Being examined apart,—Under a mastic tree, answered the one;

51. 1 REPORT, MASS. JUD. COUNCIL (1925) 42.

52. 2 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827) 152.

53. APOCRYPHA, HISTORY OF SUSANNA, verses 51-61.

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under a holme tree, answered the other. Under what tree it was committed, or whether under any, supposing it was committed, was nothing to the purpose; nor, had a string of interrogatories been drawn up by Susanna's counsel, was it much to be expected that by the draughtsman the circumstances of the tree should have been thought of, nor consequently that anything would have been said about it in the interrogatories. Had even the first answer been forseen, and an opposite interrogatory grounded on it, the foresight would hardly have extended so far as the second; of the second, still less likely so far as a third; and so on." <sup>54</sup>

It is further to be observed that this method, while hampering the examiner in effectively directing and pursuing his investigation, also offers special aid to the deponent in concealing his case. This results from the circumstance that he is informed in advance exactly how far the inquiry is to go, what facts the interrogator knows about, as evidenced by his questions, and what facts he is ignorant of, as evidenced by his silence.

In view of these limitations upon the effectiveness of written interrogatories, it is evident that they are not well adapted for the purpose of a general examination. It is only when the facts sought are few, formal and isolated, that this method can be satisfactorily employed. So long as the discovery is restricted to the case of the examiner, and he is not permitted to inquire into the case of his adversary, the facts sought by discovery will usually be few, formal and isolated, and written interrogatories will perhaps serve reasonably well. For a small task a feeble instrument may suffice. But if discovery is to involve a thorough inquiry into the vital and highly controversial phases of the case, resort must be had to an oral examination. It is apparent that the two aspects of the problem of discovery, namely its scope and its methods, are intimately connected. One depends to a considerable degree upon the other, and both should be dealt with together.

Massachusetts undertook to broaden the scope of discovery while retaining the ancient interrogatory method, with a resulting discrepancy between the authorized extent of the investigation and the capacity of the machinery for doing the work. New York retained the narrow limits of equity, but introduced the new method of oral examination, as a result of which the effectiveness of the method constantly outruns the limits placed upon its use, causing an enormous amount of technical litigation over the application of the rules.<sup>55</sup> Connecticut has at least maintained a proper correlation

54. 2 BENTHAM, *op. cit. supra* note 52, at 153.

55. To compel litigants to observe the limitations on the scope of the questions, the New York practice requires the party to set forth in his notice of deposition the matters upon which he desires to examine his adversary, and the

between scope and method, for it has changed neither. And this is true in a number of other states, either generally or in so far as interrogatories are in fact used.<sup>56</sup>

But it is also possible to preserve that correlation by changing both, authorizing a discovery as broad in its scope as the trial itself, and providing the same method of examination which is employed in trial practice. This is the solution which has been found for the problem in a group of jurisdictions of which Wisconsin is the most conspicuous example.<sup>57</sup> Discovery has by this means become a widely used system of pre-trial procedure which has profoundly affected the administration of justice.

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latter is allowed to contest the propriety of any of these matters by a motion to vacate the notice, specifying in such motion the grounds relied upon and supporting it by affidavits. N. Y. C. P. A. (Clevinger, 1932) § 281; RULES, 124. This permits interlocutory litigation to an almost unlimited extent in determining the propriety of proposed subjects of examination.

56. New Jersey belongs in this group. See *Wolters v. Fidelity Trust Co.*, 65 N. J. L. 130, 46 Atl. 627 (1900); *Watkins v. Cope*, 84 N. J. L. 143, 86 Atl. 545 (1913); *Neske v. Burns*, 8 N. J. Misc. 160, 149 Atl. 761 (1930). So, also South Carolina. See *People's Bank v. Helms*, 140 S. C. 107, 138 S. E. 622 (1927); *U. S. Tire Co. v. Keystone Tire Sales Co.*, 153 S. C. 56, 150 S. E. 347 (1929). The same is true of Washington. See *Hill v. Hill*, 126 Wash. 560, 561, 219 Pac. 18 (1923); *Kelly-Springfield Tire Co. v. Lotta Miles Tire Co.*, 139 Wash. 159, 245 Pac. 921 (1926).

57. Other jurisdictions belonging in this group include Indiana, Kentucky, Missouri, Nebraska, New Hampshire, Ohio, Ontario and Quebec. See *RAGLAND*, *op. cit. supra* note 39, at 124 *et seq.*



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THE PROPOSED FEDERAL RULES OF CIVIL PROCEDURE

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# THE PROPOSED FEDERAL RULES OF CIVIL PROCEDURE

For the District Courts of the United States and the Supreme Court of the District of Columbia  
 —Remarkable Extent to Which the Bench and Bar Have Participated in the Reform—  
 Rules Contain Many Important Innovations—Certain Changes of Interest Listed—  
 Comments and Criticism Invited<sup>1</sup>

By CHARLES E. CLARK

*Dean of the Law School of Yale University, and Reporter to the Advisory Committee  
 on Rules for Civil Procedure, Supreme Court of the United States*

**I**NTEREST in the proposed Federal Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia has been aroused in the main and quite naturally because of the important innovations they will make, if adopted, in our most extensive judicial system. Historians may find another fact of equal interest in their ultimate appraisal of the reform, namely, the extent to which the bench and the bar of the country have participated in it. This is wholly unique, both in the number of participants and the length of time in which they have been engaged upon it. True procedural reform in England took longer than even the near quarter-century campaign of the American Bar Association to secure the adoption of the Act authorizing the Supreme Court to make these rules. But in England reform came as a result almost wholly of lay pressure;<sup>2</sup> while this has been a professional movement throughout. The Bar of this Circuit can take pride in the fact that it was a distinguished Virginia lawyer, Thomas W. Shelton, who led the Association's movement from its inception in 1912 until his death in 1930 and to whom more than any other one man the Act of June 19, 1934,<sup>3</sup> is due. But he had the support not merely of the national Association, but of many state and local associations and of leaders of the profession and of law teachers generally; and it was perhaps fitting that the final passage of the Act should be due to the timely support and leadership given the movement by the official chief law officer of the country, the Attorney General of the United States.<sup>4</sup>

After passage of the Act, the assistance of lawyers and judges in the actual work of preparing

the new procedure was at once solicited through the appointment in all the judicial districts of committees to consider content and form of the proposed rules.<sup>5</sup> The appointment by the Supreme Court of the United States of an advisory drafting committee of fourteen lawyers and law professors from all parts of the country<sup>6</sup> was a practical way of giving concrete expression to informed professional and scientific opinion as to the course the reform should take. Now we come to one of the most interesting and important of the various steps in co-operative effort at law reform—for the entire bar and bench of the country in effect is invited to scrutinize and to criticize the preliminary draft of the rules which the Committee has prepared.<sup>7</sup> I look forward, with a slight touch of apprehension, but nevertheless with lively anticipation, to the deluge of comments I know the Committee will receive; for this is a subject, as we already know, arousing the most lively and active intellectual activity on the part of the lawyers. If this experiment in united or mass attack on our problem is successful, as I believe it will be, it is not too much to say that a new era in law reform activity has opened. For one suggestion contained in the Preliminary Draft is that of a continuing committee to receive suggestions from the profession as to the improvement of procedure and to submit to the Court continu-

States Supreme Court (1934) 13 Tex. L. Rev. 1; Jaffin, Federal Procedural Revision (1935) 21 Va. L. Rev. 504; Dobie, Recent Developments in Federal Procedure (1935) 21 id. 876; Clark and Moore, A New Federal Civil Procedure—II. Pleadings and Parties (1935) 44 Yale L. J. 1291; Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure (1936) 45 id. 393; Callahan and Ferguson, Evidence and the New Federal Rules of Civil Procedure (1936) 45 id. 622; Moore and Levi, Federal Intervention: I. The Right to Intervene and Reorganization (1936) 45 id. 565; James, Trial by Jury and the New Federal Rules of Procedure (1936) 45 id. 1022; McCaskill, One Form of Civil Action, But What Procedure, for the Federal Courts (1935) 30 Ill. L. Rev. 415; Eagleton, Two Fundamentals for Federal Pleading Reform (1936) 3 U. of Chi. L. Rev. 376; Eagleton, Proposed Parties and Joinder Sections for Federal Pleading Rules (1936) 3 id. 597; Chatee, The Federal Interpleader Act of 1936 (1936) 45 Yale L. J. 963, (1936) 45 id. 1161. Earlier articles are referred to in Clark and Moore, supra.

5. (1934) 20 A. B. A. J. 713-716; (1935) 18 J. Am. Jud. Soc. 163; (1935) 20 Mass. L. Q. 41-44.

6. 295 U. S. 774, 775 (1935).

7. See Foreword to Preliminary Draft of Federal Rules of Civil Procedure, May 1, 1936; Address of Chief Justice Hughes to American Law Institute, May 7, 1936, 56 S. Ct. Rep. xiii-xv, 22 A. B. A. J. 374.

ously as may be necessary recommendations for change and amendment.<sup>8</sup>

Quite appropriately, this meeting affords our first opportunity to gauge the reaction of the profession to our work. The annual conference of the Fourth Judicial Circuit has come to be recognized as one of the outstanding gatherings of lawyers to consider the administration of the law in a spirit at once scientific and practical. I am honored to be asked to report to you on what we have been doing; and for my part I feel that if we pass the test here and secure your approval of our general plan there is good augury for the ultimate success of our rules. There are so many things about the rules which I should like to discuss with you that I hardly know where to begin. It would be a pleasure to start at Rule One and go right through them all, but judging by the experience at our Committee meetings it would take all this day to discuss even the first two rules. I must therefore make selection of some things to emphasize and trust that your questions later will bring forward other points of peculiar interest to you.

May I say first how eminently satisfactory, in fact how really exhilarating, has been the work of drafting the rules with the Advisory Committee. It has been arduous, particularly in view of the time schedule which we were forced to maintain; and since we have traveled so far so rapidly we cannot hope that our work is free from error. But the spirit of the Committee, the aroused interest of each member and his knowledge and contribution to the project, was remarkable. We had brought to our meetings a real cross section of procedural experience in this country, together with the technical knowledge of other systems furnished by the teachers; and whenever one member found himself shocked or troubled by apparently new procedures, there were others to point out their long experience with just such systems. It was a process of education for all, demonstrating the infinite small diversities but fundamental general similarity of pleading objectives and techniques throughout the country. When we were through, it was difficult, if not impossible, to view those practices with which we were familiar as the only possible ones and everything else as anathema. We learned what was being done, we enjoyed ourselves in doing it, and we think we were able to select and unite in one system excellent ideas from many different sources.

Now I shall list and discuss what perhaps may be considered the most far-reaching features of the new rules, and I shall thereafter state more briefly other important points of perhaps more restricted effect. Please bear in mind that this selection is rather arbitrary and merely for convenience in discussion. Practically every rule may arouse discussion, for throughout we have tried to settle old disputes and negative the possibility of controversy over many a narrow or broad point of federal pleading or civil procedure generally. Some of the details which we have put into the rules may occasion surprise, but it will be found on examination that these are put in to make impossible in future federal practice some technical view, which has actually developed in some state or federal court or has

8. Rule A, Federal Rules of Civil Procedure (Preliminary Draft, pp. 170, 171).

been pointed out by some text writer. The detail is inserted to insure flexibility, not to compel rigidity. With this admonition, I will mention the following as among the most important features of the new draft:

(1) The principle of uniformity in all federal civil actions is substituted for conformity to state practice at law and uniformity in equity.<sup>9</sup>

(2) The union of the law and equity procedures is insured.<sup>10</sup>

(3) The civil action as the unit of judicial proceeding is given a very wide scope, with free joinder of parties, of claims, and of counterclaims, free amendment, and extensive impleader of new parties.<sup>11</sup>

(4) The rules of pleading proper provide for an extremely simple method of setting forth the issues in the case under the general control and within the discretion of the trial judge, with no detailed or formalistic allegations or denials required or expected.<sup>12</sup>

(5) New and advanced provisions for discovery and summary judgment provide for the expeditious settlement of cases where no real contested issues are involved.<sup>13</sup>

(6) The procedure of appeal to the circuit court of appeals has been greatly simplified.<sup>14</sup>

Abolition of conformity and union of law and equity were perhaps the two important objectives most stressed by the American Bar Association to be achieved by the Court under the rule-making authority contained in the bill which became the Act of 1934. The first was the original occasion for pressing for the legislation, but from it arose the opposition which delayed passage of the Act, an opposition based on the fear that the entire country would have to submit to a burdensome technical metropolitan practice and that conformity was preferable. But as the proponents of the measure demonstrated, conformity had proved unsuccessful, for it was difficult to find when conformity to state procedure should be had and when uniformity was required by federal law. Of course conformity was never had on the equity side of the court. It developed, too, that conformity to state procedure should not be had on matters involving the jurisdiction of the court or regulated by the Constitution or statutes of the United States, or on matters affecting the actual trial of a case or an appeal from a judgment.<sup>15</sup> Thus in actual effect the conformity principle operated in a restricted and not too clearly defined area; and there it operated to make theoretically possible at least one of some forty-eight different state procedures. The confusion resulting made federal procedure a paradise for the expert and a pitfall for the ignorant, and the trend toward simplification and the union of law and equity in the state courts had made the national courts seem more antiquated by contrast. In fact the Federal Equity Rules of 1912 and the Law and Equity Act of 1915 had developed a considerable union of law and equity, wherein actions were readily transferred

9. Act of June 19, 1934, *supra* note 3; Rule 2, Federal Rules of Civil Procedure.

10. Rules 2, 45, 46, 68, Federal Rules of Civil Procedure.

11. Rules 18-20, 22, 25-29, 49, Federal Rules of Civil Procedure.

12. Rules 8-23, Federal Rules of Civil Procedure.

13. Rules 31-44, Federal Rules of Civil Procedure.

14. Rules 72-76, Federal Rules of Civil Procedure.

15. Clark and Moore, *supra* note 4, at pp. 401-415.

from one docket of the court to another and equitable defenses were permitted in actions at law. This trend, which was certainly in the right direction, nevertheless made still more difficult the application of the conformity principle, and retained vestiges of the old divided procedure to cause trouble and technical difficulties. In fact the federal practice was fast approaching the united procedure of the states under enlightened decisions, such as that of your Circuit Court of Appeals speaking through Judge Parker in the case of *Clarksburg Trust Co. v. Commercial Casualty Co.*<sup>16</sup> But it was not possible to do away with either a formal resort to an attenuated conformity so far as the action was one at law or a formal transfer to the other side of the court if the action was wrongly entered. The effect of this latter requirement, particularly when the case was on appeal, was especially uncertain. If ever there had been advantages in conformity or in the divided procedure it was now gone and only the vestigial remnants remained to cause trouble, expense, and delay.<sup>17</sup>

Accordingly when the rules become effective conformity will disappear, and uniformity under a simple system based on a united procedure following the English and the best state systems will result. The enabling act<sup>18</sup> provides that all laws inconsistent with the rules shall no longer be of effect, and hence a complete repeal of all conformity provisions and principles will result. It is thought that the country is now more ready for uniformity than at any earlier time. Until very recently state procedures varied greatly, but this is now largely changed. The one single system envisaged by the rules will not seem greatly different from the procedure of most, if not all, of the states, but will appear, as it is, merely the logical extension of already existing state practice systems.

Last year the Court announced that it would at once establish rules providing for the united procedure, without the intermediate step of separate uniform rules for actions at law.<sup>19</sup> Thus it avoided a piecemeal reform which would have completely disarranged the existing system without the gain of real simplification, and with the possibility of a definite retreat from the approach towards a united procedure already achieved. Far better not to touch the procedure at all than such a half-hearted attempt with its disturbing possibilities. It was wise statesmanship to accept responsibility for a complete reform of federal civil procedure to the extent permitted and authorized by the enabling act.<sup>20</sup>

Pursuant to this mandate we have provided for a complete union of law and equity, preserving, however, the constitutional right of trial by jury and following the best state models. No formalities of pleading or division of procedure are required in bringing or defending an action, but all claims and defenses, whether formerly legal or equitable or otherwise, may be stated in the pleadings without restriction.<sup>21</sup> The right to jury trial is preserved

quite simply by allowing either party to demand it seasonably in writing, and if not so demanded it is deemed waived. Two alternative rules as to the time of demand have been presented for consideration and choice by the Court. By one the written demand must be made within twenty days after the pleadings are at issue; by the other such demand must be made by the time the case is claimed and assigned for trial.<sup>22</sup> This permits any parties honestly desiring jury trial to obtain it, but compels the settling of the question as to the form of trial in advance of the trial itself, and prevents the parties from speculating on the outcome and raising objections after decision or on appeal. The question as to the form of trial is thus actually settled on a hearing on preliminary motion, and, as state experience shows, no substantial difficulties are experienced. Any less simple procedure than this or any system which tends to require a division in the forms of action would be hardly any advance over the present federal practice since the Law and Equity Act of 1915 and would preserve just those vestiges of division referred to above which it should be the purpose of the new procedure to blot out.<sup>23</sup>

The potentially wide scope of the civil action is a recognized feature of modern procedure which is followed logically in the new rules. Of course it was not the conception of common law pleading where the case was limited, theoretically at least, to supposedly a single issue, though even there the possibility of combining diverse claims in one action, theoretically limited, was in practice fairly extensive. In the equity suit the idea was to settle all matters in issue, and this objective was satisfactorily achieved in the Equity Rules of 1912. Following this system, the new rules provide for joining of claims and counter-claims without restriction, for joining parties quite freely, for bringing in new parties responsible to the original plaintiff or merely responsible over to the defendant, and for extensive provisions for amendments before or at the trial.<sup>24</sup> The provisions for joinder of parties come from the English model, already copied in California, Illinois, New Jersey, and New York, where the substantial test of joinder is the existence of a common question of law or fact affecting the parties joined.<sup>25</sup> Experience in procedural administration has demonstrated the desirability of settling at one time all the disputes of whatever kind which exist between opposing parties or all questions involving one affair, no matter how many parties may be affected. It is sound social policy that all items of potential irritation between parties be adjusted at one time, so that repose can be achieved and litigation not continued interminably. Actually there is no difficulty in handling various issues within the boundaries of a single action. If at any time the trial court finds that the issues may more conveniently be tried separately, it has power to order such separate trials. Even the mere reduction in the filing of papers in the clerk's office is a boon.

Along with this concept of the code action as one really intended to settle all existing difficulties

16. 40 F. (2d) 626 (1930); cf. (1930) 9 N. C. L. Rev. 82.

17. Clark and Moore, *supra* note 4, at pp. 415-434; Clark, *supra* note 4, 20 Corn. L. Q. at pp. 453-455.

18. *Supra* note 3.

19. 295 U. S. 774, 775 (1935); Address of Chief Justice Hughes to the American Law Institute, May 9, 1935, 12 A. L. I. Proceedings 54, 21 A. B. A. J. 340.

20. Cf. Clark, *supra* note 4, 20 Corn. L. Q. at pp. 448-458.

21. Rules 9-23, Federal Rules of Civil Procedure.

22. Rules 45, 46, Federal Rules of Civil Procedure.

23. James, *supra* note 4, at pp. 1044-1049; Clark and Moore, *supra* note 4, at pp. 1292-1299.

24. Rules cited *supra* note 11.

25. See especially Rule 27, Federal Rules of Civil Procedure, and citations in the note thereto.

affecting the parties to the litigation goes the theory of extreme flexibility and adaptability of the pleading principles proper, that is, the rules governing the form of statement of the claims or defenses of the parties. The old requirement that a party must plead only facts, avoiding evidence on the one hand and law on the other, was logically indefensible, since the actual distinction is at most one of degree only and in actual practice it caused more confusion than any possible worth it might have as admonition. The new rules provide only for a short and plain statement of claim or defense showing that the party is entitled to the relief claimed or the action of the court desired; and there is only the further general admonition that each averment of a pleading shall be set forth as simply, concisely, and directly as the circumstances permit.<sup>26</sup> Provisions for amendment substantially without restriction and that the pleadings shall be deemed amended to conform to the evidence which is received without objection at the trial show that a party is not to be penalized by any error in any formal statement or allegation he has made.<sup>27</sup> Other provisions point the way to the pleading of special matters or the removal of restrictions; thus misjoinder of causes of action is essentially done away with and failure to state claims separately can be urged only where it will aid clarity.<sup>28</sup>

An important section of the proposed rules is that making provision for discovery and summary judgment in accordance with the general trend of procedural reform in England and in this country, since these are devices which aid enormously in the speedy ascertainment of the real issues involved in litigation and their expeditious adjudication. They are natural corollaries to supplement the system of the extremely flexible and broad pleading to which I have just referred. The requirements of pleading and allegation should not be strict, so that no person shall be deprived of his rights by the chance act or ignorance of his lawyer. But if there results any indefiniteness about the issues or the points in dispute, it can be cleared up effectively (as no purely pleading rule has ever succeeded in accomplishing) by those devices of discovery and summary judgment which enable one upon stating his own case explicitly to obtain a like statement from his opponent—so explicit in fact that the case in half or more of the instances is ready for immediate judgment. Hence the rules provide for examination before trial, orally or through written interrogatories, of a party or witness; for the listing of documents and tangible things; the discovery of their existence, and their production for inspection, copying, or photographing; for the physical and mental examination of parties; for the admission of facts and of the genuineness of documents; and for summary judgment in all, not merely a limited class of cases.<sup>29</sup>

Some may fear that the discovery provisions go to the extent of permitting fishing expeditions, so that evidence may be manufactured after the opponent's case has been disclosed. It is believed that in any event sufficient safeguards have been incorporated in the rules to avoid wholly or sub-

stantially such possibility, since either party may force the proceedings affecting him to be held before a master duly authorized to rule on the admission of evidence, examinations of parties not conducted in good faith may be stopped by the court,<sup>30</sup> and the depositions so taken are admissible in evidence, unless the parties agree, only when the witnesses cannot be produced in court or for contradiction or impeachment.<sup>31</sup> Moreover, it is to be doubted whether free examination of the parties does not promote justice and hinder fraud, rather than the contrary. The whole trend of judicial administration has been towards more and more freedom in the admission of evidence, based on the belief that it is desirable to learn promptly all the facts, rather than to have some hidden, and to rely upon cross-examination as showing up falsities. We have now gone far beyond the exclusion of the testimony of parties in interest, although similar arguments were traditionally urged in support of such exclusion. Since discovery is open to either party immediately after jurisdiction has been obtained, it will actually lessen the chance of perjured testimony; and particularly in view of the safeguards I have referred to, there can be little danger, but much gain, in the wide use of these devices, as authorized by the new rules.

Federal appellate procedure has been a complicated process of petition for appeal, allowance by the court, assignment of errors, citation and return of service thereof, summons and severance in joint appeals and a cumbersome record with all testimony normally reduced to narrative form. Appeals in criminal cases have already been considerably simplified under recent rules,<sup>32</sup> and a like or further simplification in civil appeals is desirable. Since the proceedings for taking the appeal occur in the district court, the making of these rules, which must therefore regulate these matters, affords the opportunity for improvement.<sup>33</sup> Moreover, the uniting of the law and equity procedures makes certain changes necessary. A difficulty arises in that in some cases a direct appeal lies from the district courts to the Supreme Court, which also receives cases from the state courts, though the more general appeal in federal cases is to the Circuit Courts of Appeals. Our Committee felt that it could not properly recommend rules affecting the direct appeals, and complete simplification of federal appellate procedure must await action by that Court in connection with its own rules of procedure.<sup>34</sup> The changes we have suggested, however, are considerable and point the way to what we believe to be the correct system. We recommend the abolition of the proceedings for the allowance of the appeal, since it is generally allowed as of course, and the abolition of the citation, with substitution therefor of a notice of appeal with the proper bond. Objections to the form and sufficiency of the bond may be taken, but do not render the appeal void.<sup>35</sup>

26. Rules 12, 14, 15, Federal Rules of Civil Procedure.

27. Rule 28, cf. Rule 70, Federal Rules of Civil Procedure.

28. Rules 11-13, 17, 25, Federal Rules of Civil Procedure.

29. Rules 31-44, Federal Rules of Civil Procedure.

30. Rule 32 (b) and (c), Federal Rules of Civil Procedure, applying to depositions of parties.

31. Rule 31 (d), Federal Rules of Civil Procedure.

32. 292 U. S. 661, 662-663 (1934). See also Orfield, Federal Criminal Appeals (1936) 45 Yale L. J. 1223.

33. Clark, *supra* note 4, 49 Harv. L. Rev. at pp. 1311-1321.

34. See Rule 71, Federal Rules of Civil Procedure, and the note thereto.

35. Rule 72, Federal Rules of Civil Procedure.

Summons and severance is to be done away with.<sup>39</sup> Findings of fact are required in all cases tried without a jury, both the jury waived and the former equity cases, thus making a great step in advance in doing away with the distinctions between law and equity actions on appeal.<sup>40</sup> Much simplification of the process of making up the record, including the abolition of the requirement of reduction of the testimony to narrative form, is recommended.<sup>41</sup> And going beyond this there is suggested an alternative method, following the English system, which is becoming increasingly popular in certain jurisdictions in this country, whereby the printed record is made unnecessary and there are transmitted to the court of review typewritten transcripts only of the proceedings below.<sup>42</sup>

I shall now list by brief mention a number of detailed changes of interest and importance contained in the Preliminary Draft of the new rules. Again I utter the warning that I may omit, and doubtless have omitted, many matters of equal, if not greater, interest. The following, however, are the matters I have chosen for mention:

Institution of suit by simple summons served by a marshal or any suitable indifferent person;<sup>43</sup>

Definite provisions as to service and filing of pleadings, motions, and other papers;<sup>44</sup>

Abolition of time restrictions caused by expiration of terms of court and enlargement by order of court of time intervals prescribed for the doing of various acts under the rules;<sup>45</sup>

Use of forms as examples of procedure to be followed;<sup>46</sup>

Jurisdictional defenses to be made by preliminary motion; other defenses to be incorporated in the answer and to be heard at the trial unless special hearing is ordered;<sup>47</sup>

Order formulating issues to be tried may be entered in advance of trial;<sup>48</sup>

Careful formulation of rules as to parties, including joinder, capacity, suing by representative, interpleader, intervention, and substitution of new parties;<sup>49</sup>

Provisions for dismissal of an action, special verdicts and interrogatories, alternative jurors, directed verdicts, and judgments notwithstanding the verdict;<sup>50</sup>

Provisions for freer admission of evidence and uniform rules thereof in law and equity actions and for the abolition of exceptions;<sup>51</sup>

Clarification of the rules as to references to masters;<sup>52</sup>

Detailed provisions as to motions for new trials and petitions for relief against judgments;<sup>53</sup>

Requirement that material error must affirmatively appear before reversal of any action of the court;<sup>54</sup>

Clarification of the rules as to stay of execution;<sup>55</sup>

State provisional and final remedies made available in federal procedure;<sup>56</sup>

Provisions for deposit of money in court and offer of judgment;<sup>57</sup>

Provision for a judgment itself vesting title to land in the prevailing party;<sup>58</sup>

Provision for registration of federal judgments with other district courts of the United States;<sup>59</sup>

Clarification of the rules as to hearings in chambers and as to the books to be kept by the clerk;<sup>60</sup>

Applicability of the rules to the district courts, including the three-judge courts, to the Supreme Court of the District of Columbia, and to actions removed from state courts;<sup>61</sup>

Supplemental rule-making power preserved to the district courts;<sup>62</sup>

And finally it is suggested that the rules become effective three months after the adjournment of the next session of Congress and in no event prior to September 1, 1937.<sup>63</sup>

I have thus given you a catalogue of many points brought up by the rules, because I am sure that merely naming these matters will provoke discussion on the part of the federal bar, and I am looking forward with interest to your reactions to these various ideas. Please understand that we are looking for comments and criticisms as to all these matters. In fact as to at least several of them the Committee has indicated that it has not reached a final conclusion, by suggesting alternative rules to the Court for its choice, together with notes bringing out the problem. Chairman Mitchell, in his letter of submission of the draft to the Court,<sup>64</sup> lists many of the important questions which are before the Committee. On all these and on other matters, we bespeak your help and advice. I could make a considerable list of problems upon which further light would, in my judgment, be peculiarly helpful. Thus, in the matter of provisional remedies, such as attachment and garnishment, we have retained conformity to state procedure.<sup>65</sup> Would the bar prefer some attempt at substituting uniformity here? The rules of evidence, while made more liberal by this draft, are stated only in broad general terms.<sup>66</sup> Would the bar prefer further regulation and specification of detail in the field of evidence? The weight to be given to the findings

(Continued on page 491)

- 36. Rule 73, Federal Rules of Civil Procedure.
- 37. Rule 68, Federal Rules of Civil Procedure.
- 38. Rule 74, Federal Rules of Civil Procedure.
- 39. Alternate Rule 74, Federal Rules of Civil Procedure, and the note thereto.
- 40. Rules 3, 4, Federal Rules of Civil Procedure.
- 41. Rule 6, Federal Rules of Civil Procedure.
- 42. Rule 7, Federal Rules of Civil Procedure.
- 43. Rule 8, Federal Rules of Civil Procedure. The proposed Appendix of Forms is not yet prepared; it is expected that the suggested forms will be definitely limited in number to furnish examples of the simple pleadings provided in the rules, but not to provide a lawyer's manual or form book.
- 44. Rule 16, Federal Rules of Civil Procedure.
- 45. Rule 23, Federal Rules of Civil Procedure.
- 46. Rules 24-30, Federal Rules of Civil Procedure.
- 47. Rules 48, 53, 55, 56, Federal Rules of Civil Procedure.
- 48. Rules 50, 52, Federal Rules of Civil Procedure.
- 49. Rules 58-62, Federal Rules of Civil Procedure.

- 50. Rules 65, 66, Federal Rules of Civil Procedure.
- 51. Rule 70, Federal Rules of Civil Procedure.
- 52. Rule 76, Federal Rules of Civil Procedure.
- 53. Rules 78, 83, Federal Rules of Civil Procedure.
- 54. Rules 81, 82, Federal Rules of Civil Procedure.
- 55. Rule 84, Federal Rules of Civil Procedure.
- 56. Rule 85, Federal Rules of Civil Procedure.
- 57. Rules 87, 89, Federal Rules of Civil Procedure.
- 58. Rule 90, Federal Rules of Civil Procedure.
- 59. Rule 92, Federal Rules of Civil Procedure.
- 60. Rule 94, Federal Rules of Civil Procedure.
- 61. Reprinted at pp. viii-xviii of the Preliminary Draft.
- 62. Rule 78, Federal Rules of Civil Procedure; *supra* note 53.
- 63. Rule 50, Federal Rules of Civil Procedure, with note thereto; *supra* note 48; cf. Callahan and Ferguson, *supra* note 4.

## Leading Articles in Current Legal Periodicals

*Canadian Bar Review*, May (Ottawa, Ont.)—Recent Application of the *Renvoi* in Matters of Personal Status, by Prof. Norman Bentwich; Conflict of Laws in Automobile Negligence Cases, by Angus C. Heighington, K.C.; The Immigration Act and Limitations Upon Judicial Power: Bail, by Maxwell Cohen; John Almon Ritchie, K.C., by The Right Hon. Sir Lyman P. Duff; Mr. Justice Hudson.

*University of Cincinnati Law Review*, May (Cincinnati Ohio)—Revival of Mortgages, by Charles C. White; Judicial Method in Recent Constitutional Cases, by James L. Magrath.

*Columbia Law Review*, June (New York City)—Delegation of Powers and Judicial Review: A Study in Comparative Law, by Sidney P. Jacoby; The Nonresident Alien: A Problem in Federal Taxation of Income, by Montgomery B. Angell; Comparative Aspects of the Anglo-American Offer-And-Acceptance Doctrine, by Arthur Nussbaum.

*Commercial Law Journal*, June (Chicago, Ill.)—Corporations and the Practice of Law, by I. Maurice Wormser; Hearing on Law Lists in Washington, D. C., by John B. Edwards; Rulings Relating to Law Lists and Lawyers in Oklahoma, by Henry L. Fist; Office Systems for Attorneys, by Frank E. Trobaugh.

*Journal of Criminal Law and Criminology*, May-June (Chicago)—Modern Penal Code, by Jerome Hall; Jury System, by Francois Gorphe; Vignettes of the Criminal Courts, by Charles C. Arado; Houses of Correction, by Austin Van der Slice; Prison Case Work, by Maxwell Jerome Papurt; Cryptography, by Don L. Kooken; Characteristics of Fired Bullets, by Charles M. Wilson; Police Microanalysis, by Mr. Edwin O'Neill.

*Dickinson Law Review*, May (Carlisle, Pa.)—The Contribution of Chief Justice John W. Kephart to the Law, by Ruby R. Vale; Greetings from the Superior Court to Chief Justice Kephart, by William H. Keller; Appellate Court Decisions on Constitutional Issues, by John W. Kephart; The Law Schools' Part in Excluding the Unfit from the Bar, by John W. Kephart; Unauthorized Practice of Law, by John W. Kephart.

*Harvard Law Review*, June (Cambridge, Mass.)—Ought the Doctrine of Consideration to be Abolished from the Common Law? by Lord Wright; The 1935 Amendments of the Railroad Bankruptcy Law, by Leslie Craven, Warner Fuller; Taney and the Commerce Clause, by Felix Frankfurter; Power of the Supreme Court to Make Rules of Appellate Procedure, by Charles E. Clark.

*Kentucky Law Journal*, May (Lexington, Ky.)—Special and Local Legislation, by Lyman H. Cloe and Sumner Marcus; The Seventeenth Century Justice of the Peace in England, by James R. McVicker; Madison's Theory of Judicial Review, by Robert M. Burns; The American Law Institute's Restatement of the Law of Contracts Annotated with Kentucky Decisions (Concluded), by Roy Moreland; The Public Service Commission of Kentucky, by Orba F. Traylor and Roy H. Owsley; Housing Legislation in Kentucky, by Byron Pumphrey.

*Michigan Law Review*—May (Ann Arbor, Mich.)—The Effect of Impossibility Upon Conditions in Wills, by Lewis M. Simes; The Right of Appeal in Criminal Cases, by Lester B. Orfield; Attack on Decrees of Divorce II, by Albert C. Jacobs.

*Minnesota Law Review*, June (Minneapolis, Minn.)—Removal from Public Office in Minnesota, by Edward G. Jennings; The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, by Elmer E. Smead.

*Notre Dame Lawyer*, May (South Bend, Ind.)—War's Possible Effect on Clients, by James Joseph Kearney; Confusion of the Terms "Proximate" and "Direct," by Ralph S. Bauer; The American Law Institute's Restatement of the Law of Agency with Annotations to the Indiana Decisions.

*University of Pennsylvania Law Review*, June (Philadelphia)

—The Effect of the Decision in the Sugar Institute Case upon Trade Association Activities, by William J. Donovan; The Patentable Invention, by James Hogg Austin; A Federal Administrative Court, by Louis G. Caldwell.

*Rocky Mountain Law Review*, April (Boulder, Col.)—Proposals to Restrict Judicial Nullification of Statutes, by Lynn I. Perrigo; Impossibility as a Defense in Contracts, by James D. McGuire; Suicide While Insane as a Defense to Life and Accident Policies, by J. Hartley Murray; Early Interpretation of Colorado's Guest Statute, by Don Robertson.

### Proposed Federal Rules of Civil Procedure

*(Continued from page 451)*

made by the court presents a problem which is not clear to me, however my colleagues may feel. We are making an advance, in my judgment, in treating all court cases similarly and by assimilating the review to the old chancery review.<sup>64</sup> Is it not possible that there would be a gain in simplification in the results achieved by making the review of all cases, jury waived as well as equity cases, similar and substantially like the present review at law? Certain of the provisions as to parties may still cause difficulty. Some members of the Committee felt that the continuance of the concept of the real party in interest might perpetuate the confusion that term has caused under the code, and specifically the question of suits made by assignees of patent claims may cause future difficulties, as they have already in federal litigation.<sup>65</sup> Patent lawyers in particular may be able to do a real service in clarifying this problem. The requirement that the names of parties who should have been joined and the reason for their omission be stated<sup>66</sup> may perhaps, in the light of the old case of *Gilman v. Rives*,<sup>67</sup> throw doubt as to the validity of the judgment rendered in a case where the requirement has not been fulfilled. These are but illustrative of the type of problems which are inherent in the adoption of the new rules. I will venture the prophecy, however, that upon these and kindred matters the bar of the country will not be silent and that the Committee will have the pleasant, if onerous, task of dealing with literally thousands of suggestions from our colleagues of the profession. At any rate I hope so.

64. Rule 88, Federal Rules of Civil Procedure, with note thereto; *supra* note 37.

65. Rule 24, Federal Rules of Civil Procedure; Clark and Moore, *supra* note 4, at p. 1311; *Eagleton*, *supra* note 4, at p. 412; cf. *Crown Dye & Tool Co. v. Nye Tool & Machine Works*, 261 U. S. 24, 43 S. Ct. 254, 67 L. Ed. 516 (1923); *Independent Wireless Telegraph Co. v. Radio Corp. of America*, 269 U. S. 459, 46 S. Ct. 166, 70 L. Ed. 357 (1926), noted in (1926) 20 Ill. L. Rev. 726, (1926) 4 Tex. L. Rev. 385, and (1926) 35 Yale L. J. 1018.

66. Rule 26, Federal Rules of Civil Procedure.

67. 10 Pet. 298.

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## Structural Procedural Matrix of Civil Procedure Code of USA

Discovery-Case Management-ADR-Summary Judgment Centric & Non Trial Based



## LAW COMMISSION OF INDIA

FOURTEENTH REPORT

REFORM OF JUDICIAL ADMINISTRATION  
(VOL. I—CHAPTERS 1-40)

MINISTRY OF LAW  
GOVERNMENT OF INDIA

#### 4.—INDIGENOUS SYSTEM

**Scope of Enquiry.**

1. The task assigned to us of suggesting ways and means for the improvement of our present system of judicial administration, does not preclude us from considering radical or revolutionary measures which may make it more suitable to our needs.

**Criticism of existing system of Judicial Administration.**

2. It is said in some quarters that the present system of administration of justice does not accord with the pattern of our life and conditions. We are told that large masses of our population are illiterate and live in the villages. These conditions demand, it is said "a system of judicial administration suited to the genius of our country" or "an indigenous system". Even the Uttar Pradesh Judicial Reforms Committee of 1950-51 stated, though by a majority that "it cannot be denied that the rules of procedure and evidence which they (the British) framed to regulate the proceedings in court, were in some cases foreign to our genius and in many cases were made a convenient handle to defeat and delay justice".<sup>1</sup>

**General support for existing system.**

3. In the circumstances, it became our duty to elicit opinion on these views. The answers we have received state with almost complete unanimity that the system which has prevailed in our country for nearly two centuries though British in its origin has grown and developed in Indian conditions and is now firmly rooted in the Indian soil. It would be disastrous and entirely destructive of our future growth to think of a radical change at this stage of the development of our country. It has been pointed out that those who have supported a reversion to an indigenous system of judicial administration have not really applied their minds to the question. It would be ridiculous, it is said, for the social welfare State envisaged by our Constitution which itself is based largely on the Anglo-Saxon model to think of remodelling its system of judicial administration on ancient practices, adherence to which is totally unsuitable to modern conditions and ways of life. We may as well, it is said, think of rejecting modern medicine and surgery and content ourselves with what the ancients knew and practised.

**Radical changes not necessary.**

4. Nevertheless, we must not fail to distinguish between the essential principles of our present system and its subsidiary features like clumsy and cumbrous procedures. It should not be forgotten as pointed out earlier that those charged with fashioning our laws, have while regarding the English laws and institutions as a model, consciously and

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<sup>1</sup>Report, Page 1.

continuously attempted to modify and mould them to suit Indian life and Indian conditions. That attempt was continued throughout the period of British rule with the subsequent association in an ever-increasing degree of Indian legislators, Indian Judges and Indian administrators in the making of laws and the administration of justice. It may be that we have failed to make our laws and our court systems and procedures conform sufficiently to the needs of our people. To that extent, no doubt, they require modification and adjustment. We have endeavoured to give attention to these points of view; but such changes can only be made within the framework of a system suited to our present conditions and needs, which are the needs and conditions of a highly organized welfare society with a developing industrial economy. We have, therefore, in considering the changes which are necessary and practicable made a distinction between the fundamentals which must exist in any modern system for the administration of justice and the procedures and practices by which the system is to be operated. We agree with the observations of the Uttar Pradesh Judicial Reforms Committee<sup>1</sup> that "the need of the hour is that rules and procedures and evidence should be so simplified that justice may be available to the rich and the poor alike and that it may be prompt and effective". But simplification cannot mean a sacrifice of fundamentals and essentials. Perhaps, as pointed out in a note of dissent to the report of the Committee, "the real need of the hour is the inculcation of a higher sense of duty, a greater regard for public convenience, greater efficiency, in all those concerned in the administration of justice."<sup>2</sup> In any case whichever way our needs are looked at, little is to be gained by an insistence on what has been called an indigenous system or a system suited to the genius of our country.

5. However, we shall briefly endeavour to gather the essentials of such an indigenous system as existed in our country prior to the advent of the British and point out that the essentials of our ancient system were not very different from those of our present system.

It is undoubtedly true that a study of the past is very desirable when we are planning for the future. But it should not be forgotten that a system of judicial administration is a matter of slow growth and its advance is moulded by contemporary conditions and the existing social structure. As society advances from stage to stage its needs alter from time to time and any system which governs the functioning of society or its component parts would also call for progressive modification. In considering the ancient system and contrasting it with the present judicial system, we must always keep in mind the differences in the structure and conditions of society as it existed then and as it is today.

<sup>1</sup>Report, Page 1.  
<sup>2</sup>Report, Page 127.



LAW COMMISSION OF INDIA

**ONE HUNDRED AND FOURTEENTH  
REPORT**

**ON  
GRAM NYAYALAYA**

AUGUST 1986

## CHAPTER V

### EXAMINATION AND ANALYSIS OF CRITICAL DISCUSSION ON CERTAIN DRAFT PROPOSALS

5.1. If the historical perspective and past experiences are not to be ignored Choice and policy because of an articulated reverence generated for the existing system of judicial decision. administration by some vocal elements, it becomes a compelling necessity to give up any effort at introducing peripheral changes, an exercise repeatedly undertaken in the past. Any amount of legitimisation of the present system would not hide its utter and almost irremedial failure. All the previous attempts and their fall-outs have been succinctly set out in the working paper. Every possible attempt to reform and revitalise the system not only failed to yield the desired results, but, in fact, aggravated the situation. To chalk out a new path became a compelling necessity.

Every organised society, primitive, tribal or clan, is likely to generate disputes. Consequently, every such society must evolve a forum for resolution of such disputes. Prior to the imposed imperial court structure, socialisation of finding solutions to disputed issues, began with appearance of a "third party"<sup>1</sup>. The organisation of the village as a social and political unit finds reference in vedic literature. Village assembly with local headman provided forum for resolution of disputes. People participated in the administration of justice. During colonial rule State courts exclusively took over the function of resolution of disputes.

5.2. While visualising the possible direction in which the reform of the system must move, the prior experience and the experimentation must be duly evaluated Evaluation of past and a lesson be drawn from it. The stark reality that emerges from the historical evaluation of the past attempts and the experience thus gained is that the tinkering with the system at the fringes would be of no avail. On the contrary, it is likely to add to the malaise. The true test to measure the effectiveness of a change sought to be introduced must be the pains and gains of an average citizen, the consumer of justice. The harsh *albeit* unpalatable outcome of all attempts made so far to improve the system must provide an art lesson in that if simplest and non-complicated dispute between rural people is sought to be dealt with by the present system keeping structural part intact, the effort is bound to go down the drain. It would in no way make the system resilient, effective and responsive to the felt needs of the times. The inescapable conclusion thus is that a basic structural change in the mode, method and forum for resolution of specified types of disputes is a *sine qua non* before the system is engulfed by its own debris.

5.3. It would be unwise to look at the problem from the point of view of court management only. In other words, it would be very imprecise to examine the matter from the aspect of ever-growing court dockets. Such an endeavour has to be guided by the aspirations proclaimed in the Constitution of India. Article 39A of the Constitution of India directs the State to secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. This is the constitutional imperative. Denial of justice on the ground of economic and other disabilities is in nutshell referred to what has been known as problematic access to law. The Constitution now commands us to remove impediments to access to justice in a systematic manner. All agencies of the Government are now under a fundamental obligation to enhance access to justice. Article 40 which directs the State to take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government, has to be appreciated afresh in the light of the mandate of the new article 39A.

5.4. How does one develop an approach to access to justice contemplated by article 39A? Hitherto, as we will shortly note in our discussion of the organisation of Nyaya Panchayat (by whatever name called), the dominant consideration has been to ameliorate the burden on the court-system, not so much to prevent denial of justice to any citizen by reason of economic or other disabilities. The command of article 39A now is to focus on these disabilities and to develop schemes for their removal. The managerial consideration of ameliorating the burdens on court-system through creation of local fora for dispute settlement can not predominate any longer.

<sup>1</sup>. Kalman Kulscar, *Peoples Assessors in the courts: A study on the Sociology of Law*, (1982) p. 17.

**Disabilities in the Indian legal system.**

5.5. The 'other disabilities' referred to in article 39A, distinct from the economic disabilities, are assuredly difficulties posed by the existing profiles of the Indian Legal System. This system, as has already been pointed out, itself imposes disabilities on people in their quest for justice. The disabilities arise because of lack of sustainable local fora for dispute handling and an emphasis on professionalised justice. The renovation of the system, now contemplated by the Constitution, requires us to remove these disabilities. The professionalised model of justicing cannot be extended to Bharat, not merely because India has over 2,50,000 lawyers only but also because bulk of them are located in urban areas and given the voluntary nature of the profession, it is at this stage not possible through the law to plan their dispersal in a manner which would adequately and equitably serve the needs of the Indian masses. Such a measure ought to be at least proposed and discussed. But, for the time being, we accept the realities as they are.

**Alternative system**

5.6. If professionalized model of justice delivery thus cannot be extended to meet the legal needs of the Indian masses, it becomes incumbent to consider alternatives. The alternative is deprofessionalized model of justice. In this model, the indigenous juristic potential of the people, including their own sense of justice, is allowed room for development. This has been sought to be done through people's participation in the administration of justice.

**People's participation in the administration of justice.**

5.7. Settlement of disputes arising in a locality by a body of laymen of the locality is almost universally recognised. Number of such institutions all over the world may be briefly noticed to substantiate this statement<sup>1</sup>. The institution of Justice of the Peace in England and United States of America, 'Peoples Court' in USSR and with minor variations in all Eastern European countries manned by Lay Justices, all entail people's participation in the administration of justice. Yugoslavia is making an attempt in the direction of setting-up exclusively lay tribunals more or less based on the ideology similar to that underlying our Indian Panchayats.<sup>2</sup> So is the remarkable experience of Hungary in the System of People's Assessors.<sup>3</sup> Popular assessors, mediation committee, the district committee, the resident's committee as devised in China provide for people's participation. There are similar institution in Lusaka, Burma and Sri Lanka. The concept of lay participation in judicial decision-making made its appearance centuries back and it began with the appearance of a "third party" who establishes the ransom following the periods of self-judgment or blood feud.<sup>4</sup> Mediation model for settling disputed issues developed when and where the third party intervening in the dispute had sufficient prestige and power to enforce decision,<sup>5</sup> ransom indicated state intervention, private injury became public injury which assisted the process under which passing judgement became a state function<sup>6</sup>. In some form or the other, lay local participation in the mode and method of resolution of disputes was always in existence.

**Indigenous system in India.**

5.8. Before the advent of the British system of justice, there undoubtedly was an indigenous system for resolution of disputes in India. The impact of English Language, Western literature, the British system of justice and the universal rationality of Western Law have combined to induce an inbuilt prejudice for anything ancient. However, while trying to unearth and evaluate the indigenous system, it was found that the essentials of our ancient system were not very different from those of our present system<sup>7</sup>. While comparing the two systems, it was accepted that the subsidiary features of the present system include clumsy and cumbrous procedure, while the earlier one was simple and less-formal. Undoubtedly, 'as the society

<sup>1</sup>The Institution of 'Justice of the Peace' in U.K. dealing with the greater part of criminal jurisdiction and a small but not unimportant part of civil jurisdiction 'is the wonder of all foreigners, for nothing like it exists in any other part of the world'. 'With few exceptions, this institution has worked quite satisfactorily and it is quite cheap'; C.K. Allen, *The Queen's Peace*, The Hamlyn Lectures (Fifth Series, 1953). P. 178.

<sup>2</sup>'Report of the Study Team on Nyaya Panchayat, Government of India, Ministry of Law (April 1962), Ch. III, para 16; p. 29.

<sup>3</sup> See Kalman Kulcsar, *People's Assessors in the Courts; A study on the Sociology of Law* (1982).

<sup>4</sup> *Id.*, p. 17.

<sup>5</sup> *Id.*, p. 19.

<sup>6</sup> *Id.*, p. 18.

<sup>7</sup> LCI Fourteenth Report, Ch. IV, para 5, p. 25.

## CHAPTER IV

### PROPOSAL FOR ADOPTION OF A NEW FORUM OF NYAYA PANCHAYATS

**Composition of existing Nyaya Panchayats.**

4.1. It is at this stage advantageous to refer to the composition of Nyaya Panchayats at present in vogue. The Nyaya Panchayats at present are composed of directly elected members, and in some cases elected members of Gram Panchayat forming Nyaya Panchayats. The method is wholly elective. Undoubtedly, with adult universal suffrage and democratic decentralisation, political parties have penetrated into the smallest village. Even the Panchayat elections are more or less fought on political party lines. To that extent, the village landscape is politicised.

The purely elective system may bring in politicised individuals to man Nyaya Panchayats and with it would come inevitably political confrontations, prejudices and divisions. This may hamper administration of even handed justice. And even if these elected representatives act in an wholly judicious manner their political attachments would cause dissatisfaction amongst litigants to different political hue. This would cut at the root of one of the facets of justice, namely, justice must seem to be done. Therefore, having regard to this existing unquestionable situation, it is necessary to devise a scheme which permits people's participation simultaneously avoiding the pitfalls of elective system.

**Constitutional justification for a new forum of Nyaya Panchayat.**

4.2. A forum for resolution of disputes with people's participation in the administration of justice is justified in terms of Article 39A mandate. It may also seem to be justified in terms of providing simple procedure which may help in fighting the delay in the disposal of disputes simultaneously reducing the cost of making justice effective and substantial in character<sup>20</sup>. A body variously described as Nyaya Panchayat, Lok Adalat, Jan Panchayat, People's Court is the goal intended herein. Its basic details are worked out in the succeeding paragraphs.

**Composition of Nyaya Panchayat Judges.**

4.3. The constitutional goal is to set up an egalitarian society governed by rule of law. It is oft repeated with some emotional attachment that we may better be ruled by laws than by men. The wholly elective method of choosing members for Nyaya Panchayats may not permit a legally trained mind to get into it. Basic knowledge of laws to render justice according to law is must. Therefore, any composition of Nyaya Panchayats must ensure for a legally trained Judge. It is, therefore, suggested that persons recruited to the civil judicial service of a state as Munsif, District Munsif or Civil Judge (JD) should preside over the Nyaya Panchayats. They would also be subject to the jurisdiction of the High Courts under Article 235 of the Constitution. They would, however, be eligible for promotion as sub-judges, District Judges, etc. as at present prevalent in the Subordinate Judicial Service of the States.

**Continuation of existing Nyaya Panchayat laws.**

4.4. In some states, the local Nyaya Panchayat laws provide for voluntary submission of disputes for resolution of Nyaya Panchayats constituted under the local law. The jurisdiction is minimal and has hardly been proved to be effective. However, if voluntary submission of jurisdiction to such Panchayat can be retained without in any way impinging upon the new forum herein suggested, no exception need be taken to it.

**Panel of laymen to be kept for appointment of Panchayat Judges.**

4.5. To provide effective people's participation in the administration of justice, the District Magistrate and the District and Sessions Judge for each District should draw up a panel of laymen from respectable residents in villages comprised in the district having educational attainments preferably upto a University degree or at least a Higher Secondary School Leaving Examination. It is not intended to exclude marginal farmers, farm workers or other local residents from being empanelled and it would be in the discretion of the District Magistrate/District Judge to include such persons even if they do not possess necessary educational qualifications. Depending upon the size of each Taluka/Tehsil, the list of panelists may vary from ten to twenty. The list should be got approved by the High Court. Provision may be made in the law that the High Court should approve the panel within a specified period and shall be deemed to have been approved after the expiry of the period.

<sup>20</sup>. See for a comprehensive Critical Review of Nyaya Panchayat System : U. Baxi; *The Crisis of the Indian Legal System*, (1982), Ch. 10, pp. 295-327.

4.6. Whenever a dispute is brought to the Panchayat Judges having his head-quarters at Taluka/Tehsil level, he would first proceed to select two from the panel of laymen drawn up as afore-mentioned, keeping in view the fact that their inhabitant must be as far away as possible from the geographical location of the dispute. The Panchayat Judge and the two members of the panel will constitute a Nyaya Panchayat for the disputes. This constitution of Nyaya Panchayat will have legal expertise and people's participation and would avoid caste, communal or political contaminations.

4.7. Keeping in view the nature of the dispute, the Panchayat Court shall, after notice to parties, assemble in the village where the dispute has arisen or if it is not accessible, then in the nearest village, accessible by public road transport, hear parties, examine witnesses, if any, produced making a brief note of the evidence and dispose of the dispute there and then on the same day. In 90% of the disputes this procedure will provide adequate safeguards for judicial and judicious disposal of disputes.

4.8. The Panchayat Judge shall be provided with a transport vehicle preferably a jeep so that he can frequently move to the villages for on the spot disposal of the cases. Simultaneously, the vehicle must be made available to the other two Members of the Nyaya Panchayat for attending the court wherever it is to be held. This will save such voluntary Members from incurring cost and wasting time in reaching the place where the court is to be held.

4.9. If the two Members of the Panel constituting the court with the Panchayat Judge are employees working on wages, it is necessary to provide either that while working as the Members of the Panchayat, they are deemed to be on duty and should not suffer loss of wages or alternatively they must be paid daily allowance not less than the daily minimum wage earned by each of them.

4.10. Order XXI (Execution) of the present Code of Civil Procedure has been variously described by the High Courts as lawyer's heaven and the starting point of all the torture of the successful litigant. To avoid this tragic outcome, a decision of the Nyaya Panchayat must be immediately executed so that justice is effectively rendered. If the Nyaya Panchayat itself can there and then execute the decision, namely, a water passage or a cart road is to be prescribed by putting it on the paper and asking the revenue authority to map it out. In all other respects, it can take the assistance of the local officers of the revenue department and the development department as it suits its requirement for effective execution of its order.

4.11. The jurisdiction of such Nyaya Panchayats would extend to all disputes falling within the various heads set out in paragraph 2.7. To substantiate wide jurisdiction sought to be conferred on Nyaya Panchayats, it may be stated that in its Fourteenth Report, the Law Commission recommended that the civil jurisdiction of Panchayats should be Rs. 200/- or Rs. 250/- and with the approval of the High Court their jurisdiction may be increased to Rs. 500/-. If the value of the rupee in 1954 is compared to the present value, one can easily confer jurisdiction upto the value of Rs. 10,000/-. Therefore, it is best not to prescribe any pecuniary limits as the jurisdiction and all the disputes comprehended in the afore-mentioned heads must come within the purview of the Nyaya Panchayats.

4.12. Similarly, in respect of the criminal jurisdiction, the Law Commission in its Fourteenth Report recommended that Nyaya Panchayat should have jurisdiction limited to inflicting a fine of Rs. 50/-, applying the same measure, it must have jurisdiction to try all petty offences which formerly a Magistrate of First Class was competent to try and must have power to inflict sentence of imprisonment also. This change is desirable, because the Nyaya Panchayat will now be composed of a legally trained Judge also.

4.13. While hearing a dispute, the Judges will evaluate and appreciate the evidence and the Panchayat Judge will render assistance with regard to simple for the resolution of law relevant to the dispute. Ordinarily, the Nyaya Panchayat will try of disputes to resolve the dispute by consensus. A decision by majority should not be ruled out. The decision must be drawn up in the local language supported by brief reasons.

4.14. When the dispute is before the Nyaya Panchayat, ordinarily, parties should be discouraged from engaging lawyers but if any party chooses to engage one, the lawyer so engaged may be heard but on no account an adjournment shall be granted for his accommodation nor the venue of the hearing be changed to accommodate him.

Revision against  
the orders of  
Panchayat Courts.

4.15. Even though the Law Commission of India in its Fourteenth Report deprecated any suggestion of an appeal or revision against the decision of the Nyaya Panchayat, it is necessary to provide for one revision petition to the District Court in the initial stages for correcting errors of law.

Exclusion of certain  
areas where courts  
with people's  
participation are  
Successful.

4.16. At present a unique experiment is being carried on by Anand Niketan Ashram, Rangpur, covering literally number of Talukas where voluntary Lok Adalat is functioning successfully. This was initiated by one Shri Harivallabh Parikh.<sup>31</sup> Similar experiment with a slight variation is being carried on in Dholka Taluka. It was initiated by Ravi Shanker Maharaj and Muni Santbalji. If people in these and similar areas where such successful experiments with peoples participation in the administration of justice are carried on, so desire, it would be open to the authority to exclude these areas from the operation of the Nyaya Panchayat that may be set up as herein envisaged. Drawing inspiration from the success achieved by the Lok Adalats in Gujarat which at present is a voluntary effort sustained by the local Legal Aid Committee, some Lok Adalats were convened in various cities of Uttar Pradesh. A Lok Adalat presided over by retired Judges of the Delhi High Court was convened in Delhi for settling claims of victims of motor accidents. The attempt is to give it a concrete shape and form.

Impact on appeals  
to District Court.

4.17. It is hoped that a large number of disputes will be resolved by consensus and the feed stock for appeals in the District Court will be considerably reduced with the result that it will have an impact on the reduction of arrears in the District Courts as also in the High Courts.

Views invited.

4.18. The Law Commission invites views/comments on the subject with specific reference to the question whether there is need to constitute a body variously described a Nyaya Panchayat, Lok Adalat, Jan Panchayat, People's Court in rural and semi-urban areas on the lines indicated in the preceding paragraphs.

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<sup>31</sup>. See U. Baxi, 'From Takkar to Karar : The Lok Adalat at Rangpur, A Preliminary Study' 10 *Journal of Constitutional and Parliamentary studies*, (1976), pp. 52-116, at p. 54.

People's Union For Democratic ... vs Union Of India & Others on 18 September, 1982

Equivalent citations: 1982 AIR 1473, 1983 SCR (1) 456

Bench: Bhagwati, P.N.

PETITIONER:

PEOPLE'S UNION FOR DEMOCRATIC RIGHTS AND OTHERS

Vs.

RESPONDENT:

UNION OF INDIA & OTHERS

DATE OF JUDGMENT 18/09/1982

BENCH:

BHAGWATI, P.N.

BENCH:

BHAGWATI, P.N.

ISLAM, BAHARUL (J)

CITATION:

1982 AIR 1473 1983 SCR (1) 456

1982 SCC (3) 235 1982 SCALE (1) 818

CITATOR INFO :

RF 1983 SC 75 (6)

R 1983 SC 328 (3)

RF 1984 SC 177 (1,6,7)

F 1984 SC 802 (10,21)

RF 1987 SC 1086 (4)

ACT:

Public Interest Litigation, scope and need for- Violation of various labour laws in relation to workmen employed in the construction work connected with the Asian Games like Constitution of India, 1950 Arts. 24, Minimum wages Act, 1948, Equal Remuneration Act. The employment of Children Act, 1938 and 1970, Interstate Migrant workman (Regulation of Employment and conditions of Service) Act, 1970 and contract Labour (Regulation and Abolition) Act, 1970-Locus-standi-Maintainability of the writ and remedial relief that could be granted-Duties of Court regarding sentencing in cases of violation of Labour Laws-Constitution of

India Articles 14, 23, 24 and 32-Scope of Article 23 Meaning of "begar" Duty of State when violation of Arts. 17, 23 and 24 is complained.

**HEADNOTE:**

Petitioner No. 1, is an organisation formed for the purpose of protecting democratic rights. It commissioned three social scientists for the purpose of investigating and inquiring into the conditions under which the workmen engaged in the various Asiad Projects were working. Based on the report made by these three social scientists after personal investigation and study the 1st petitioner addressed a letter to Hon'ble Mr. Justice Bhagwati complaining of violation of various labour laws by the respondents' and/or their agents and seeking interference by the Supreme Court to render social justice by means of appropriate directions to the affected workmen. The Supreme Court treated the letter as a writ petition on the judicial side and issued notice to the Union of India, Delhi Administration and the Delhi Development Authority. The allegations in the petition were:

(i) The various authorities to whom the execution of the different projects was entrusted engaged contractors for the purpose of carrying out the construction work of the projects and they were registered as principal employers under section 7 of the Contract Labour (Regulation and Abolition) Act. 1970. These contractors engaged workers through "Jamadars" who brought them from different parts of India particularly the States of Rajasthan, Uttar Pradesh and Orissa and paid to these Jamadars the minimum wage of Rs. 9.25 per day per worker and not to the workmen direct. The Jamadars deducted Rupee one per day per worker as their commis-

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sion with the result that there was a violation of the provisions of A the Minimum Wages Act;

(ii) The provisions of Equal Remuneration Act, 1976 were violated as the women workers were being paid Rs. 71- per day, the balance of the amount of the wage was being misappropriated by the Jamadars: (iii) There was violation of Article 24 of the Constitution and of the - . provisions of the Employment of Children Acts, 1938 and 1970 in as much as children below the age of 14 years were employed by the contractors in the construction work of the various projects.

(iv) There was violation of the provisions of the Contract Labour (Regulations and Abolition) Act, 1970 which resulted in deprivation and exploitation of the workers and denial of their right to proper living condition and medical and other facilities under the Act; and

(v) The provisions of the Inter-state Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, though brought into force as far back as 2nd October 1980 in the Union Territory of Delhi were not implemented by the Contractors.

Allowing the petition, the Court,

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**HELD:** I:1. Public interest litigation which is strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief. Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and indicate public interest which demands that violations of constitutional or legal rights of large number of people who are poor, ignorant or in a socially or economically

disadvantaged position should not go unnoticed and unredressed. That would be destructive of the Rule of Law which forms one of the essential elements of public interest in any democratic form of Government. [467 C-F] 1:2. The Rule of Law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be prostituted by the vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political rights. The poor too have civil and political rights and the Rule of law is meant for them also, though today it exists only on paper and not in reality. If the sugar barons and the alcohol kings have the Fundamental rights to carry on their business and to fatten their purses by exploiting the consuming public, certainly the "chamaras" to belonging 458

to the lowest strata of society have Fundamental Right to earn an honest living through their sweat and toil. Large numbers of men, women and children who constitute the bulk of a population are today living a sub human existence in conditions of object poverty; utter grinding poverty has broken their back and sapped their moral fibre. They have no faith in the existing social and economic system. Nor can these poor and deprived sections of humanity afford to enforce their civil and political rights. (467 P-H; 468 A-D] 1:3. The only solution of making civil and political rights meaningful to these large sections of society would be to remake the material conditions and restructure the social and economic order so that they may be able to realise the economic, social and cultural rights. Of course, the task of restructuring the social and economic order so that the social and economic right become a meaningful reality for the poor and lowly sections of the community is one which legitimately belongs to the legislature and the executive but mere initiation of social and economic rescue programmes by the executive and the legislature would not be enough and it is only through multi-dimensional strategies including public interest litigation that these social and economic rescue programmes can be made effective. [468 G-H, 469 B-D]

1:4. Public interest litigation, is essentially a cooperative or collaborative effort on the part of the petitioner, the State or public authority and the Court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them. The State or public authority against whom public interest litigation is brought should be as much interested in ensuring basic human rights, constitutional as well as legal, to those who are in a socially and economically disadvantaged position, as the petitioner who brings the public interest litigation before the court. The State or public authority which is arrayed as a respondent in public interest litigation should, in fact, welcome it, as it would give it an opportunity to right a wrong or to redress an injustice done to the poor and weaker sections of the community whose welfare is and must be the prime concern of the State or the public authority. [469 D-F] 1:5. The legal aid movement and public interest litigation seek to bring justice to these forgotten specimens of humanity who constitute the bulk of the citizens of India and who are really and truly the "People of India" who gave to themselves this magnificent Constitution. Pendency of large arrears in the courts cannot be any reason for denying access of justice to the poor and weaker sections of the community. [470 E-F]

1:6. The time has now come when the courts must become the courts for the poor and struggling masses of this country. They must shed their character as upholders of the established order and the status quo. They must be sensitised to the need of doing justice to the large masses of people to whom justice has been denied by a cruel and heartless society for generations. The realisation must come to them that social justice is the signature tune of our Constitution and it is their solemn duty under the Constitution to enforce the basic human rights of the poor and vulnerable sections of the community and actively help in the

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realisation of the constitutional goals. This new change has to come if the judicial system is to become an effective instrument of social justice for without it, it cannot survive for long. Fortunately this change is gradually taking place and public interest litigation is playing a large part in bringing about this change. It is through public interest litigation that the problems of the poor are now coming to the forefront and the entire theatre of the law is changing. It holds out great possibilities for the future. This writ petition is one such instance of public interest litigation. [470 G-H; 471 A-C]

2. It is true that construction industry does not find a place on the schedule to the Employment of Children Act, 1938 and the Prohibition enacted in section 3 sub-section ( 3 ) of that Act against the employment of a child who has not completed his fourteenth year cannot apply to employment in construction industry. But, apart altogether from the requirement of Convention No. 59 of C the International Labour organisation and ratified by India, Article 24 of the Constitution provides that no child below the age of 14 shall be employed to work in any factory or mine or engaged in any other hazardous employment. This is a constitutional prohibition which, even if not followed up by appropriate legislation, must operate proprio vigore and construction work being plainly and indubitably a hazardous employment, it is clear that by reason of this Constitutional prohibition, no child below the age of 14 years can be allowed to be engaged in construction work. Therefore, notwithstanding the absence of specification of construction industry in the Schedule to the Employment of Children Act 1938, no child below the age of 14 years can be employed in construction work and the Union of India as also every state Government must ensure that this constitutional mandate is not violated in any part of the Country [474 A-F]

3. Magistrates and Judges in the country must view violations of labour laws with strictness and whenever any violations of labour laws are established before them, they should punish the errant employers by imposing adequate punishment. The labour laws are enacted for improving the conditions of workers and the employers cannot be allowed to buy off immunity against violations of labour laws by paying a paltry fine which they would not mind paying, because by violating the labour laws they would be making profit which would far exceed the amount of the fine. If violations of labour laws are to be punished with meagre fines, it would be impossible to ensure observance of the labour laws and the labour laws would be reduced to nullity. They would remain merely paper tigers without any teeth or claws. [476 E-H]

4:1. It is true that the complaint of the petitioners in the writ petition is in regard to the violations of the provisions of various labour laws designed for the welfare of workmen, and therefore from a strictly traditional point of view it would be only the workmen whose legal rights are violated who would be entitled to approach the court for judicial redress. But the traditional rule of standing which confines access to the judicial process only to those to whom legal injury is caused or legal wrong is done has now been jettisoned by the Supreme Court and the narrow confines within which the rule of standing was imprisoned for long years as a result of inheritance of the Anglo-saxon system of jurisprudence have been broken and a new dimension has been given to the doctrine of

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locus standi which has revolutionised the whole concept of access to justice in a way not known before to the Western System of jurisprudence. [477 F-H]

4:2. Having regard to the peculiar socio economic conditions prevailing in the country where there is considerable poverty, illiteracy and ignorance obstructing and impeding accessibility to the judicial process, it would result in closing the doors of justice to the poor and deprived sections of the community if the traditional rule of standing evolved by Anglo-Saxon jurisprudence that only a person wronged can sue for judicial redress were to be blindly adhered to and followed, and it is therefore Necessary to evolve a new strategy by relaxing this traditional rule of standing in order that justice may become easily available to the lowly and the lost. [478 A-C] 4:3. Where a person or class of persons to whom legal injury is caused or legal wrong is done is by reason of poverty, disability or socially or economically disadvantaged position not able to approach the Court for judicial redress, any member of the public acting bona fide and not out of any extraneous motivation may move the Court for judicial redress of the legal injury or wrong suffered by such person or class of persons and the judicial process may be set in motion by any public spirited individual or institution even by addressing a letter to the court. Where judicial redress is sought of a legal injury or legal wrong suffered by a person or class of persons who by reason of poverty, disability or socially or economically disadvantaged position are unable to approach the court and the court is moved for this purpose by a member of a public by addressing a letter drawing the attention of the court to such legal injury or legal

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wrong, court would cast aside all technical rules of procedure and entertain the letter as a writ Petition on the judicial side and take action upon it. [478 C-F]

Here, the workmen whose rights are said to have been violated and to whom a life of basic human dignity has been denied are poor, ignorant, illiterate humans who, by reason of their poverty and social and economic disability, are unable to approach the courts for judicial redress and hence the petitioners have, under the liberalised rule of standing, locus standi to maintain the present writ petition espousing the cause of the workmen. The petitioners are not acting mala fide or out of extraneous motives since the first petitioner is admittedly an organisation dedicated to the protecting and enforcement of Fundamental Rights and making Directive Principles of State Policy enforceable and justiciable. There can be no doubt that it is out of a sense of public service that the present Litigation has been brought by the petitioners and it is clearly maintainable. [478 G-H; 479 A-B]

4.4 The Union of India, the Delhi Administration and the Delhi Development Authority cannot escape their obligation to the workmen to ensure observance of the provisions of various labour law by its contractors and for non-compliance with the laws by the contractors, the workmen would clearly have a cause of actions against them as principal employers. So far as to Contract Labour (Regulation and Abolition) Act, 1970 is concerned, section 20 is clear that if any amenity required to be provided under sections 16 to 18 or 19 for the

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benefit of the workmen employed in an establishment is not provided by the contractor, the obligation to provide such amenity rests on the principal employer. [479 C-D] Sections 17 and 18 of the Inter-state Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979 also make principal employer liable to make payment of the wages to the wages to the migrant workmen employed by the contractor as also to pay the allowances provided under sections 14 and 15 and to provide the facilities specified in section 16 of such migrant workmen. [479 F-G] Article 24 of the Constitution embodies a Fundamental Right which is plainly and indubitably enforceable against every one and by reason of its compulsive mandate, no one can employ a child below the age of 14 years in a hazardous employment. Since, construction work is a hazardous employment, no child below the age of 14 years can be employed in constructions work and therefore, not only are the contractors under a constitutional mandate not to employ any child below the age of 14 years, but it is also the duty of the Union of India, the Delhi Administration and the Delhi Development Authority to ensure that this constitutional obligation is obeyed by the contractors to whom they have entrusted the construction work of the various Asiad Projects. Similarly the respondents must ensure compliance with by the contractors of the Provisions of the equal Remuneration Act, 1946 as they express the principle of equality embodied in Article 14 of the Constitution. [479 G-H; 480 A-D]

No doubt, the contractors are liable to pay the minimum wage to the workmen employed by them under the Minimum Wage Act 1948 but the Union of India, the Delhi Administration and the Delhi Development Authority who have entrusted the construction work to the contractors would equally be responsible to ensure that the minimum wage is paid to the workmen by their contractors.

[480 G-H]

5:1. It is true that the present writ petition cannot be maintained by the petitioners unless they can show some violation of a Fundamental Right, for it is only for enforcement right that a writ petition can be maintained in this Court under Article 32. But, certainly the following complaints do legitimately form the subject matter of a writ petition under Article 32; namely, (i) the complaint of violation of Article 24 based on the averment that children below the age of 14 years are employed in the construction work of the Asiad Projects, (ii) allegation of non-observance of the provisions of the Equal Remuneration Act 1946, is in effect and substance a complaint of breach of the principle of equality before the law enshrined in Article 14; and (iii) the complaint of non-observance of the provisions of the Contract Labour (Regulation and Abolition) Act 1970 and the

Interstate Migrant Workmen (Regulations of Employment and Conditions of Service) Act 1979 as it is a complaint relating to violation of Article 21. Now the rights and benefits conferred on the workmen employed by a contractor under the provisions of the Contract Labour (Regulation and Abolition Act 1970 and the Inter-State Migrant Workmen Regulation of Employment and Conditions of Service) Act 1979 which became enforceable w.e.f. 4-6-1982 are clearly intended to ensure basic

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human dignity to the workmen and if the workmen are deprived of any of these rights and benefits to which they are entitled under the provisions of these two pieces of social welfare legislation, that would clearly be a violation of Article 21 by the Union of India, the Delhi Administration and the Delhi Development Authority which, as principal employers, are made statutorily responsible for securing such rights and benefits to the workmen; and (iv) the complaint in regard to non-payment of minimum wage to the workmen under the Minimum Wages Act 1948, is also one relating to breach of a Fundamental Right enshrined in Article 23 which is violated by non-payment of minimum wage to the workmen.

[481 D-H; 482 A-F]

Maneka Gandhi v. Union of India, [1978] 2 SCR 663; Francis Coralie Mullin v. The Administrator of Union Territory of Delhi & Others, [1981] 2 SCR 516, applied. 5:2. Many of the fundamental rights enacted in Part III operate as limitations on the power of the State and impose negative obligations on the State not to encroach on individual liberty and they are enforceable only against the State. But there are certain fundamental rights conferred by the Constitution which are enforceable against the whole world and they are to be found inter alia in Articles 17, 23 and 24. [483 C-D]

5:3. Article 23 is clearly designed to protect the individual not only against the State but also against other private citizens. Article 23 is not limited in its application against the State but it prohibits "traffic in human beings and begar and other similar forms of forced labour" practised by anyone else. The prohibition against "traffic in human being and begar and other similar forms of forced labour" is clearly intended to be a general prohibition, total in its effect and all pervasive in its range and it is enforceable not only against the State but also against any other person indulging in any such practice. [484 G-H; 485 A]

5:4. The word "begar" in Article 23 is not a word of common use in English language, but a word of Indian origin which like many other words has found its way in English vocabulary. It is a form of forced labour under which a person is compelled to work without receiving any remuneration. Begar is thus clearly a form of forced labour. [485 E-G]

S. Vasudevan v. S.D. Mittal AIR 1962 Bom. 53 applied. 5:5. It is not merely 'begar' which is constitutionally prohibited by Article 23 but also all other similar forms of forced labour. Article 23 strikes at forced labour in whatever form it may manifest itself, because it is violative of human dignity and is contrary to basic human values. To contend that exacting labour by passing some remuneration, though it be inadequate will not attract the provisions of Article 23 is to unduly restrict the amplitude of the prohibition against forced labour enacted in Article

23. The contention is not only illfounded, but does not accord with the principle enunciated by this Court in Maneka Gandhi v. Union of India that when interpreting the provisions of the Constitution conferring fundamental rights, the attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than to attenuate

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their meaning and content. The Constitution makers did not intend to strike only at certain forms of forced labour leaving it open to the socially or economically powerful sections of the community to exploit the poor and weaker sections by resorting to other forms of forced labour. There could be no logic or reason in enacting that if a person is forced to give labour or service to another without receiving any remuneration at all, it should be regarded as a pernicious practice sufficient to attract the condemnation of Article 23, but if some remuneration is paid for it, then it should be outside the inhibition of that Article. To interpret Article 23 as contended would be reducing Article 23 to a mere rope of sand, for it would then be the easiest thing in an exploitative society for a person belonging to a socially or economically dominant class to exact labour or service from a person belonging to the deprived and vulnerable section of the community by paying a negligible amount of remuneration and thus escape the rigour of Art.

23. It would not be right to place on the language of Article 23 an interpretation which would emasculate its beneficent provisions and defeat the very purpose of enacting them. Article 23 is intended to abolish every form of forced labour. [486 E-H; 487 A-D]

5:6. The words "other similar forms of forced labour" are used in Article 23 not with a view to importing the particular characteristic of 'begar' that labour or service should be exacted without payment of any remuneration but with a view to bringing within the scope and ambit of that Article all other forms of forced labour and since 'begar' is one form of forced labour, the Constitution makers used the words "other similar forms of forced labour". If the requirement that labour or work should be exacted without any remuneration were imported in other forms of forced labour, they would straight-away come within the meaning of the word 'begar' and in that event there would be no need to have the additional words "other similar forms of forced labour." These words would be rendered futile and meaningless and it is a well recognised rule of interpretation that the court should avoid a construction which has the effect of rendering any words used by the legislature superfluous redundant. [487 E-G] The object of adding these words was clearly to expand the reach and content of Article 23 by including, in addition to 'begar', other forms of forced labour within the prohibition of that Article. Every form of forced labour, 'begar' or otherwise, is within the inhibition of Article 23 and it makes no difference whether the person who is forced to give his labour or service to another is remunerated or not. Even if remuneration is paid, labour supplied by a person would be hit by Article 23 if it is forced labour, that is, labour supplied not willingly but as a result of force or compulsion. For example, where a person has entered into a contract of service with another for a period of three years and he wishes to discontinue serving such other person before the expiration of the period of three years, if a law were to provide that in such a case the contract shall be specifically enforced and he shall be compelled to serve for the full period of three years, it would clearly amount to forced labour and such a law would be void as offending Article 23. That is why specific performance of a contract of service cannot be enforced against an employee 464

and the employee cannot be forced by compulsion of law to continue to serve the employer. Of course, if there is a breach of the contract of service, the employee would be liable to pay damages to the employer but he cannot be forced to continue to serve the employer without breaching the injunction of Article 23. [487 H; 488 A-D] *Baily v. Alabama*, 219 US 219:55 Law Ed. 191; quoted with approval,

5:7. Even if a person has contracted with another to perform service and there is consideration for such service in the shape of liquidation of debt or even remuneration, he cannot be forced by compulsion of law or otherwise, to continue to perform such service, as that would be forced labour within the inhibition of Article 23, which strikes at every form of forced labour even if it has its origin in a contract voluntarily entered into by the person obligated to provide labour or service, for the reasons, namely; (i) it offends against human dignity to compel a person to provide labour or service to another if he does not wish to do so, even though it be breach of the contract entered into by him; (ii) there should be no serfdom or involuntary servitude in a free democratic India which respects the dignity of the individual and the worth of the human person; (iii) in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, a contract of service may appear on its face voluntary but it may, in reality, be involuntary, because

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while entering into the contract the employee by reason of his economically helpless condition, may have been faced with Hobson's choice, either to starve or to submit to the exploitative terms dictated by the powerful employer. It would be a travesty of justice to hold the employee in such a case to the terms of the contract and to compel him to serve the employer even though he may not wish to do so. That would aggravate the inequality and injustice from which the employee even otherwise suffers on account of his economically disadvantaged position and lend the authority of law to the exploitation of the poor helpless employee by the economically powerful employer. Article 23 therefore, provides that no one shall be forced to provide labour or service against his will, even though it be under a contractor of service. [490 C-H]

Pollock v. Williams, 322 US 4:88 Lawyers Edn. 1095; referred to.

5:8. Where a person provides labour or services to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words "forced labour" under Article 23. Such a person would be entitled to come to the court for enforcement of his fundamental right under Article 23 by asking the court to direct payment of the minimum wage to him so that the labour or service provided by him ceases to be 'forced labour' and the breach of Article 23 is remedied. [492 F-G]

5:9. Ordinarily no one would willingly supply labour or service to another for less than the minimum wage, when he knows that under the law he is entitled to get minimum wage for the labour or service provided by him. Therefore when a person provides labour or service to another against receipt of remuneration which is less than the minimum wage, he is acting under the force of

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some compulsion which drives him to work though he is paid less than what he is entitled under law to receive. What Article 23 prohibits is 'forced labour' that is labour or service which a person is forced to provide." [491 B-D] 5:10. 'Force' which would make such labour or service 'forced labour' may arise in several ways. It may be physical force which may compel a person to provide labour or service to another or it may be force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution. Any factor which deprives a person of a choice of alternative and compels him to adopt one particular course of action may properly be regarded as 'force' and if labour or service is compelled as a result of such 'force', it would be 'forced labour'. Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or to feed his wife and children or even to hide their nakedness, where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair and where no other employment is available to alleviate the rigour of his poverty, he would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. He would be in no position to bargain with the employer; he would have to accept what is offered to him. And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour or service provided by him would be clearly 'forced labour'. The word 'forced' should not be read in a narrow and restricted manner so as to be confined only to physical or legal 'force' particularly when the national character, its fundamental document has promised to build a new socialist republic where there will be socio-economic justice for all and every one shall have the right to work, to education and to adequate means of livelihood. The constitution makers have given us one of the most remarkable documents in history for ushering in a new socio-economic order and the Constitution which they have forged for us has a social purpose and an economic mission and, therefore, every word or phrase in the Constitution must be interpreted in a manner which would advance the socio-economic objective of the Constitution. It is a fact that in a capitalist society economic circumstances exert much greater pressure on an individual in driving him to a particular course of action than physical compulsion or force of legislative provision. The word 'force' must therefore be construed to include not only physical or legal force but force arising from the compulsion of economic circumstances which leaves no choice of alternatives to a person in

want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage. Of course, if a person provides labour or service to another against receipt of the minimum wage, it would not be possible to say that the labour or service provided by him is 'forced labour' because he gets what he is entitled under law to receive. No inference can reasonably be drawn in such a case that he is forced to provide labour or service for the simple reason that would be providing labour or service against receipt of what is lawfully payable to him just like any other person who is not under the force of any compulsion. [491 D-H; 492 A-E]

6. Wherever any fundamental right which is enforceable against private individuals such as, for example, a fundamental right enacted in Article 17 or 23 466

or 24 is being violated, it is the constitutional obligation of the State to take necessary steps for the purpose of interdicting such violation and ensuring observance of the fundamental right by the private individual who is transgressing the same. The fact that the person whose fundamental right is violated can always approach the court for the purpose of enforcement of his fundamental right, cannot absolve the State from its constitutional obligation to see that there is no violation of the fundamental right of such person, particularly when he belongs to the weaker section of humanity and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him. [493 A-D]

#### JUDGMENT:

**ORIGINAL JURISDICTION:** Writ Petition No. 8143 of 1981. (Under article 32 of the Constitution of India) Govind Mukhoty in person and A.K. Ganguli for the petitioner.

Miss A. Subhashini for Respondent No. 1.

N.C. Talukdar and R.N. Poddar for Respondents Nos.5 and 6.

Sardar Bahadur Saharya and Vishnu Bahadur Saharya for Respondent No. 7.

The Judgment of the Court was delivered by

**BHAGWATI, J.** This is a writ petition brought by way of public interest litigation in order to ensure observance of the provisions of various labour laws in relation to workmen employed in the construction work of various projects connected with the Asian Games. The matter was brought to the attention of the Court by the 1st petitioner which is an organisation formed for the purpose of protecting democratic rights by means of a letter addressed to one of us (Bhagwati, J.). The letter was based on a report made by a team of three social scientists who were commissioned by the 1st petitioner for the purpose of investigating and inquiring into the conditions under which the workmen engaged in the various Asiad Projects were working. Since the letter addressed by the 1st petitioner was based on the report made by three social scientists after personal investigation and study, it was treated as a writ petition on the judicial side and notice was issued upon it inter alia to the Union of India, Delhi Development Authority and Delhi Administration which

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were arrayed as respondents to the writ petition. These respondents filed their respective affidavits in reply to the allegations contained in the writ petition and an affidavit was filed on behalf of the petitioner in rejoinder to the affidavits in reply and the writ petition was argued before us on the basis of these pleadings.

Before we proceed to deal with the facts giving rise to this writ petition, we may repeat what we have said earlier in various orders made by us from time to time dealing with public interest litigation. We wish to point out with all the emphasis at our command that public interest litigation which is a strategic arm of the legal

aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief. Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed. That would be destructive of the Rule of Law which forms one of the essential elements of public interest in any democratic form of government. The Rule of Law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be prostituted by the vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political rights. The poor too have civil and political rights and the Rule of Law is meant for them also, though today it exists only on paper and not in reality. If the sugar barons and the alcohol kings have the Fundamental Right to carry on their business and to fatten their purses by exploiting the consuming public, have the 'chamars' belonging to the lowest strata of society no Fundamental Right to earn an honest living through their sweat and toil ? The former can approach the courts with a formidable army of distinguished lawyers paid in four or five figures per day and if their right to exploit is upheld against the government under the label of Fundamental Right, the courts are praised for their boldness

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and courage and their independence and fearlessness are applauded and acclaimed. But, if the Fundamental Right of the poor and helpless victims of injustice is sought to be enforced by public interest litigation, the so called champions of human rights frown upon it as waste of time of the highest court in the land, which, according to them, should not engage itself in such small and trifling matters. Moreover, these self-styled human rights activists forget that civil and political rights, priceless and invaluable as they are for freedom and democracy, simply do not exist for the vast masses of our people. Large numbers of men, women and children who constitute the bulk of our population are today living a sub-human existence in conditions of abject poverty: utter grinding poverty has broken their back and sapped their moral fibre. They have no faith in the existing social and economic system. What civil and political rights are these poor and deprived sections of humanity going to enforce ? This was brought out forcibly by W. Paul Gormseley at the Silver Jubilee Celebrations of the Universal Declaration of Human Rights at the Banaras Hindu University: "Since India is one of those countries which has given a pride of place to the basic human rights and freedoms in its Constitution in its chapter on Fundamental Rights and on the Directive Principles of State Policy and has already completed twenty-five years of independence, the question may be raised whether or not the Fundamental Rights enshrined in our Constitution have any meaning to the millions of our people to whom food, drinking water, timely medical facilities and relief from disease and disaster, education and job opportunities still remain unavoidable. We, in India, should on this occasion study the Human Rights declared and defined by the United Nations and compare them with the rights available in practice and secured by the law of our country."

The only solution for making civil and political rights meaningful to these large sections of society would be to remake the material conditions and restructure the social and economic order so that they may be able to realise the economic, social and cultural rights. There is indeed close relationship between civil and political rights on the one hand and economic, social and cultural rights on the other and this relationship is so obvious that the International 469

Human Rights Conference in Tehran called by the General Assembly in 1968 declared in a final proclamation: "Since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible."

Of course, the task of restructuring the social and economic order so that the social and economic rights become a meaningful reality for the poor and lowly sections of the community is one which legitimately belongs to the legislature and the executive, but mere initiation of social and economic rescue programmes by the executive and the legislature would not be enough and it is only through multidimensional strategies including public interest litigation that these social and economic rescue programmes can be made effective. Public interest litigation, as we conceive it, is essentially a co-operative or collaborative effort on the part of the petitioner, the State or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them. The State or public authority against whom public interest litigation is brought should be as much interested in ensuring basic human rights, constitutional as well as legal, to those who are in a socially and economically disadvantaged position, as the petitioner who brings the public interest litigation before the Court. The state or public authority which is arrayed as a respondent in public interest litigation should, in fact, welcome it, as it would give it an opportunity to right a wrong or to redress an injustice done to the poor and weaker sections of the community whose welfare is and must be the prime concern of the State or the public authority. There is a misconception in the minds of some lawyers, journalists and men in public life that public interest litigation is unnecessarily cluttering up the files of the court and adding to the already staggering arrears of cases which are pending for long years and it should not therefore be encouraged by the court. This is, to our mind, a totally perverse view smacking of elitist and status quoist approach. Those who are decrying public interest litigation do not seem to realise that courts are not meant only for the rich and the well-to-do, for the landlord and the gentry, for the business magnate

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and the industrial tycoon, but they exist also for the poor and the down-trodden the have-nots and the handicapped and the half-hungry millions of our countrymen. So far the courts have been used only for the purpose of vindicating the rights of the wealthy and the affluent. It is only these privileged classes which have been able to approach the courts for protecting their vested interests. It is only the moneyed who have so far had the golden key to unlock the doors of justice. But, now for the first time the portals of the court are being thrown open to the poor and the down-trodden, the ignorant and the illiterate, and their cases are coming before the courts through public interest litigation which has been made possible by the recent judgment delivered by this Court in Judges Appointment and Transfer cases. Millions of persons belonging to the deprived and vulnerable sections of humanity are looking to the courts for improving their life conditions and making basic human rights meaningful for them. They have been crying for justice but their cries have so far been in the wilderness. They have been suffering injustice silently with the patience of a rock, without the strength even to shed any tears. Mahatma Gandhi once said to Gurudev Tagore, "I have had the pain of watching birds, who for want of strength could not be coaxed even into a flutter of their wings. The human bird under the Indian sky gets up weaker than when he pretended to retire. For millions it is an eternal trance." This is true of the 'human bird' in India even today after more than 30 years of independence. The legal aid movement and public interest litigation seek to bring justice to these forgotten specimens of humanity who constitute the bulk of the citizens of India and who are really and truly the "People of India" who gave to themselves this magnificent Constitution. It is true that there are large arrears pending in the courts but, that cannot be any reason for denying access to justice to the poor and weaker sections of the community. No State has a right to tell its citizens that because a large number of cases of the rich and the well-to-do are pending in our courts, we will not help the poor to come to the courts for seeking justice until the staggering load of cases of people who can afford, is disposed of. The time has now come when the courts must become the courts for the poor and struggling masses of this country. They must shed their character as upholders of the established order and the status quo. They must be sensitised to the need of doing justice to the large masses of people to whom justice has been denied by a cruel and heartless society for generations. The realisation must come to them that 471

social justice is the signature tune of our Constitution and it is their solemn duty under the Constitution to enforce the basic human rights of the poor and vulnerable sections of the community and actively help in the

realisation of the constitutional goals. This new change has to come if the judicial system is to become an effective instrument of social justice, for without it, it cannot survive for long. Fortunately, this change is gradually taking place and public interest litigation is playing a large part in bringing about this change. It is through public interest litigation that the problems of the poor are now coming to the fore front and the entire theatre of the law is changing. It holds out great possibilities for the future. This writ petition is one such instance of public interest litigation.

The Asian Games take place periodically in different parts of Asia and this time India is hosting the Asian Games. It is a highly prestigious undertaking and in order to accomplish it successfully according to international standards, the Government of India had to embark upon various construction projects which included building of fly-overs, stadia, swimming pool, hotels and Asian Games village complex. This construction work was framed out by the Government of India amongst various Authorities such as the Delhi Administration, the Delhi Development Authority and the New Delhi Municipal Committee. It is not necessary for the purpose of the present writ petition to set out what particular project was entrusted to which authority because it is not the purpose of this writ petition to find fault with any particular authority for not observing the labour laws in relation to the workmen employed in the projects which are being executed by it, but to ensure that in future the labour laws are implemented and the rights of the workers under the labour laws are not violated. These various authorities to whom the execution of the different projects was entrusted engaged contractors for the purpose of carrying out the construction work of the projects and they were registered as principal employers under section 7 of the Contract Labour (Regulation and Abolition) Act, 1970. The contractors started the construction work of the projects and for the purpose of carrying out the construction work, they engaged workers through jamadars. The jamadars brought the workers from different parts of India and particularly the States of Rajasthan, Uttar Pradesh and Orissa and got them employed by the contractors. The workers were entitled to a minimum wage of Rs. 472

Rs. 9.25 per day, that being the minimum wage fixed for workers employed on the construction of roads and in building operations but the case of the petitioners was that the workers were not paid this minimum wage and they were exploited by the contractors and the jamadars. The Union of India in the affidavit reply filed on its behalf by Madan Mohan; Under Secretary, Ministry of Labour asserted that the contractors did pay the minimum wage of Rs. 9.25 per day but frankly admitted that this minimum wage was paid to the jamadars through whom the workers were recruited and the jamadars deducted rupee one per day per worker as their commission and paid only Rs. 8.25 by way of wage to the workers. The result was that in fact the workers did not get the minimum wage of Rs. 9.25 per day. The petitioners also alleged in the writ petition that the provisions of the Equal Remuneration Act, 1976 were violated and women workers were being paid only Rs. 7/- per day and the balance of the amount of the wage was being misappropriated by the jamadars. It was also pointed out by the petitioners that there was violation of Article 24 of the Constitution and of the provisions of the Employment of Children Act, 1938 in as much as children below the age of 14 years were employed by the contractors in the construction work of the various projects. The petitioners also alleged violation of the provisions of the Contract Labour (Regulation and Abolition) Act 1970 and pointed out various breaches of those provisions by the contractors which resulted in deprivation and exploitation of the workers employed in the construction work of most of the projects. It was also the case of the petitioners that the workers were denied proper living conditions and medical and other facilities to which they were entitled under the provisions of the Contract Labour (Regulation and Abolition) Act 1970. The petitioners also complained that the contractors were not implementing the provisions of the Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979 though that Act was brought in force in the Union Territory of Delhi as far back as 2nd October 1980. The report of the team of three social scientists on which the writ petition was based set out various instances of violations of the provisions of the Minimum Wages Act, 1948, the Equal Remuneration Act 1976, Article 24 of the Constitution, The Employment of Children Act 1970, and the Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979.

These averments made on behalf of the petitioners were denied in the affidavits in reply filed on behalf of the Union of India, the

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Delhi Administration and the Delhi Development Authority. It was asserted by these authorities that so far as the Equal Remuneration Act 1976 and the Contract Labour (Regulation and Abolition) Act 1970 were concerned, the provisions of these labour laws were being complied with by the contractors and whenever any violations of these labour laws were brought to the attention of the authorities as a result of periodical inspections carried out by them, action by way of prosecution was being taken against the contractors. The provisions of the Minimum Wages Act 1948 were, according to the Delhi Development Authority, being observed by the contractors and it was pointed out by the Delhi Development Authority in its affidavit in reply that the construction work of the projects entrusted to it was being carried out by the contractors under a written contract entered into with them and this written contract incorporated "Model Rules for the Protection of Health and Sanitary Arrangements for Workers employed by Delhi Development Authority or its Contractors" which provided for various facilities to be given to the workers employed in the construction work and also ensured to them payment of minimum wage. The Delhi Administration was not so categorical as the Delhi Development Authority in regard to the observance of the provisions of the Minimum Wages Act 1948 and in its affidavit in reply it conceded that the jamadars through whom the workers were recruited might be deducting rupee one per day per worker from the minimum wage payable to the workers. The Union of India was however more frank and it clearly admitted in its affidavit in reply that the jamadars were deducting rupee one per day per worker from the wage payable to the workers with the result that the workers did not get the minimum wage of Rs. 9.25 per day and there was violation of the provisions of the Minimum Wages Act, 1948. So far as the Employment of Children Act 1938 is concerned the case of the Union of India, the Delhi Administration and the Delhi Development Authority was that no complaint in regard to the violation of the provisions of that Act was at any time received by them and they disputed that there was any violation of these provisions by the contractors. It was also contended on behalf of these Authorities that the Employment of Children Act 1938 was not applicable in case of employment in the construction work of these projects, since construction industry is not a process specified in the Schedule and is therefore not within the provisions of sub-

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section (3) of section 3 of that Act. Now unfortunately this contention urged on behalf of the respondents is well founded, because construction industry does not find a place in the Schedule to the Employment of Children Act 1938 and the prohibition enacted in section 3 sub-section (3) of that Act against the employment of a child who has not completed his fourteenth year cannot apply to employment in construction industry. This is a sad and deplorable omission which, we think, must be immediately set right by every State Government by amending the Schedule so as to include construction industry in it in exercise of the power conferred under section 3A of the Employment of Children Act, 1938. We hope and trust that every State Government will take the necessary steps in this behalf without any undue delay, because construction work is clearly a hazardous occupation and it is absolutely essential that the employment of children under the age of 14 years must be prohibited in every type of construction work. That would be in consonance with Convention No. 59 adopted by the International Labour Organisation and ratified by India. But apart altogether from the requirement of Convention No. 59, we have Article 24 of the Constitution which provides that no child below the age of 14 shall be employed to work in any factory or mine or engaged in any other hazardous employment. This is a constitutional prohibition which, even if not followed up by appropriate legislation, must operate proprio vigore and construction work being plainly and indubitably a hazardous employment, it is clear that by reason of this constitutional prohibition, no child below the age of 14 years can be allowed to be engaged in construction work. There can therefore be no doubt that notwithstanding the absence of specification of construction industry in the Schedule to the Employment of Children Act 1938, no child below the age of 14 years can be employed in construction work and the Union of India as also every State Government must ensure that this constitutional mandate is not violated in any part of the country. Here, of course, the plea of the Union of India, the Delhi Administration and the Delhi Development Authority was that no child below the age of 14 years was at any time employed in the construction work of these projects

and in any event no complaint in that behalf was received by any of these Authorities and hence there was no violation of the constitutional prohibition enacted in Article 24. So far as the complaint in regard to non-observance of the provisions of the Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979 was concerned, the defence of the Union of India, the Delhi Administration and the Delhi Development Authority that though this Act had come into force in the 475

Union Territory of Delhi with effect from 2nd October 1980, the power to enforce the provisions of the Act was delegated to the Administrator of the Union Territory of Delhi only on 14th July 1981 and thereafter also the provisions of the Act could not been enforced because the Rules to be made under the Act had not been finalised until 4th June 1982. It is difficult to understand as to why in the case of beneficent legislation like the Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979 it should have taken more than 18 months for the Government of India to delegate the power to enforce the provisions of the Act to the Administrator of the Union Territory of Delhi and another almost 12 months to make the Rules under the Act. It was well known that a large number of migrant workmen coming from different States were employed in the construction work of various Asiad projects and if the provisions of a social welfare legislation like the Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979 were applied and the benefit of such provisions made available to these migrant workmen, it would have gone a long way towards ameliorating their conditions of work and ensuring them a decent living with basic human dignity. We very much wished that the provisions of this Act had been made applicable earlier to the migrant workmen employed in the construction work of these projects though we must confess that we do not see why the enforcement of the provisions of the Act should have been held up until the making of the Rules. It is no doubt true that there are certain provisions in the Act which cannot be enforced unless there are rules made under the Act but equally there are other provisions which do not need any prescription by the Rules for their enforcement and these latter provisions could certainly have been enforced by the Administrator of the Union Territory of Delhi in so far as migrant workmen employed in these projects were concerned. There can be no doubt that in any event from and after 4th June, 1982 the provisions of this beneficent legislation have become enforceable and the migrant workmen employed in the construction work of these projects are entitled to the rights and benefits conferred upon them under those provisions. We need not point out that so far as the rights and benefits conferred upon migrant workmen under the provisions of section 13 to 16 of the Act are concerned, the responsibility for ensuring such rights and benefits rests not only on the contractors but also on the Union of India, the Delhi Administration or the Delhi Development Authority who is

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the principal employer in relation to the construction work entrusted by it to the contractors. We must confess that we have serious doubts whether the provisions of this Act are being implemented in relation to the migrant workmen employed in the construction work of these projects and we have therefore by our Order dated 11th May 1982 appointed three Ombudsmen for the purpose of making periodic inspection and reporting to us whether the provisions of this Act are being implemented at least from 4th June 1982. We must in fairness point out that the Union of India has stated in its affidavit in reply that a number of prosecution have been launched against the contractors for violations of the provision of various labour laws and in Annexure I to its affidavit in reply it has given detailed particulars of such prosecutions. It is apparent from the particulars given in this Annexure that the prosecutions launched against the contractors were primarily for offences such as non-maintenance of relevant registers non-provision of welfare and health facilities such as first aid box, latrines, urinals etc. and non-issue of wage slips. We do not propose to go into the details of these prosecutions launched against the contractors but we are shocked to find that in cases of violations of labour laws enacted for the benefit of workmen, the Magistrates have been imposing only small fines of Rs. 200/- thereabouts. The Magistrates seem to view the violations of labour laws with great indifference and unconcern as if they are trifling offences undeserving of judicial severity. They seem to over-look the fact labour laws are enacted for improving the conditions of workers and the employers cannot be allowed to buy off immunity against violations of labour laws by paying a paltry fine which they would not mind paying, because by violations the labour laws they would be making profit which would far exceed the

amount of the fine. If violations of labour laws are going to be punished only by meagre fines, it would be impossible to ensure observance of the labour laws and the labour laws would be reduced to nullity. They would remain merely paper tigers without any teeth or claws. We would like to impress upon the Magistrates and Judges in the country that violations of labour laws must be viewed with strictness and whenever any violations of labour laws are established before them, they should punish the errant employers by imposing adequate punishment.

We may conveniently at this stage, before proceeding to examine the factual aspects of the case, deal with two preliminary

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objections raised on behalf of the respondents against the maintainability of the writ petition. The first preliminary objection was that the petitioners had no locus standi to maintain the writ petition since, even on the averments made in the writ petition, the rights said to have been violated were those of the workers employed in the construction work of the various Asiad projects and not of the petitioners and the petitioners could not therefore have any cause of action. The second preliminary objection urged on behalf of the respondents was that in any event no writ petition could lie against the respondents, because the workmen whose rights were said to have been violated were employees of the contractors and not of the respondents and the cause of action of the workmen, if any, was therefore against the contractors and not against the respondents. It was also contended as part of this preliminary objection that no writ petition under article 32 of the Constitution could lie against the respondents for the alleged violations of the rights of the workmen under the various labour laws, and the remedy, if any, was only under the provisions of those laws. These two preliminary objections were pressed before us on behalf of the Union of India, the Delhi Administration and the Delhi Development Authority with a view to shutting out an inquiry by this Court into the violations of various labour laws alleged in the writ petition, but we do not think there is any substance in them and they must be rejected. Our reasons for saying so are as follows: The first preliminary objection raises the question of locus standi of the petitioners to maintain the writ petition. It is true, that the complaint of the petitioners in the writ petition is in regard to the violations of the provisions of various labour laws designed for the welfare of workmen and therefore from a strictly traditional point of view, it would be only the workmen whose legal rights are violated who would be entitled to approach the court for judicial redress. But the traditional rule of standing which confines access to the judicial process only to those to whom legal injury is caused or legal wrong is done has now been jettisoned by this Court and the narrow confines within which the rule of standing was imprisoned for long years as a result of inheritance of the Anglo-Saxon System of jurisprudence have been broken and a new dimension has been given to the doctrine of locus standi which has revolutionised the whole concept of access to justice in a way not known before to the Western System of jurisprudence. This Court

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has taken the view that, having regard to the peculiar socioeconomic conditions prevailing in the country where there is, considerable poverty, illiteracy and ignorance obstructing and impeding accessibility to the judicial process, it would result in closing the doors of justice to the poor and deprived sections of the community if the traditional rule of standing evolved by Anglo-Saxon jurisprudence that only a person wronged can sue for judicial redress were to be blindly adhered to and followed, and it is therefore necessary to evolve a new strategy by relaxing this traditional rule of standing in order that justice may become easily available to the lowly and the lost. It has been held by this Court in its recent judgment in the Judges Appointment and Transfer case, in a major break-through which in the years to come is likely to impart new significance and relevance to the judicial system and to transform it into an instrument of socio-economic change, that where a person or class of persons to whom legal injury is caused or legal wrong is done is by reason of poverty, disability or socially or economically disadvantaged position not able to approach the Court for judicial redress, any member of the public acting bona fide and not out of any extraneous motivation may

move the Court for judicial redress of the legal injury or wrong suffered by such person or class of persons and the judicial process may be set in motion by any public spirited individual or institution even by addressing a letter to the court. Where judicial redress is sought of a legal injury or legal wrong suffered by a person or class of persons who by reason of poverty, disability or socially or economically disadvantaged position are unable to approach the court and the court is moved for this purpose by a member of a public by addressing a letter drawing the attention of the court to such legal injury or legal wrong, court would cast aside all technical rules of procedure and entertain the letter as a writ petition on the judicial side and take action upon it. That is what has happened in the present case. Here the workmen whose rights are said to have been violated and to whom a life of basic human dignity has been denied are poor, ignorant, illiterate humans who, by reason of their poverty and social and economic disability, are unable to approach the courts for judicial redress and hence the petitioners, have under the liberalised rule of standing, locus standi to maintain the present writ petition espousing the cause of the workmen. It is not the case of the respondents that the petitioners are acting mala fide or out of extraneous motives and in fact the respondents cannot so allege, since 479

the first petitioner is admittedly an organisation dedicated to the protection and enforcement of Fundamental Rights and making Directive Principles of State Policy enforceable and justiciable. There can be no doubt that it is out of a sense of public service that the present litigation has been brought by the petitioners and it is clearly maintainable. We must then proceed to consider the first limb of the second preliminary objection. It is true that the workmen whose cause has been championed by the petitioners are employees of the contractors but the Union of India, the Delhi Administration and the Delhi Development Authority which have entrusted the construction work of Asiad projects to the contractors cannot escape their obligation for observance of the various labour laws by the contractors. So far as the Contract Labour (Regulation and Abolition) Act 1970 is concerned, it is clear that under section 20, if any amenity required to be provided under sections 16, 17, 18 or 19 for the benefit of the workmen employed in an establishment is not provided by the contractor, the obligation to provide such amenity rests on the principal employer and therefore if in the construction work of the Asiad projects, the contractors do not carry out the obligations imposed upon them by any of these sections, the Union of India, the Delhi Administration and the Delhi Development Authority as principal employers would be liable and these obligations would be enforceable against them. The same position obtains in regard to the Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979. In the case of this Act also, sections 17 and 18 make the principal employer liable to make payment of the wages to the migrant workmen employed by the contractor as also to pay the allowances provided under sections 14 and 15 and to provide the facilities specified in section 16 to such migrant workmen, in case the contractor fails to do so and these obligations are also therefore clearly enforceable against the Union of India, the Delhi Administration and the Delhi Development Authority as principal employers. So far as Article 24 of the Constitution is concerned, it embodies a fundamental right which is plainly and indubitably enforceable against every one and by reason of its compulsive mandate, no one can employ a child below the age of 14 years in a hazardous employment and since, as pointed out above, construction work is a hazardous employment, no child below the age of 14 years can be employed in construction work and there

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fore, not only are the contractors under a constitutional mandate not to employ any child below the age of 14 years, but it is also the duty of the Union of India, the Delhi Administration and the Delhi Development Authority to ensure that this constitutional obligation is obeyed by the contractors to whom they have entrusted the construction work of the various Asiad projects. The Union of India, the Delhi Administration and the Delhi Development Authority cannot fold their hands in despair and become silent spectators of the breach of a constitutional prohibition being committed by their own contractors. So also with regard to the observance of the provisions of the Equal Remuneration Act 1946, the Union of India, the Delhi Administration and the Delhi Development Authority cannot avoid their obligation to ensure that these provisions are complied with by the contractors. It is the principle of equality embodied in Article 14 of the Constitution which finds expression in the provisions of the Equal Remuneration Act 1946 and if the Union of

India, the Delhi Administration or the Delhi Development Authority at any time finds that the provisions of the Equal Remuneration Act 1946 are not observed and the principles of equality before the law enshrined in Article 14 is violated by its own contractors, it cannot ignore such violation and sit quiet by adopting a non-interfering attitude and taking shelter under the executive that the violation is being committed by the contractors and not by it. If any particular contractor is committing a breach of the provisions of the Equal Remuneration Act 1946 and thus denying equality before the law to the workmen, the Union of India, the Delhi Administration or the Delhi Development Authority as the case may be, would be under an obligation to ensure that the contractor observes the provisions of the Equal Remuneration Act 1946 and does not breach the equality clause enacted in Article 14. The Union of India, the Delhi Administration and the Delhi Development Authority must also ensure that the minimum wage is paid to the workmen as provided under the Minimum Wages Act 1948. The contractors are, of course, liable to pay the minimum wage to the workmen employed by them but the Union of India the Delhi Administration and the Delhi Development Authority who have entrusted the construction work to the contractors would equally be responsible to ensure that the minimum wage is paid to the workmen by their contractors. This obligation which even otherwise rests on the Union of India, the Delhi Administration and the Delhi Development Authority is additionally

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re-inforced by section 17 of the Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979 in so far as migrant workmen are concerned. It is obvious, therefore, that the Union of India, the Delhi Administration and the Delhi Development Authority cannot escape their obligation to the workmen to ensure observance of these labour laws by the contractors and if these labour laws are not complied with by the contractors, the workmen would clearly have a cause of action against the Union of India, the Delhi Administration and the Delhi Development Authority.

That takes us to a consideration of the other limb of the second preliminary objection. The argument of the respondents under this head of preliminary objection was that a writ petition under Article 32 cannot be maintained unless it complains of a breach of some fundamental right or the other and since what were alleged in the present writ petition were merely violations of the labour laws enacted for the benefit of the workmen and not breaches of any fundamental rights, the present writ petition was not maintainable and was liable to be dismissed. Now it is true that the present writ petition cannot be maintained by the petitioners unless they can show some violation of a fundamental right, for it is only for enforcement of a fundamental right that a writ petition can be maintained in this Court under Article 32. So far we agree with the contention of the respondents but there our agreement ends. We cannot accept the plea of the respondents that the present writ petition does not complain of any breach of a fundamental right. The complaint of violation of Article 24 based on the averment that children below the age of 14 years are employed in the construction work of the Asiad projects is clearly a complaint of violation of a fundamental right. So also when the petitioners allege non-observance of the provisions of the Equal Remuneration Act 1946, it is in effect and substance a complaint of breach of the principle of equality before the law enshrined in Article 14 and it can hardly be disputed that such a complaint can legitimately form the subject matter of a writ petition under Article 32. Then there is the complaint of non-observance of the provisions of the Contract Labour (Regulation & Abolition) Act 1970 and the Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979 and this is also in our opinion a complaint relating to violation of Article 21. This Article has

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acquired a new dimension as a result of the decision of this Court in Maneka Gandhi v. Union of India (1) and it has received its most expansive interpretation in Francis Coralie Mullin v. The Administrator, Union Territory of Delhi & Ors,(2) where it has been held by this Court that the right to life guaranteed under this Article is not confined merely to physical existence or to the use of any faculty or limb through which life is enjoyed or the soul communicates with outside world but it also includes within its scope and ambit the right

to live with basic human dignity and the State cannot deprive any one of this precious and invaluable right because no procedure by which such deprivation may be effected can ever be regarded as reasonable, fair and just. Now the rights and benefits conferred on the workmen employed by a contractor under the provisions of the Contract Labour (Regulation and Abolition) Act 1970 and the Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 are clearly intended to ensure basic human dignity to the workmen and if the workmen are deprived of any of these rights and benefits to which they are entitled under the provisions of these two pieces of social welfare legislation, that would clearly be a violation of Article 21 by the Union of India, the Delhi Administration and the Delhi Development Authority which, as principal employers, are made statutorily responsible for securing such rights and benefits to the workmen. That leaves for consideration the complaint in regard to non-payment of minimum wage to the workmen under the Minimum Wages Act 1948. We are of the view that this complaint is also one relating to breach of a fundamental right and for reasons which we shall presently state, it is the fundamental right enshrined in Article 23 which is violated by non-payment of minimum wage to the workmen. Article 23 enacts a very important fundamental right in the following terms :

"Art. 23 : Prohibition of traffic in human beings and forced labour-

(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and

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any contravention of this provision shall be an offence punishable in accordance with law. (2) Nothing in this Article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

Now many of the fundamental rights enacted in Part III operate as limitations on the power of the State and impose negative obligations on the State not to encroach on individual liberty and they are enforceable only against the State. But there are certain fundamental rights conferred by the Constitution which are enforceable against the whole world and they are to be found inter alia in Articles 17, 23 and 24. We have already discussed the true scope and ambit of Article 24 in an earlier portion of this judgment and hence we do not propose to say anything more about it. So also we need not expatiate on the proper meaning and effect of the fundamental right enshrined in Article 17 since we are not concerned with that Article in the present writ petition. It is Article 23 with which we are concerned and that Article is clearly designed to protect the individual not only against the State but also against other private citizens. Article 23 is not limited in its application against the State but it prohibits "traffic in human beings and begar and other similar forms of forced labour" practised by anyone else. The sweep of Article 23 is wide and unlimited and it strikes at traffic in human beings and begar and other similar forms of forced labour" wherever they are found. The reason for enacting this provision in the chapter on fundamental rights is to be found in the socio-economic condition of the people at the time when the Constitution came to be enacted. The Constitution makers, when they set out to frame the Constitution, found that they had the enormous task before them of changing the socio-economic structure of the country and bringing about socio-economic regeneration with a view to reaching social and economic justice to the common man. Large masses of people, bled white by well nigh two centuries of foreign rule, were living in abject poverty and destitution with ignorance and illiteracy accentuating their helplessness and despair. The society had degenerated into a status-oriented hierarchical society

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with little respect for the dignity of individual who was in the lower rungs of the social ladder or in an economically impoverished condition. The political revolution was completed and it had succeeded in bringing freedom to the country but freedom was not an end in itself, it was only a means to an end, the end being the raising of the people to higher levels of achievement and bringing about their total advancement and

welfare. Political freedom had no meaning unless it was accompanied by social and economic freedom and it was therefore necessary to carry forward the social and economic revolution with a view to creating social economic conditions in which every one would be able to enjoy basic human rights and participate in the fruits of freedom and liberty in an egalitarian social and economic framework. It was with this end in view that the constitution makers enacted the Directive Principles of State Policy in Part IV of the Constitution setting out the constitutional goal of a new socio-economic order. Now there was one feature of our national life which was ugly and shameful and which cried for urgent attention and that was the existence of bonded or forced labour in large parts of the country. This evil was the relic of feudal exploitative society and it was totally incompatible with the new egalitarian socio-economic order which, "We the people of India" were determined to build and constituted a gross and most revolting denial of basic human dignity. It was therefore necessary to eradicate this pernicious practice and wipe it out altogether from the national scene and this had to be done immediately because with the advent of freedom, such practice could not be allowed to continue to blight the national life any longer. Obviously, it would not have been enough merely to include abolition of forced labour in the Directive Principles of State Policy, because then the outlaying of this practice would not have been legally enforceable and it would have continued to plague our national life in violation of the basic constitutional norms and values until some appropriate legislation could be brought by the legislature forbidding such practice. The Constitution makers therefore decided to give teeth to their resolve to obliterate and wipe out this evil practice by enacting constitutional prohibition against it in the chapter on fundamental rights, so that the abolition of such practice may become enforceable and effective as soon as the Constitution came into force. This is the reason why the provision enacted in Article 23 was included in the chapter on fundamental rights. The prohibition against "traffic in human beings and begar and other similar forms of forced labour"

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is clearly intended to be a general prohibition, total in its effect and all pervasive in its range and it is enforceable not only against the State but also against any other person indulging in any such practice. The question then is as to what is the true scope and meaning of the expression "traffic in human beings and begar and other similar forms of forced labour" in Article 23? What are the forms of 'forced labour' prohibited by that Article and what kind of labour provided by a person can be regarded as 'forced labour' so as to fall within this prohibition ?

When the Constitution makers enacted Article 23 they had before them Article of the Universal Declaration of Human Rights but they deliberately departed from its language and employed words which would make the reach and content of Article 23 much wider than that of Article 4 of the Universal Declaration of Human Rights. They banned 'traffic in human beings which is an expression of much larger amplitude than "slave trade" and they also interdicted "begar and other similar forms of forced labour". The question is what is the scope and ambit of the expression 'begar and other similar forms of forced labour ?' In this expression wide enough to include every conceivable form of forced labour and what is the true scope and meaning of the words "forced labour ?" The word 'begar' in this Article is not a word of common use in English language. It is a word of Indian origin which like many other words has found its way in the English vocabulary. It is very difficult to formulate a precise definition of the word 'begar' but there can be no doubt that it is a form of forced labour under which a person is compelled to work without receiving any remuneration. Molesworth describes 'begar' as "labour or service exacted by a government or person in power without giving remuneration for it." Wilson's glossary of Judicial and Revenue Terms gives the following meaning of the word 'begar': "a forced labourer, one pressed to carry burthens for individuals or the public. Under the old system, when pressed for public service, no pay was given. The Begari, though still liable to be pressed for public objects, now receives pay: Forced labour for private service is prohibited." "Begar" may therefore be loosely described as labour or service which a person is forced to give without receiving any remuneration for 'it. That was the meaning of the word 'begar' accepted by a Division Bench

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of the Bombay High Court in *S. Vasudevan v. S.D. Mital*.(1) 'Begar' is thus clearly a film of forced labour. Now it is not merely 'begar' which is unconstitutionally prohibited by Article 23 but also all other similar forms of forced labour. This Article strikes at forced labour in whatever form it may manifest itself, because it is violative of human dignity and is contrary to basic human values. The practice of forced labour is condemned in almost every international instrument dealing with human rights. It is interesting to find that as far back as 1930 long before the Universal Declaration of Human Rights came into being, International Labour organisation adopted Convention No. 29 laying down that every member of the International Labour organisation which ratifies this convention shall "suppress the use of forced or compulsory labour in all its forms" and this prohibition was elaborated in Convention No. 105 adopted by the International Labour organisation in 1957. The words "forced or compulsory labour" in Convention No. 29 had of course a limited meaning but that was so on account of the restricted definition of these words given in Article 2 of the Convention. Article 4 of the European Convention of Human Rights and Article 8 of the International Covenant on Civil and Political Rights also prohibit forced or compulsory labour. Article 23 is in the same strain and it enacts a prohibition against forced labour in whatever form it may be found. The learned counsel appearing on behalf of the respondent laid some emphasis on the word 'similar' and contended that it is not every form of forced labour which is prohibited by Article 23 but only such form of forced labour as is similar to 'begar' and since 'begar' means labour or service which a person is forced to give without receiving any remuneration for it, the interdict of Article 23 is limited only to those forms of forced labour where labour or service is exacted from a person without paying any remuneration at all and if some remuneration is paid, though it be inadequate, it would not fall within the words 'other similar forms of forced labour'. This contention seeks to unduly restrict the amplitude of the prohibition . against forced labour enacted in Article 23 and is in our opinion not well founded. It does not accord with the principle enunciated by this Court in *Maneka Gandhi v. Union of India*(2) that when interpreting the provisions of the Constitution conferring fundamental rights, the attempt of the court should be to expand the reach and ambit of the fundamental rights rather than to attenuate their (1) AIR 1962 Bom. 53:

(2) [1978] 2 SCR 621.

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meaning and content. It is difficult to imagine that the Constitution makers should have intended to strike only at certain forms of forced labour leaving it open to the socially or economically powerful sections of the community to exploit the poor and weaker sections by resorting to other forms of forced labour. Could there be any logic or reason in enacting that if a person is forced to give labour or service to another without receiving any remuneration at all it should be regarded as a pernicious practice sufficient to attract the condemnation of Article 23, but if some remuneration is paid for it, then it should be outside the inhibition of that Article ? If this were the true interpretation, Article 23 would be reduced to a mere rope of sand, for it would then be the easiest thing in an exploitative society for a person belonging to a socially or economically dominant class to exact labour or service from a person belonging to the deprived and vulnerable section of the community by paying a negligible amount of remuneration and thus escape the rigour of Article 23. We do not think it would be right to place on the language of Article 23 an interpretation which would emasculate its beneficent provisions and defeat the very purpose of enacting them. We are clear of the view that Article 23 is intended to abolish every form of forced labour. The words "other similar forms of forced labour are used in Article 23 not with a view to importing the particular characteristic of 'begar' that labour or service should be exacted without payment of any remuneration but with a view to bringing within the scope and ambit of that Article all other forms of forced labour and since 'begar' is one form of forced labour, the Constitution makers used the words "other similar forms of forced labour." If the requirement that labour or work should be exacted without any remuneration were imported in other forms of forced labour, they p would straightaway come within the meaning of the word 'begar' and in that event there would be no need to have the additional words "other similar forms of forced labour." These words would be rendered futile and meaningless and it is a well recognised rule of interpretation that the court should avoid a construction which as the effect of rendering any words used by the legislature superfluous or redundant. The object of adding

these words was clearly to expand the reach and content of Article 23 by including, in addition to 'begar', other forms of forced labour within the prohibition of that Article. Every form of forced labour 'begar' or otherwise, is within the inhibition of Article 23 and it makes no difference whether the per-

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son who is forced to give his labour or service to another is remunerated or not. Even if remuneration is paid, labour supplied by a person would be hit by this Article if it is forced labour, that is, labour supplied not willingly but as a result of force or compulsion. Take for example a case where a person has entered into a contract of service with another for a period of three years and he wishes to discontinue serving such other person before the expiration of the period of three years. If a law were to provide that in such a case the contract shall be specifically enforced and he shall be compelled to serve for the full period of three years, it would clearly amount to forced labour and such a law would be void as offending Article 23. That is why specific performance of a contract of service cannot be enforced against an employee and the employee cannot be forced by compulsion of law to continue to serve the employer. Of course, if there is a breach of the contract of service, the employee would be liable to pay damages to the employer but he cannot be forced to continue to serve the employer without breaching the injunction of Article 23. This was precisely the view taken by the Supreme Court of United States in *Bailv v. Alabama*(1) while dealing with a similar provision in the Thirteenth Amendment. There, a legislation enacted by the Alabama State providing that when a person with intent to injure or defraud his employer enters into a contract in writing for the purpose of any service and obtains money or other property from the employer and without refunding the money or the property refuses or fails to perform such service, he will be punished with fine. The constitutional validity of this legislation was challenged on the ground that it violated the Thirteenth Amendment which inter alia provides: "Neither slavery nor involuntary servitude shall exist within the United States or any place subject to their jurisdiction". This challenge was upheld by a majority of the Court and Mr. Justice Hughes delivering the majority opinion said: "We cannot escape the conclusion that although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those . who simply fail or refuse to perform contracts for personal service in liquidation of a debt, and judging its purpose by its effect that it seeks in this way to provide the means of compulsion through which performance of such service may (1) 219 U.S. 219: 55 L. Ed. 191.

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be secured. The question is whether such a statute is constitutional".

The learned Judge proceeded to explain the scope and ambit of the expression 'involuntary servitude' in the following words:

"The plain intention was to abolish slavery of whatever name and form and all its badges and incidents, to render impossible any state of bondage, to make labour free by prohibiting that control by which the personal service of one men is disposed of or coerced for another's benefit, which is the essence of involuntary servitude."

Then, dealing with the contention that the employee in that case had voluntarily contracted to perform the service which was sought to be compelled and there was therefore no violation of the provisions of the Thirteenth Amendment, the learned Judge observed:

"The fact that the debtor contracted to perform the labour which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the statute. The full intent of the constitutional provision could be defeated with obvious facility if through the guise of contracts under which advances had been made, debtors could be held to compulsory service. It is the compulsion of the service that the statute inhibits, for when that occurs, the condition of servitude is created which would be not less involuntary because of the

original agreement to work out the indebtedness. The contract exposes the debtor to liability for the loss due to the breach, but not to enforced labour."

and proceeded to elaborate this thesis by pointing out: "Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the Service of his creditor. The other is forced upon the debtor by some provision of law. But peonage however created, is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the pay-

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ment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labour or rendering of services in payment of a debt. In the latter case the debtor though contracting to pay his indebtedness by labour of service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service."

It is therefore clear that even if a person has contracted with another to perform service and there is consideration for such service in the shape of liquidation of debt or even remuneration, he cannot be forced by compulsion of law or otherwise to continue to perform such service, as that would be forced labour within the inhibition of Article 23. This Article strikes at every form of forced labour even if it has its origin in a contract voluntarily entered into by the person obligated to provide labour or service Vide Pollock v. Williams.(1) The reason is that it offends against human dignity to compel a person to provide labour or service to another if he does not wish to do so, even though it be in breach of the contract entered into by him. There should be no serfdom or involuntary servitude in a free democratic India which respects the dignity of the individual and the worth of the human person. Moreover, in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, a contract of service may appear on its face voluntary but it may, in reality, be involuntary, because while entering into the contract, the employee, by reason of his economically helpless condition, may have been faced with Hobson's choice, either to starve or to submit to the exploitative terms dictated by the powerful employer. It would be a travesty of justice to hold the employee in such a case to the terms of the contract and to compel him to serve the employer even though he may not wish to do so. That would aggravate the inequality and injustice from which the employee even otherwise suffers on account of his economically disadvantaged position and lend the authority of law to the exploitation of the poor helpless employee by the economically powerful employer. Article 23 therefore says that no one shall be forced to (1) 322 U.S. 4:88 Lawyers Edition 1095.

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provide labour or service against his will, even though it be under a contract of service.

Now the next question that arises for consideration is whether there is any breach of Article 23 when a person provides labour or service to the State or to any other person and is paid less than the minimum wage for it. It is obvious that ordinarily no one would willingly supply labour or service to another for less than the minimum wage when he knows that under the law he is entitled to get minimum wage for the labour or service provided by him. It may therefore be legitimately presumed that when a person provides labour or service to another against receipt of remuneration which is less than the minimum wage, he is acting under the force of some compulsion which drives him to work though he is paid less than what he is entitled under law to receive. What Article 23 prohibits is 'forced labour' that is labour or service which a person is forced to provide and 'force' which would make such labour or service 'forced labour' may arise in several ways. It may be physical force which may compel a person to provide labour or service to another or it may be force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution.

Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as 'force' and if labour or service is compelled as a result of such 'force', it would be 'forced labour'. Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or feed his wife and children or even to hide their nakedness, where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair and where no other employment is available to alleviate the rigour of his poverty, he would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. He would be in no position to bargain with the employer; he would have to accept what is offered to him. And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour or service provided by him would be clearly 'forced labour.' There is no reason why the word 'forced' should be read in a narrow and

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restricted manner so as to be confined only to physical or legal 'force' particularly when the national charter, its fundamental document has promised to build a new socialist republic where there will be socioeconomic justice for all and every one shall have the right to work, to education and to adequate means of livelihood. The constitution makers have given us one of the most remarkable documents in history for ushering in a new socio-economic order and the Constitution which they have forged for us has a social purpose and an economic mission and therefore every word or phrase in the Constitution must be interpreted in a manner which would advance the socio-economic objective of the Constitution. It is not often that in capitalist society economic circumstance exert much greater pressure on an individual in driving him to a particular course of action than physical compulsion or force of legislative provision. The word 'force' must therefore be construed to include not only physical or legal force but also force arising from the compulsion of economic circumstance which leaves no choice of alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage of course, if a person provides labour or service to another against receipt of the minimum wage, it would not be possible to say that the labour or service provided by him is 'forced labour' because he gets - what he is entitled under law to receive. No inference can reasonably be drawn in such a case that he is forced to provide labour or service for the simple reason that he would be providing labour or service against receipt of what is lawfully payable to him just like any other person who is not under the force of any compulsion. We are therefore of the view that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words 'forced labour' under Article 23. Such a person would be entitled to come to the court for enforcement of his fundamental right under Article 23 by asking the court to direct payment of the minimum wage to him so that the labour or service provided by him ceases to be 'forced labour' and the breach of Article 23 is remedied. It is therefore clear that when the petitioners alleged that minimum wage was not paid to the workmen employed by the contractors, the complaint was really in effect and substance a complaint against violation of the fundamental right of the workmen under Article 23.

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Before leaving this subject, we may point out with all the emphasis at our command that whenever any fundamental right, which is enforceable against private individuals such as, for example a fundamental right enacted in Article 17 or 23 or 24 is being violated, it is the constitutional obligation of the State to take the necessary steps for the purpose of interdicting such violation and ensuring observance of the fundamental right by the private individual who is transgressing the same. Of course, the person whose fundamental right is violated can always approach the court for the purpose of enforcement of his fundamental right, but that cannot absolve the State from its constitutional obligation to see that there is no violation of the fundamental right of such person, particularly, when he belongs to the weaker section humanity and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him. The Union of India, the Delhi Administration and the Delhi Development Authority must therefore be held to be under an obligation to

ensure observance of these various labour laws by the contractors and if the provisions of any of these labour laws are violated by the contractors, the petitioners indicating the cause of the workmen are entitled to enforce this obligation against the Union of India, the Delhi Administration and the Delhi Development Authority by filing the present writ petition. The preliminary objections urged on behalf of the respondents must accordingly be rejected.

Having disposed of these preliminary objections, we may turn to consider whether there was any violation of the provisions of the Minimum Wages Act 1948, Article 24 of the Constitution, the Equal Remuneration Act 1976, the Contract labour (Regulation and Abolition) Act 1970 and the Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979 by the contractors. The Union of India in its affidavit in reply admitted that there were certain violations committed by the contractors but hastened to add that for these violations prosecutions were initiated against the errant contractors and no violation of any of the labour laws was allowed to go unpunished. The Union of India also conceded in its affidavit in reply that Re. 1/- per worker per day was deducted by the jamdars from the wage payable to the workers with the result that the workers did not get the minimum wage of Rh. 9.25 per day, but stated that proceedings had been taken for the purpose of recovering the amount of the short fall in minimum wage from the contractors. No particulars were however given of 494

such proceedings adopted by the Union of India or the Delhi Administration or the Delhi Development Authority. It was for this reason that we directed by our order dated 11th May 1982 that whatever is the minimum wage for the time being or if the wage payable is higher than such wage, shall be paid by the contractors to the workmen directly without the intervention of the jamadars and that the jamadars shall not be entitled to deduct or recover any amount from the minimum wage payable to the workmen as and by way of commission or otherwise. He would also direct in addition that if the Union of India or the Delhi Administration or the Delhi Development Authority finds and for this purpose it may hold such inquiry as is possible in the circumstances that any of the workmen has not received the minimum wage payable to him, it shall take the necessary legal action against the contracts whether by way of prosecution or by way of recovery of the amount of the short-fall. We would also suggest that hereafter whenever any contracts are given by the government or any other governmental authority including 2 public sector corporation, it should be ensured by introducing a suitable provision in the contracts that wage shall be paid by the contractors to the workmen directly without the intervention of any jamadars or thekadars and that the contractors shall ensure that no amount by way of commission or otherwise is deducted or recovered by the Jamadars from the wage of the workmen. So far as observance of the other labour laws by the contractors is concerned, the Union of India, the Delhi Administration and the Delhi Development Authority disputed the claim of the petitioners that the provisions of these labour laws were not being implemented by the contractors save in a few instances where prosecutions had been launched against the contractors. Since it would not be possible for this Court to take evidence for the purpose of deciding this factual dispute between the parties and we also wanted to ensure that in any event the provisions of these various laws enacted for the benefit of the workmen were strictly observed and implemented by the contractors, we by our order dated 11th May 1982 appointed three ombudsmen and requested them to make periodical inspections of the sites of the construction work for the purpose of ascertaining whether the provisions of these labour laws were being carried out and the workers were receiving the benefits and amenities provided for them under these beneficent statutes or whether there were any violations of these provisions being committed by the contractors so that on the basis of the reports of the three ombudsmen, this Court could give further direction in the matter if found necessary. We may

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add that whenever any construction work is being carried out either departmentally or through contractors, the government or any other governmental authority including a public sector corporation which is carrying out such work must take great care to see that the provisions of the labour laws are being strictly observed and they should not wait for any complaint to be received from the workmen in regard to nonobservance of any

People'S Union For Democratic ... vs Union Of India & Others on 18 September, 1982

such provision before proceeding to take action against the erring officers or contractor, but they should institute an effective system of periodic inspections coupled with occasional surprise inspections by the higher officers in order to ensure that there are no violations of the provisions of labour laws and the workmen are not denied the rights and benefits to which they are entitled under such provisions and if any such violations are found, immediate action should be taken against defaulting officers or contractors. That is the least which a government or a governmental authority or a public sector corporation is expected to do in a social welfare state. These are the reasons for which we made our order dated 11th May 1982.

S.R. Petition allowed.

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## I

**The Legal Services Authorities Act, 1987**

(No. 39 of 1987)

[As amended by The Legal Services Authorities (Amendment) Act, 1994 (No. 59 of 1994)]

and

[Legal Services Authorities (Amendment) Act, 2002 (No. 37 of 2002)]

The 11<sup>th</sup> October, 1987The 29<sup>th</sup> October, 1994

An Act to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity.

Be it enacted by Parliament in the thirty-eighth year of the Republic of India as follows:-

### **CHAPTER I** **PRELIMINARY**

- |   |                                       |
|---|---------------------------------------|
| <p>1. (1) This Act may be called the Legal Services Authorities Act, 1987.</p> <p>(2) It extends to the whole of India, except the State of Jammu and Kashmir.</p> <p>(3) It shall come into force on such date<sup>1</sup> as the Central Government may, by notification, appoint; and different dates may be appointed for different provisions of this Act and for different States, and any reference to commencement in any provision of this Act in relation to any State shall be construed as a reference to the commencement of that provision in that State.</p>                 | Short title, extent and commencement. |
| <p>2. (1) In this Act, unless the context otherwise requires,-</p> <p>(a) <sup>2</sup> "case" includes a suit or any proceeding before a court;</p> <p>(aa) "Central Authority" means the National Legal Services Authority constituted under Section 3;</p> <p>(aaa) "court" means a civil, criminal or revenue court and includes any tribunal or any other authority constituted under any law for the time being in force, to exercise judicial or quasi-judicial functions;</p> <p>(b) "District Authority" means a District Legal Services Authority constituted under Section 9;</p> | Definitions                           |

<sup>1</sup> Whole Act except Chapter III. Came into force on 9.11.1995, vide S.O.893 (E) dated 9.11.1995.

<sup>2</sup> Subs. by Act 59 of 1994 Sec. 2, for clause (a) (w.e.f. 29.10.1994)

- <sup>3</sup>(bb) "High Court Legal Services Committee" means a High Court Legal Services Committee constituted under Section 8A;
- (c) "legal service" includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter;
- (d) "Lok Adalat" means a Lok Adalat organized under Chapter VI;
- (e) "notification" means a notification published in the Official Gazette;
- (f) "prescribed" means prescribed by rules made under this Act;
- (ff) <sup>4</sup>"regulations" means regulations made under this Act;
- (g) "scheme" means any scheme framed by the Central Authority, a State Authority or a District Authority for the purpose of giving effect to any of the provisions of this Act;
- (h) "State Authority" means a State Legal Services Authority constituted under Section 6;
- (i) "State Government" includes the administrator of a Union territory appointed by the President under article 239 of the Constitution.
- (j) "Supreme Court Legal Services Committee" means the Supreme Court Legal Services Committee constituted under Section 3A;
- (k) "Taluk Legal Services Committee" means a Taluk Legal Services Committee constituted under Section 11A.

(2) Any reference in this Act to any other enactment or any provision thereof shall, in relation to an area in which such enactment or provision is not in force, be construed as a reference to the corresponding law or the relevant provision of the corresponding law, if any, in force in that area.

## CHAPTER II

### The National Legal Services Authority

Constitution of  
the National  
Legal Services  
Authority

<sup>5</sup>3. (1) The Central Government shall constitute a body to be called the National Legal Services Authority to exercise the powers and perform the functions conferred on, or assigned to, the Central Authority under this Act.

(2) The Central Authority shall consist of -

<sup>3</sup> Ins. by Act 59 of 1994, sec.2(w.e.f. 29.10.1994)

<sup>4</sup> Ins. by Act 59 of 1994, sec.2(w.e.f. 29.10.1994)

<sup>5</sup> Ins. by Act 59 of 1994, sec.3, for section 3 (w.e.f. 29.10.1994)

- (a) the Chief Justice of India who shall be the Patron-in-Chief;
- (b) a serving or retired Judge of the Supreme Court to be nominated by the President, in consultation with the Chief Justice of India, who shall be the Executive Chairman; and
- (c) such number of other members, possessing such experience and qualifications, as may be prescribed by the Central Government, to be nominated by that Government in consultation with the Chief Justice of India.

(3) The Central Government shall, in consultation with the Chief Justice of India, appoint a person to be the Member Secretary of the Central Authority, possessing such experience and qualification as may be prescribed by that Government, to exercise such powers and perform such duties under the Executive Chairman of the Central Authority as may be prescribed by that Government or as may be assigned to him by the Executive Chairman of that Authority.

(4) The terms of office and other conditions relating thereto, of members and the Member Secretary of the Central Authority shall be such as may be prescribed by the Central Government in consultation with the Chief Justice of India.

(5) The Central Authority may appoint such number of officers and other employees as may be prescribed by the Central Government, in consultation with the Chief Justice of India, for the efficient discharge of its functions under this Act.

(6) The Officers and other employees of the Central Authority shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the Central Government in consultation with the Chief Justice of India.

(7) The administrative expenses of the Central Authority, including the salaries, allowances and pensions payable to the Member-Secretary, officers and other employees of the Central Authority, shall be defrayed out of the Consolidated Fund of India.

(8) All orders and decisions of the Central Authority shall be, authenticated by the Member-Secretary or any other officer of the Central Authority duly authorized by the Executive Chairman of that Authority.

(9) No act or proceeding of the Central Authority shall be invalid merely on the ground of the existence of any vacancy in, or any defect in the constitution of, the Central Authority.

**3A.** (1) The Central Authority shall constitute a committee to be called the Supreme Court Legal Services Committee for the purpose of exercising such powers and performing such functions as may be determined by regulations made by the Central Authority.

Supreme Court  
Legal Services  
Committee.

(2) The Committee shall consist of –

- (a) a sitting Judge of the Supreme Court who shall be the Chairman; and
- (b) such number of other members possessing such experience and qualifications as may be prescribed by the Central Government,
- to be nominated by the Chief Justice of India.

(3) The Chief Justice of India shall appoint a person to be the Secretary to the Committee, possessing such experience and qualifications as may be prescribed by the Central Government.

(4) The terms of office and other conditions relating thereto, of the members and Secretary of the Committee shall be such as may be determined by regulations made by the Central Authority.

(5) The Committee may appoint such number of officers and other employees as may be prescribed by the Central Government, in consultation with the Chief Justice of India, for the efficient discharge of its functions.

(6) The officers and other employees of the Committee shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the Central Government in consultation with the Chief Justice of India.

4. The Central Authority shall [\*\*\*\*]<sup>6</sup> perform all or any of the following functions, namely: -

Functions of the  
Central  
Authority

- (a) lay down policies and principles for making legal services available under the provisions of the Act;
- (b) frame the most effective and economical schemes for the purpose of making legal services available under the provisions of this Act;
- (c) utilize the funds at its disposal and make appropriate allocations of funds to the State Authorities and District Authorities;
- (d) take necessary steps by way of social justice litigation with regard to consumer protection, environmental protection or any other matter of special concern to the weaker sections of the society and for this purpose, give training to social workers in legal skills;
- (e) organize legal aid camps, especially in rural area, slums or labour colonies with the dual propose of educating the weaker sections of the society as to their rights as well as encouraging the settlement of disputes through Lok Adalats.

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<sup>6</sup> The words "subject to the general directions of the Central Government" omitted by Act 59 of 1994 sec. 4, (w.e.f. 29.10.1994).

- (f) encourage the settlement of disputes by way of negotiations, arbitration and conciliation;
- (g) undertake and promote research in the field of legal services with special reference to the need for such services among the poor;
- (h) to do all things necessary for the purpose of ensuring commitment to the fundamental duties of citizens under Part IVA of the Constitution;
- (i) monitor and evaluate implementation of the legal aid programmes at periodic intervals and provide for independent evaluation of programmes and schemes implemented in whole or in part by funds provided under this Act;
- (j) <sup>7</sup>provide grants-in-aid for specific schemes to various voluntary social service institutions and the State and District Authorities, from out of the amounts placed at its disposal for the implementation of legal services schemes under the provisions of this Act;
- (k) develop, in consultation with the Bar Council of India, programmes for clinical legal education and promote guidance and supervise the establishment and working of legal services clinics in universities, law colleges and other institutions;
- (l) take appropriate measures for spreading legal literacy and legal awareness amongst the people and, in particular, to educate weaker sections of the society about the rights, benefits and privileges guaranteed by social welfare legislations and other enactments as well as administrative programmes and measures;
- (m) make special efforts to enlist the support of voluntary social welfare institutions working at the grass-root level, particularly among the Scheduled Castes and the Scheduled Tribes, women and rural and urban labour; and
- (n) coordinate and monitor the functioning of State<sup>8</sup> Authorities, District Authorities, Supreme Court Legal Services Committee, High Court Legal Services Committees, Taluk Legal Services Committees and voluntary social services institutions and other legal services organization and give general directions for the proper implementation of the legal services programmes.

Central Authority  
to work in  
Coordination  
with other  
agencies.

**5.** In the discharge of its functions under this Act, the Central Authority shall, wherever appropriate, act in coordination with other governmental and non-governmental agencies, universities and others engaged in the work of promoting the cause of legal services to the poor.

<sup>7</sup> Subs. by Act 59 of 1994 sec.4, for clause (j) (w.e.f 29.10.1994).

<sup>8</sup> Subs. by Act 59 of 1994, sec.4, for "state and District Authorities and other voluntary social welfare institution" (w.e.f. 29.10.1994).

### CHAPTER III

#### State Legal Services Authority

Constitution of  
State Legal  
Services  
Authority.

**96.** (1) Every State Government shall constitute a body to be called the Legal Services Authority for the State to exercise the powers and perform the functions conferred on, or assigned to, a State Authority under this Act.

(2) A State Authority shall consist of-

- (a) the Chief Justice of the High Court who shall be the Patron-in-Chief;
- (b) a serving or retired Judge of the High Court to be nominated by the Governor, in consultation with the Chief Justice of the High Court, who shall be the Executive Chairman; and
- (c) such number of other members, possessing such experience and qualifications as may be prescribed by the State Government, to be nominated by that Government in consultation with the Chief Justice of the High Court.

(3) The State Government shall, in consultation with the Chief Justice of the High Court, appoint a person belonging to the State Higher Judicial Service, not lower in rank than that of a District Judge, as the Member Secretary of the State Authority, to exercise such powers and perform such duties under the Executive Chairman of the State Authority as may be prescribed by that Government or as may be assigned to him by the Executive Chairman of that Authority:

Provided that a person functioning as Secretary of a State Legal Aid and Advice Board immediately before the date of constitution of the State Authority may be appointed as Member-Secretary of that Authority, even if he is not qualified to be appointed as such under this sub-section, for a period not exceeding five years.

(4) The terms of office and other conditions relating thereby, of members and the Member-Secretary of the State Authority shall be such as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(5) The State Authority may appoint such number of officers and other employees as may be prescribed by the State Government in consultation with the Chief Justice of the High Court, for the efficient discharge of its functions under this Act.

(6) The officers and other employees of the State Authority shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

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<sup>9</sup> Subs. by Act 59 of 1994, sec.5, for section 6 (w.e.f. 29.10.1994)

(7) The administrative expenses of the State Authority, including the salaries, allowances and pensions payable to the Member-Secretary or any other officer of the State Authority shall be defrayed out of the consolidated fund of the State.

(8) All orders and decisions of the State Authority shall be authenticated by the Member Secretary or any other officer of the State Authority duly authorized by the Executive Chairman of the State Authority.

(9) No act or proceeding of a State Authority shall be invalid merely on the ground of the existence of any vacancy in, or any defect in the constitution of, the State Authority.

7. (1) It shall be the duty of the State Authority to give effect to the policy and directions of the Central Authority. Functions of the State Authority

(2) Without prejudice to the generality of the functions referred to in sub-section (1), the State Authority shall perform all or any of the following functions, namely:-

- (a) give legal service to persons who satisfy the criteria laid down under this Act;
- (b) conduct Lok Adalats, including Lok Adalats for High Court cases<sup>10</sup>;
- (c) undertake preventive and strategic legal aid programmes: and
- (d) perform such other functions as the State Authority may, in consultation with the Central Authority<sup>11</sup>, fix by regulations.

<sup>12</sup>8. In the discharge of its functions the State Authority shall appropriately act in coordination with other governmental agencies, non-governmental voluntary social service institutions, universities and other bodies engaged in the work of promoting the cause of legal services to the poor and shall also be guided by such directions as the Central Authority may give to it in writing. State Authority to act in coordination with other agencies, etc., and be subject to directions given by Central Authority.

8A. (1) The State Authority shall constitute a committee to be called the High Court Legal Services Committee for every High Court, for the purpose of exercising such powers and performing such functions as may be determined by regulations made by the State Authority. High Court Legal Services Committee.

(2) The Committee shall consists of-

- (a) a sitting Judge of the High Court who shall be the Chairman; and
- (b) such number of other members possessing such experience and qualifications as may be determined by regulations made by the State Authority.

<sup>10</sup> Subs. by Act 59 of 1994, sec.6, for "Lok Adalats" (w.e.f. 29.10.1994).

<sup>11</sup> Subs. by Act 59 of 1994, sec.6, for Central Government" (w.e.f. 29.10.1994).

<sup>12</sup> Subs. by Act 59 of 1994, sec.7, for section 8 (w.e.f. 29.10.1994).

to be nominated by the Chief Justice of the High Court.

(3) The Chief Justice of the High Court shall appoint a Secretary to the Committee possessing such experience and qualifications as may be prescribed by the State Government.

(4) The terms of office and other conditions relating thereto, of the members and Secretary of the Committee shall be such as may be determined by regulations made by the State Authority.

(5) The Committee may appoint such number of officers and other employees as may be prescribed by the State Government in consultation with the Chief Justice of the High Court for the efficient discharge of its functions.

(6) The officers and other employees of the Committee shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

<sup>139.</sup> (1) The State Government shall, in consultation with Chief Justice of the High Court, constitute a body to be called the District Legal Services Authority for every District in the State to exercise the powers and perform the functions conferred on, or assigned to, the District Authority under this Act.

Constitution of  
District Legal  
Services Authority

(2) A District Authority shall consist of-

- (a) the district Judge who shall be its Chairman; and
- (b) such number of other members, possessing such experience and qualifications, as may be prescribed by the State Government, to be nominated by that Government in consultation with the Chief Justice of the High Court.

(3) The State Authority shall, in consultation with the Chairman of the District Authority, appoint a person belonging to the State Judicial Service not lower in rank than that of a Subordinate Judge or Civil Judge posted at the seat of the District Judiciary as Secretary of the District Authority to exercise such powers and perform such duties under the Chairman of that Committee as may be assigned to him by such Chairman.

(4) The terms of office and other conditions relating thereto, of members and Secretary of the District Authority shall be such as may be determined by regulations made by the State Authority in consultation with the Chief Justice of the High Court.

(5) The District Authority may appoint such number of officers and other employees as may be prescribed by the State Government in consultation with the Chief Justice of the High Court for the efficient discharge of its functions.

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<sup>13</sup> Subs. by Act 59 of 1994, sec. 7, for section 9 (w.e.f. 29.10.1994)

(6) The officers and other employees of the District Authority shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(7) The administrative expenses of every District Authority, including the salaries, allowances and pensions payable to the Secretary, officers and other employees of the District Authority shall be defrayed out of the Consolidated Fund of the State.

(8) All orders and decisions of the District Authority shall be authenticated by the Secretary or by any other officer of the District Authority duly authorized by the Chairman of that Authority.

(9) No act or proceeding of a District Authority shall be invalid merely on the ground of the existence of any vacancy in, or any defect in the constitution of, the District Authority.

**10.** (1) It shall be the duty of every District Authority to perform such of the functions of the State Authority in the District as may be delegated to it from time to time by the State Authority. Functions of District Authority.

(2) Without prejudice to the generality of the functions referred to in subsection (1), the District Authority may perform all or any of the following functions, namely:-

- (a) <sup>14</sup>coordinate the activities of the Taluk Legal Services Committee and other legal services in the District;
- (b) organize Lok Adalats within the District; and
- (c) perform such other functions as the State Authority may [\*\*\*\*]<sup>15</sup> fix by regulations.

**11.** In the discharge of its functions under this act, the District Authority shall, wherever appropriate act in coordination with other governmental and non-governmental institutions, universities and others engaged in the work of promoting the cause of legal services to the poor and shall also be guided by such directions as the Central Authority or the State Authority may give to it in writing.

District Authority to act in coordination with other agencies and be subject to directions given by the Central Authority, etc.

**16 11A. (1)** The State Authority may constitute a Committee, to be called the Taluk Legal Services Committee, for each taluk or mandal or for group of taluks or mandals. Taluk Legal Services Committee.

(2) The Committee shall consist of ---

<sup>14</sup> Subs. by Act 59 of 1994, sec.8, for clause (a) (w.e.f. 29.10.1994)

<sup>15</sup> The words "in consultation with the State Government", omitted by Act 59 of 1994, sec.8 (w.e.f. 29.10.1994).

<sup>16</sup> Ins. by Act 59 of 1994, sec.9 (w.e.f. 29.10.1994)

(a) the "senior most judicial officer"<sup>17</sup> operating within the jurisdiction of the Committee who shall be the ex-officio Chairman; and

(b) such number of other members, possessing such experience and qualifications, as may be prescribed by the State Government, to be nominated by that Government in consultation with Chief Justice of the High Court.

(3) The Committee may appoint such number of officers and other employees as may be prescribed by the State Government in consultation with Chief Justice of the High Court for the efficient discharge of its functions.

(4) The officers and other employees of the Committee shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the State Government in consultation with Chief Justice of the High Court,

(5) The administrative expenses of the Committee shall be defrayed out of the District Legal Aid Fund by the District Authority.

**11B.** The Taluk Legal Services Committee may perform all or any of the following functions, namely:--

Functions of Taluk  
Legal Services  
Committee.

- (a) coordinate the activities of legal services in the taluka;
- (b) organize Lok Adalats within the taluk; and
- (c) perform such other functions as the District Authority may assign to it.

#### **CHAPTER IV** **Entitlement to Legal Services**

**Criteria for giving legal services.** **12.** Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is--

- (a) a member of a Scheduled Caste or Scheduled Tribe;
- (b) a victim of trafficking in human beings or beggar as referred in article 23 of the Constitution;
- (c) a woman or a child;
- (d) a person with disability as defined in clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995<sup>18</sup>.

<sup>17</sup> Subs. by Act 37 of 2002, sec.2, for "senior Civil Judge" (w.e.f. 11.6.2002).

<sup>18</sup> Subs. by Act 1 of 1996, sec.74, for clause (d) (w.e.f. 7.2.1996)

Subs. by Act 59 of 1994, sec.10, for clause (h) (w.e.f. 29.10.1994).

- (e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or
- (f) an industrial workman; or
- (g) in custody, including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956, or in a Juvenile home within the meaning of clause (j) of section 2 of the Juvenile Justice Act, 1986, or in a psychiatric hospital or psychiatric nursing home within the meaning clause (g) of section 2 of the Mental Health Act, 1987; or
- (h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court.

**Entitlement of legal services.** 13. (1) Persons who satisfy or any of the criteria specified in section 12 shall be entitled to receive legal services provided that the concerned Authority is satisfied that such person has a *prima-facie* case to prosecute or to defend.

(2) An affidavit made by a person as to his income may be regarded as sufficient for making him eligible to the entitlement of legal services under this Act unless the concerned Authority has reason to disbelieve such affidavit.

## CHAPTER V

### Finance, Accounts and Audit

**Grants by the Central Government** 14. The Central Government shall, after due appropriation made by Parliament by law in this behalf, pay to the Central Authority, by way of grants, such sums of money as the Central Government may think fit for being utilized for the purposes of this Act.

**National Legal Aid Fund.** 15. (1) The Central Authority shall establish a fund to be called the National Legal Aid fund and there shall be credited thereto—

- (a) all sums of money given as grants by the Central Government under section 14;
- (b) any grants or donations that may be made to the Central Authority by any other person for the purposes of this Act;
- (c) any amount received by the Central Authority under the orders of any court or from any other source.

(2) The National Legal Aid Fund shall be applied for meeting--

- (a) the cost of legal services provided under this Act including grants made to State Authorities;

- (b) the cost of legal services provided by the Supreme Court Legal Services Committee;
- (c) any other expenses which are required to be met by the Central Authority.<sup>19</sup>

**16.** (1) A State Authority shall establish a fund to be called the State Legal Aid Fund and there shall be credited thereto —

- (a) all sums of money paid to it or any grants made by the Central Authority for the purposes of this Act;
  - (b) any grants or donations that may be made to the State Authority by the State Government or by any person for the purposes of this Act;
  - (c) any other amount received by the State Authority under the orders of any court or from any other source.
- (2) A State Legal Aid Fund shall be applied for meeting--
- (a) the cost of functions referred to in section 7;
  - (b) the cost of legal services provided by the High Court Legal Services Committees;
  - (c) any other expenses which are required to be met by the State Authority.<sup>20</sup>

**17.** (1) Every District Authority shall establish a fund to be called the District Legal Aid Fund and there shall be credited thereto—

- (a) all sums of money paid or any grants made by the State Authority to the District Authority for the purposes of this Act;
  - (b) any grants or donations that may be made to the District Authority by any person, with the prior approval of the State Authority, for the purposes of this Act;
  - (c) any other amount received by the District Authority under the orders of any court or from any other source.<sup>21</sup>
- (2) A District Legal Aid Fund shall be applied for meeting--
- (a) the cost of functions referred to in section 10 and 11B<sup>22</sup>;
  - (b) any other expenses which are required to be met by the District Authority.

<sup>19</sup> Subs. by Act 59 of 1994, sec.11, for clause (b) (w.e.f. 29.10.1994)

<sup>20</sup> Subs. by Act 59 of 1994, sec.12, for clause (b) (w.e.f. 29.10.1994)

<sup>21</sup> Subs. by Act 59 of 1994, sec.13, for clause (b) (w.e.f. 29.10.1994)

<sup>22</sup> Ins. by Act 59 of 1994, sec. 13, (w.e.f.29.10.1994).

**18.** (1) The Central Authority, State Authority or the District Authority <sup>Accounts and Audit</sup> (hereinafter referred to in this section as 'the Authority'), as the case may be, shall maintain proper accounts and other relevant records and prepare an annual statement of accounts including the income and expenditure account and the balance-sheet in such form and in such manner as may be prescribed by the Central Government in consultation with the Comptroller and Auditor General of India.

(2) The accounts of the Authorities shall be audited by the Comptroller and Auditor General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Authority concerned to the Comptroller and Auditor General of India.

(3) The Comptroller and Auditor General of India and any other person appointed by him in connection with the auditing of the accounts of an Authority under this Act shall have the same rights and privileges and authority in connection with such audit as the Comptroller and Auditor General of India has in connection with the auditing of the Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Authorities under this Act.

(4) The accounts of the Authorities, as certified by the Comptroller and Auditor General of India or any other person appointed by him in this behalf together with the audit report thereon, shall be forwarded annually by the Authorities to the Central Government or the State Governments, as the case may be.

<sup>23</sup>(5) The Central Government shall cause the accounts and the audit report received by it under sub-section (4) to be laid, as soon as may be after they are received, before each house of Parliament.

(6) The State Government shall cause the accounts and the audit report received by it under sub-section (4) to be laid, as soon as may be after they are received, before the State Legislature.

## CHAPTER VI

### LOK ADALATS

**19.** (1) Every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or, as the case may be, Taluk Legal Services Committee may organize Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit.

(2) Every Lok Adalat organized for an area shall consist of such number of-

- (a) serving or retired judicial officers; and
- (b) other persons,

of the area as may be specified by the State Authority or the District Authority or the Supreme Court Legal Services Committee or the High Court Legal Services Committee

<sup>23</sup> Ins. by Act 59 of 1994, sec.14 (w.e.f. 29.10.1994)

or, as the case may be, the Taluk Legal Services Committee, organizing such Lok Adalat.

(3) The experience and qualifications of other persons referred to in clause (b) of sub-section (2) for Lok Adalats organized by the Supreme Court Legal Services Committee shall be such as may be prescribed by the Central Government in consultation with the Chief Justice of India.

(4) The experience and qualifications of other persons referred to in clause (b) of sub-section (2) for Lok Adalats other than referred to in sub-section (3) shall be such as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(5) A Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of--

- (i) any case pending before; or
- (ii) any matter which is falling within the jurisdiction of and is not brought before, any court for which the Lok Adalat is organized:

Provided that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law.

<sup>24</sup>20. (1) Where in case referred to in clause (i) of sub-section (5) of section 19.

Cognizance of cases  
by Lok Adalats.

- (i) (a) the parties thereof agree; or
- (b) one of the parties thereof makes an application to the court,

for referring the case to the Lok Adalat for settlement and if such court is prima facie satisfied that there are chances of such settlement; or

- (ii) the court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat,

the court shall refer the case to the Lok Adalat :

Provided that no case shall be referred to the Lok Adalat under sub-clause (b) of clause (i) or clause (ii) by such court except after giving a reasonable opportunity of being heard to the parties.

(2) Notwithstanding anything contained in any other law for the time being in force, the Authority or Committee organizing the Lok Adalat under sub-section (1) of section 19 may, on receipt of an application from any one of the parties to any matter referred to in clause (ii) of sub-section (5) of section 19 that such matter needs to be determined by a Lok Adalat, refer such matter to the Lok Adalat, for determination:

Provided that no matter shall be referred to the Lok Adalat except after giving a reasonable opportunity of being heard to the other party.

<sup>24</sup> Subs. by Act 59 of 1994, sec.15, for section 20 (w.e.f 29.10.1994)

(3) Where any case is referred to a Lok Adalat under sub-section (1) or where a reference has been made to it under sub-section (2), the Lok Adalat shall proceed to dispose of the case or matter and arrive at a compromise or settlement between the parties.

(4) Every Lok Adalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice, equity fair play and other legal principles.

(5) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, the record of the case shall be returned by it to the court, from which the reference has been received under sub-section (1) for disposal in accordance with law.

(6) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, in a matter referred to in sub-section (2), that Lok Adalat shall advise the parties to seek remedy in a court.

(7) Where the record of the case is returned under sub-section (5) to the court, such court shall proceed to deal with such case from the stage which was reached before such reference under sub-section (1).

**21.** <sup>25</sup>(1) Every award of the Lok Adalat shall be deemed to be a decree of a civil court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at by a Lok Adalat in a case referred to it under sub-section (1) of section 20, the court-fee paid in such case shall be refunded in the manner provided under the Court-fees Act, 1870.

Award of Lok  
Adalat.  
7 of 1870

(2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award.

**22.** (1) The Lok Adalat "or Permanent Lok Adalat"<sup>26</sup> shall, for the purposes of holding any determination under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely:-

- (a) the summoning and enforcing the attendance of any witness and examining him on oath;
- (b) the discovery and production of any document;
- (c) the reception of evidence on affidavits;
- (d) the requisitioning of any public record or document or copy of such record or document from any court or office; and
- (e) such other matters as may be prescribed.

Powers of  
Lok Adalats.  
5 of 1908.

<sup>25</sup> Sub. by Act 59 of 1994, sec. 16, for sub-section (1) (w.e.f. 29.10.1994)

<sup>26</sup> Added by Legal Services Authorities (Amendment) Act No. 37 of 2002 published in Gazette of India vide notification No. 40 dated 12-6-2002.

45 of 1860.

(2) Without prejudice to the generality of the powers contained in sub-section (1), every<sup>27</sup> Lok Adalat "or Permanent Lok Adalat" shall have the requisite powers to specify its own procedure for the determination of any dispute coming before it.

2 of 1974.

(3) All proceedings before a Lok Adalat "or Permanent Lok Adalat" shall be deemed to be judicial proceedings within the meaning of sections 193, 219 and 228 of the Indian Penal Code and every Lok Adalat shall be deemed to be a civil court for the purpose of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

## CHAPTER VIA<sup>28</sup>

### Pre-Litigation Conciliation and Settlement

**Definitions.** **22A.** In this Chapter and for the purpose of sections 22 and 23, unless the context otherwise requires;—

- (a) "Permanent Lok Adalat" means a Permanent Lok Adalat established under sub-section (1) of section 22B;
- (b) "public utility service" means any—
  - (i) transport service for the carriage of passengers or goods by air, road or water; or
  - (ii) postal, telegraph or telephone service; or
  - (iii) supply of power, light or water to the public by any establishment; or
  - (iv) system of public conservancy or sanitation; or
  - (v) service in hospital or dispensary; or
  - (vi) Insurance service.
  - (vii) Housing and Estates<sup>29</sup>
  - (viii) Banking and Financial<sup>30</sup>

and includes any service which the Central Government or the State Government, as the case may be, may, in the public interest, by notification, declare to be a public utility service for the purposes of this chapter.

Establishment of  
Permanent Lok  
Adalats.

**22B.** (1) Notwithstanding anything contained in section 19, the Central Authority or, as the case may be, every State Authority shall, by notification, establish Permanent Lok Adalats at such places and for exercising such jurisdiction in respect of one or more public utility services and for such areas as may be specified in the notification.

<sup>27</sup> Subs. by Act 37 of 2002, sec.3, for Lok Adalat (w.e.f. 11.6.2002)

<sup>28</sup> Chapter VIA (containing sections 22A to 22E) ins. by Act 37 of 2002 (w.e.f. 11.6.2002)

<sup>29</sup> Notified by Haryana Government vide Notification No.20/1/2009-4JJ(1) dated 19.5.2009

<sup>30</sup> Notified by Haryana Government vide Notification No.20/1/2009-4JJ(1) dated 19.5.2009

(2) Every Permanent Lok Adalat established for an area notified under sub-section (1) shall consist of --

- (a) a person who is, or has been, a district judge or additional district judge or has held judicial office higher in rank than that of a district judge, shall be the Chairman of the Permanent Lok Adalat; and
- (b) two other persons having adequate experience in public utility service to be nominated by the Central Government or, as the case may be, the State Government on the recommendation of the Central Authority or, as the case may be, the State Authority,

appointed by the Central Authority or, as the case may be, the State Authority, establishing such Permanent Lok Adalat and the other terms and conditions of the appointment of the Chairman and other persons referred to in clause (b) shall be such as may be prescribed by the Central Government.

22C. (1) Any party to a dispute may, before the dispute is brought before any court, make an application to the Permanent Lok Adalat for the settlement of dispute:

Cognizance of cases  
by Permanent Lok  
Adalat.

Provided that the Permanent Lok Adalat shall not have jurisdiction in respect of any matter relating to an offence not compoundable under any law:

Provided further that the Permanent Lok Adalat shall not have jurisdiction in the matter where the value of the property in dispute exceeds twenty five lakh rupees<sup>31</sup>:

Provided also that the Central Government, may, by notification, increase the limit of "twenty five lakh rupees" specified in the second proviso in consultation with the Central Authority.

(2) After an application is made under sub-section (1) to the Permanent Lok Adalat, no party to that application shall invoke jurisdiction of any court in the same dispute.

(3) Where an application is made to a Permanent Lok Adalat under sub-section (1), it--

- (a) shall direct each party to the application to file before it a written statement, stating therein the facts and nature of dispute under the application, points or issues in such dispute and grounds relied in support of, or in opposition to, such points or issues, as the case may be, and such party may supplement such statement with any document and other evidence which such party deems appropriate in proof of such facts and grounds and shall send a copy of such statement together with a copy of such document and other evidence, if any, to each of the parties to the application;

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<sup>31</sup> Substituted vide notification No.S.O. 2083 (E) dated 15.9.2011 by Ministry of Law and Justice Government of India.

(b) may require any party to the application to file additional statement before it at any stage of the conciliation proceedings;

(c) shall communicate any document or statement received by it from any party to the application to the other party, to enable such other party to present reply thereto.

(4) When statement, additional statement and reply, if any, have been filed under sub-section (3), to the satisfaction of the Permanent Lok Adalat, it shall conduct conciliation proceedings between the parties to the application in such manner as it thinks appropriate taking into account the circumstances of the dispute.

(5) The Permanent Lok Adalat shall, during conduct of conciliation proceedings under sub-section (4), assist the parties in their attempt to reach an amicable settlement of the dispute in an independent and impartial manner.

(6) It shall be the duty of every party to the application to cooperate in good faith with the Permanent Lok Adalat in conciliation of the dispute relating to the application and to comply with the direction of the Permanent Lok Adalat to produce evidence and other related documents before it.

(7) When a Permanent Lok Adalat, in the aforesaid conciliation proceedings, is of opinion that there exist elements of settlement in such proceedings which may be acceptable to the parties, it may formulate the terms of a possible settlement of the dispute and give to the parties concerned for their observations and in case the parties reach at an agreement on the settlement of the dispute, they shall sign the settlement agreement and the Permanent Lok Adalat shall pass an award in terms thereof and furnish a copy of the same to each of the parties concerned.

(8) Where the parties fail to reach at an agreement under sub-section (7), the Permanent Lok Adalat shall, if the dispute does not relate to any offence, decide the dispute.

Procedure of  
Permanent Lok  
Adalat

5 of 1908.  
1 of 1872.

**22D.** The Permanent Lok Adalat shall, while conducting conciliation proceedings or deciding a dispute on merit under this Act, be guided by the principles of natural justice, objectivity, fair play, equity and other principles of justice, and shall not be bound by the Code of Civil Procedure, 1908(1 of 1872) and the Indian Evidence Act, 1872(5 of 1908).

Award of  
Permanent Lok  
Adalat to be final.

**22E.** (1) Every award of the Permanent Lok Adalat under this Act made either on merit or in terms of a settlement agreement shall be final and binding on all the parties thereto and on persons claiming under them.

(2) Every award of the Permanent Lok Adalat under this Act shall be deemed to be a decree of a civil court.

(3) The award made by the Permanent Lok Adalat under this Act shall be by a majority of the persons constituting the Permanent Lok Adalat.

(4) Every award made by the Permanent Lok Adalat under this Act shall be final and shall not be called in question in any original suit, application or execution proceeding.

(5) The Permanent Lok Adalat may transmit any award made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court".

## CHAPTER VII

### Miscellaneous

~~Members and staff~~<sup>32</sup> 23. The members including Member-Secretary or, as the case may be, Secretary of the Central Authority, the State Authorities, the District Authorities, the Supreme Court Legal Services Committee, High Court Legal Services Committee, Taluk Legal Services Committees and officers and other employees of such Authorities,

~~Adalats to be public servants.~~<sup>45 of 1860.</sup> Committees "and the Members of the Lok Adalats or the persons Constituting Permanent Lok Adalats"<sup>33</sup> shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

~~Protection of action~~ 24. No suit, prosecution or other legal proceedings shall lie against-- taken in good faith.

- (a) the Central Government or the State Government;
- (b) the Patron-in-Chief, Executive Chairman, Members or Member Secretary or officers or other employees of the Central Authority;
- (c) Patron-in-Chief, Executive Chairman, Member, Member Secretary or officers or other employees of the State Authority;
- (d) Chairman, Secretary, Members or officers or other employees of the Supreme Court Legal Services Committee, High Court Legal Services Committees, Taluk Legal Services Committees or the District Authority; or
- (e) Any other person authorized by any of the Patron-in-Chief, Executive Chairman, Chairman, Member, Member Secretary referred to in sub-clauses (b) to (d),

for anything which is in good faith done or intended to be done under the provisions of this Act or any rule or regulation made thereunder.

~~Act to have over riding effect.~~ 25. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

~~Power to remove difficulties.~~ 26. (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such

<sup>32</sup> Subs. by Act 59 of 1994, sec. 17, for sections 23 and 24 (w.e.f. 29.10.1994).

<sup>33</sup> Substituted by Legal Services Authorities (Amendment) Act No. 37 of 2002 published in Gazette of India vide notification No. 40 dated 12-6-2002.

**The Legal Services Authorities Act, 1987**

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provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty.

Provided that no such order shall be made after the expiry of a period of two years from the date on which this Act receives the assent of the President.

(2) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

Power of Central Government to make rules. **3427.** (1) The Central Government, in consultation with the Chief Justice of India may, by notification, make rules to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

- (a) the number, experience and qualifications of other members of the Central Authority under clause (c) of sub-section (2) of section 3;
- (b) the experience and qualifications of the Member Secretary of the Central Authority and his powers and functions under sub-section (3) of section 3;
- (c) the terms of office and other conditions relating thereto, of Members and Member Secretary of the Central Authority under sub-section (4) of section 3;
- (d) the number of officers and other employees of the Central Authority under sub-section (5) of section 3;
- (e) the conditions of service and the salary and allowances of officers and other employees of the Central Authority under sub-section (6) of section 3;
- (f) the number, experience and qualifications of Members of the Supreme Court Legal Services Committee under clause (b) of sub-section (2) of section 3A;
- (g) the experience and qualifications of Secretary of the Supreme Court Legal Services Committee under sub-section (3) of section 3A;
- (h) the number of officers and other employees of the Supreme Court Legal Services Committee under sub-section (5) of section 3A and the conditions of service and the salary and allowances payable to them under sub-section (6) of that section;
- (i) the upper limit of annual income of a person entitling him to legal services under clause (h) of section 12, if the case is before the Supreme Court;

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<sup>34</sup> Subs. by Act 59 of 1994, sec.18, for sections 27, 28 and 29 (w.e.f. 29.10.1994)

**The Legal Services Authorities Act, 1987**

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- (j) the manner in which the accounts of the Central Authority, the State Authority or the District Authority shall be maintained under section 18;
- (k) the experience and qualifications of other persons of the Lok Adalats organized by the Supreme Court Legal Services Committee specified in sub-section (3) of section 19;
- (l) other matters under clause (e) of sub-section (l) of section 22;
- (la) the other terms and conditions of appointment of the Chairman and other persons under sub-section (2) of section 22B,<sup>35</sup>
- (m) any other matter which is to be, or may be, prescribed.

**Power of State Government to make rules.**

**28.** (1) The State Government in consultation with the Chief Justice of the High Court may, by notification, make rules to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:--

- (a) the number, experience and qualifications of other Members of the State Authority under clause (c) of sub-section (2) of section 6;
- (b) the powers and functions of the member Secretary of the State Authority under sub-section (3) of section 6.
- (c) the terms of office and other conditions relating thereto, of Members and Member Secretary of the State Authority under sub-section (4) of section 6;
- (d) the number of officers and other employees of the State Authority under sub-section (5) of section 6;
- (e) the conditions of service and the salary and allowances of officers and other employees of the State Authority under sub-section (6) of section 6;
- (f) the experience and qualifications of Secretary of the High Court Legal Services Committee under sub-section (3) of section 8A;
- (g) the number of officers and other employees of the High Court Legal Services Committee under sub-section (5) of section 8A and the conditions of service and the salary and allowances payable to them under sub-section (6) of that section;
- (h) the number, experience and qualifications of Members of the District Authority under clause (b) of sub-section (2) of section 9;

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<sup>35</sup> Inserted by Legal Services Authorities (Amendment) Act No. 37 of 2002 published in Gazette of India vide notification No. 40 dated 12-6-2002.

- (i) the number of officers and other employees of the District Authority under sub-section (5) of section 9;
- (j) the conditions of service and the salary and allowances of officers and other employees of the District Authority under sub-section (6) of section 9;
- (k) the number, experience and qualifications of Members of the Taluk Legal Services Committee under clause (b) of sub-section (2) of section 11A;
- (l) the number of officers and other employees of Taluk Legal Services Committee under sub-section (3) of section 11A;
- (m) the conditions of service and the salary and allowances of officers and other employees of the Taluk Legal Services Committee under sub-section (4) of section 11A;
- (n) the upper limit of annual income of a person entitling him to legal services under clause (h) of section 12, if the case is before a court, other than the Supreme Court;
- (o) the experience and qualifications of other persons of the Lok Adalats other than referred to in sub-section (4) of section 19;
- (p) any other matter which is to be, or may be, prescribed.

**Power of Central Authority to make regulations.** (1) The Central Authority may, by notification, make regulations not inconsistent with the provisions of this Act and the rules made there under, to provide for all matters for which provision is necessary or expedient for the purposes of giving effect to the provisions of this Act.

- (2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:--
- (a) the powers and functions of the Supreme Court Legal Services Committee under sub-section (1) of section 3A;
  - (b) the terms of office and other conditions relating thereto, of the members and Secretary of the Supreme Court Legal Services Committee under sub-section (4) of section 3A.

**Power of State Authority to make regulations.** (1) The State Authority may, by notification, make regulations not inconsistent with the provisions of this Act and the rules made thereunder to provide for all matters for which provision is necessary or expedient for the purposes of giving effect to the provisions of this Act.

- (2) In particular, and without prejudice to the generality of the forgoing power, such regulations may provide for all or any of the following matters namely:--
- (a) the other functions to be performed by the State Authority under clause (d) of sub-section (2) of section 7;

- (b) the powers and functions of the High Court Legal Services Committee under sub-section (1) of section 8A;
- (c) the number, experience and qualifications of Members of the High Court Legal Services Committee under clause (b) of sub-section (2) of section 8A;
- (d) the terms of office and other conditions relating thereto, of the Members and Secretary of the High Court Legal Services Committee under sub-section (4) of section 8A.;
- (e) the terms of office and other conditions relating thereto, of the Members and Secretary of the District Authority under sub-section (4) of section 9;
- (f) the number, experience and qualifications of Members of the High Court Legal Services Committee under clause (b) of sub-section (2) of section 8A;
- (g) the other functions to be performed by the District Authority under clause (c) of sub-section (2) of section 10;
- (h) the terms of office and other conditions relating thereto, of the Members and Secretary of the Taluk Legal Services Committee under sub-section (3) of section 11A;

**30.** (1) Every rule made under this Act by the Central Government and every regulation made by the Central Authority there under shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation, or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

Laying of rules and regulations

(2) Every rule made under this Act by a State Government and every regulation made by a State Authority there under shall be laid, as soon as may be after it is made, before the State Legislature.

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**Equivalent Citation:** AIR2003SC189, 2003(1)ALLMR(SC)391, 2002(6)ALT1(SC), 2003(3)AWC2238(SC), 100(2002)DLT691(SC), I(2003)DMC73SC, (2003)1GLR148, JT2002(9)SC175, RLW2007(3)SC2531, (2003)1SCC49, 2003(1)UJ1(SC), 2003(2)WLN665

## IN THE SUPREME COURT OF INDIA

Decided On: 25.10.2002

**Appellants: Salem Advocate Bar Association**

Vs.

**Respondent: Union of India (UOI)**

**Hon'ble Judges: B.N. Kirpal, C.J., Y.K. Sabharwal and Arijit Pasayat, J.J.**

**Subject: Civil**

**Acts/Rules/Orders:**

Civil Procedure Code (CPC), 1908 - Section 1; Civil Procedure Code (CPC) (Amendment) Act, 1999; Civil Procedure Code (CPC) (Amendment) Act, 2002

**Case Note:**

**Civil - Summons to defendants - Amendment to Section 27 of Civil Procedure Code, 1908 - Words added by amendment fixed outer time frame by providing that steps must be taken within 30 days from the date of institution of suit, to issue summons and not that the summons must be served within 30 days of the date of the institution of the suit.**

**Civil - Settlement of disputes outside the court - Alternative dispute resolution (ADR) mechanism contemplated by Section 89 of C. P. C. through arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation - Modalities have to be formulated for the manner in which Section 89 and for that matter, the other provisions which have been introduced by way of amendments, may have to be in operation - For that purpose a committee may be constituted consisting of judge, sitting or retired nominated by the Chief Justice of India and other nominated members from the Bar - Committee may consider devising a model case management formula as well as rules and regulations which should be followed while taking recourse to the ADR referred to in Section 89.**

**Civil - Intra Court appeals - Amendment to Section 100 A of Civil Procedure Code - Where the single judge hears an appeal from an appellate decree or order, question of there being any further appeal in such a case cannot and should not be contemplated - Where however an appeal is filed before the High Court against the decree of a trial court, a question may arise whether any further appeal should be permitted or not - Depending upon the value of the case, the appeal from the original decree is either heard by a single judge or by a division bench of the High Court - Where the regular first appeal so filed is heard by a division bench, the question of there being an intra-court appeal does not arise - No prejudice would be caused to the litigants by not providing for intra court appeal, even where the value involved is large - In such a case, the High Court by rules, can provide that the division bench will hear the regular first appeal - No fault can, thus, be found with the amended provision of Section 100A.**

**Civil - Rejection of plaint where it is not filed in duplicate or where the plaintiff fails to comply with the provisions of Rule 9 of Order 7 of CPC - Said clause being procedural would not require the automatic rejection of the plaint at the first instance - If there is any defect as contemplated by Rule 11(c) or non compliance as referred to in Rule 11(f), the court should ordinarily give an opportunity for rectifying the defects and in the event of the same not being done the court will have the liberty or the right to reject the plaint.**

**Civil - Witness - Examination in chief - Substitution of Order 18 Rule 4 of CPC - Reading the provisions of Order 16 and Order 18 together, Order 18 Rule 4(1) will necessarily apply to a case contemplated by Order 16 Rule 1A i. e. where any party to a suit, without applying for summoning under Rule 1 brings any witness to give evidence or produce any document - In such a case, examination - in - chief is not to be recorded in court but shall be in the form of an affidavit - Order 18 Rule 4 will necessarily apply to a case contemplated by Order 16, Rule 1A where a party to a suit without applying for summoning brings any witness to give evidence or produce any document - In case where summons have to be issued under Order 16, Rule 1 the provisions of Order 18, Rule 4 may not apply - Word "mechanically" in Rule 4(3) indicates that evidence can be recorded even with the help of electronic, media, audio or audiovisual.**

**Civil - Registry of memorandum of appeal - Introduction of Rule 9 Order 41 - Appeal is to be filed under Order 41 Rule 1 in the court in which it is maintainable - Order 41 Rule 9 require that a copy of memorandum of appeal which has been filed in the appellate court should also be presented before the court against whose decree the appeal has been filed and endorsement thereof shall be made by the decreeing court in a book called the register to appeals - Merely because a memorandum of appeal is not filed under Order 41 Rule 9 will not make the appeal filed in the appellate court as a defective one.**

**Constitution of India, 1950 - Article 32--Writ petitions in the form of public interest litigation seeking to challenge amendments made to Code of Civil Procedure by Amending Acts of 1999 and 2002--Held, provisions are made for purpose of speedy trial of cases and they are not in any way ultra vires the Constitution--However a committee directed to be constituted to give clarifications about certain ambiguous provisions within period of 4 months.**

Writ Petition Disposed of

#### **JUDGMENT**

**B.N. Kirpal, CJI**

1. Rule - These writ petitions have been filed seeking to challenge Amendments made to the Code of Civil Procedure by the Amendment Act 46 of 1999 and Amendment Act 22 of 2002.
2. Writ Petition C No. 496 of 2002 was filed by the Salem Advocate Bar Association and after notice was issued the petitioner sought leave to this Court to withdraw the writ petition. By order dated 16th September, 2002, the prayer to withdraw the writ petition was declined, as the petition had been filed in public interest. At the request of the Court, Shri C.S. Vaidyanathan, Sr. Advocate assisted by Shri K.V. Vishwanathan, Advocate agreed to assist the Court as Amicus curiae and they have rendered assistance to the Court for dealing with the case. The Court records its appreciation for the assistance given.
3. In the petitions, the amendments which were sought to be made by the aforesaid Amendment Acts, have been challenged, but we do not find that the said provisions are in any way ultra vires the Constitution. Neither Mr. Vaidyanathan nor any other learned counsel made any submissions to the effect that any of the amendments made were without legislative competence or violative of any of the provisions of the Constitution. We have also gone through the provisions by which amendments have been made and do not find any constitutional infirmity in the same.
4. Mr. Vaidyanathan, however, drew our attention to some of the amendments which have been made with a view to show that there may be some practical difficulties in implementing the same. He also contended that some clarifications may be necessary. We shall deal with the said provisions presently.
5. Amendment has been made to Section 27 dealing with summons to the defendant which, after the amendment, reads as follows:

"Summons to Defendants - Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in the manner prescribed on such day not beyond thirty days from the date of the institution of the suit."

6. It would be submitted by Mr. Vaidyanathan that the words "on such day not beyond thirty days from the date of the institution of the suit" seem to indicate that the summons must be served within thirty days of the date of the institution of the suit. In our opinion, the said provisions read as a whole will not be susceptible to that meaning. The words added by amendment, it appears, fix outer time frame, by providing that steps must be taken within thirty days from the date of the institution of the suit, to issue summons. In other words, if the suit is instituted, for example, on 1st January, 2002, then the correct addresses of the defendants and the process fee must be filed in the court within thirty days so that summons be issued by the court not beyond thirty days from the date of the institution of the suit. The object is to avoid long delay in issue of summons for want of steps by the plaintiff. It is quite evident that if all that is required to be done by a party, has been performed within the period of thirty days, then no fault can be attributed to the party. If for any reason, the court is not in a position or is unable to or does not issue summons within thirty days, there will, in our opinion, compliance with the provisions of Section 27 once within thirty days of the issue of the summons the party concerned has taken steps to file the process fee along with completing the other formalities which are required to enable the court to issue the summons.

7. Our attention was then drawn to a new Section 89 which has been introduced in the Code of Civil Procedure. This provides for settlement of disputes, etc., and reads as under:

"89. Settlement of disputes outside the Court.--(1) Where it appears to the Court that there exist elements which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for--

- (a) arbitration;
- (b) conciliation;
- (c) judicial settlement including settlement through Lok Adalat; or
- (d) mediation.

(2) Where a dispute has been referred--

- (a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;
- (b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of Sub-section (1) of Section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat.
- (c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or persona shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;
- (d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

8. it is quite obvious that the reason why Section 89 has been inserted to try and see that all the cases which are filed in court need not necessarily be decided by the court itself. Keeping in mind the laws delay and the limited number of Judges which are available, it has now become imperative that resort should be had to Alternative Dispute Resolution Mechanism with a view to bring to an end litigation between the parties at an early date. The Alternative Dispute Resolution (ADR) mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation. Sub-section (2) of Section 89 refer to different acts in relation to arbitration, conciliation or settlement through Lok Adalat, but with regard to mediation Section 89(2)(d) provides that the parties shall follow the procedure as may be prescribed. Section 89(2)(d), therefore, contemplates appropriate rules being framed with regard to mediation.

9. In certain countries of the world where ADR has been successful to the extent that over 90 per cent of the cases are settled out of court, there is a requirement that the parties to the suit must indicate the form of ADR which they would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial.

10. Section 89 is a new provision and even though arbitration or conciliation has been in place as a mode for setting the disputes, this has not really reduced the burden on the courts. It does appear to us that modalities have to be formulated for the manner in which Section 89 and, for that matter, the other provisions which have been introduced by way of amendments, may have to be in operation. All counsel are agreed that for this purpose, it will be appropriate if a Committee is constituted so as to ensure that the amendments made become effective and result in quicker dispensation of justice.

11. In our opinion, the suggestion so made merits a favourable consideration. With the constitution of such a Committee, any creases which require to be ironed out can be identified and apprehensions which may exist in the minds of the litigating public or the lawyer's clarified. As suggested, the Committee will consist of a Judge sitting or retired nominated by the Chief Justice of India and the other members of the Committee will be Mr. Kapil Sibal, Senior Advocate, Mr. Arun Jaitley, Senior Advocate, Mr. C.S. Vaidyanathan, Senior Advocate and Mr. D.V. Subba Rao, Chairman, Bar Council of India. This Committee will be at liberty to co-opt any other member and to take assistance of any member of the Bar or Association. This Committee may consider devising a model case management formula as well as rules and regulations which should be followed while taking recourse to the ADR referred to in Section 89. The model rules, with or without modification, which are formulated may be adopted by the High Courts concerned for giving effect to Section 89(2)(d).

12. Mr. Vaidyanathan drew our attention to Section 100A which deals with intra-court appeals. This Section reads as follows:

"100A. No further appeal in certain cases--Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a Single Judge or a High Court, no further appeal shall lie from the judgment and decree of such Single Judge."

13. It was submitted by Mr. Vaidyanathan that where the original decree is reversed by a Single Judge of the High Court, there should be a provision for filing a Letters Patent Appeal.

14. Section 100A deals with two types of cases which are decided by a Single Judge. One is where the Single Judge hears an appeal from an appellate decree or order. The question of there being any further appeal in such a case cannot and should not be contemplated. Where, however, an appeal is filed before the High Court against the decree of a trial court, a question may arise whether any further appeal should

be permitted or not. Even at present depending upon the value of the case, the appeal from the original decree is either heard by a Single Judge or by a Division Bench of the High Court. Where the regular first appeal so filed is heard by a Division Bench, the question of there being an intra-court appeal does not arise. It is only in cases where the value is not substantial that the rules of the High Court may provide for the regular first appeal to be heard by a Single Judge.

15. In Such a case to give a further right of appeal where the amount involved is nominal to a Division Bench will really be increasing the workload unnecessarily. We do not find that any prejudice would be caused to the litigants by not providing for intra-court appeal, even where the value involved is large. In such a case, the High Court by Rules, can provide that the Division Bench will hear the regular first appeal. No fault can, thus, be found with the amended provision Section 100A.

16. Our attention has been drawn to Order 7 Rule 11 to which Clauses (e) and (f) have been added which enable the court to reject the plaint where it is not filed in duplicate or where the plaintiff fails to comply with the provisions of Rule 9 of Order 7. It appears to us that the said clauses being procedural would not require the automatic rejection of the plaint at the first instance. If there is any defect as contemplated by Rule 11(e) or non-compliance as referred to in Rule 11(f), the court should ordinarily give an opportunity for rectifying the defects and in the event of the same not being done the court will have the liberty or the right to reject the plaint.

17. In Order 18, Rule 4 has been substituted and Sub-rule (1) provides that in every case examination-in-chief of the witnesses shall be on affidavits and copies thereof shall be supplied to the opposite parties by the party who calls them for evidence. It was contended by Mr. Vaidyanathan that it may not be possible for the party calling the witness to compel the witness to file an affidavit. It often happens that the witness may not be under the control of the party who wants to rely upon his evidence and that witness may have to be summoned through court. Order 16 Rule 1 provides for list of witnesses being filed and summons being issued to them for being present in court for recording their evidence. Rule 1A, on the other hand, refers to production of witnesses without summons where any party to the suit may bring any witness to give any evidence or to produce documents. Reading the provisions of Order 16 and Order 18 together, it appears to us that Order 18 Rule 4(1) will necessarily apply to a case contemplated by Order 16 Rule 1A, i.e. where any party to a suit, without applying for summoning under Rule 1 brings any witness to give evidence or produce any document. In such a case, examination-in-chief is not to be recorded in court but shall be in the form of an affidavit.

18. In cases where the summons have to be issued under Order 16 Rule 1 the stringent provision of Order 18 Rule 4 may not apply. When summons are issued, the court can give an option to the witness summoned either to file an affidavit by way of examination-in-chief or to be present in court for his examination. In appropriate cases, the court can direct the summoned witness to file an affidavit by way of examination-in-chief. In other words, with regard to the summoned witnesses the principle incorporated in Order 18 Rule 4 can be waived. Whether a witness shall be directed to file affidavit or be required to be present in court for recording of his evidence is a matter to be decided by the court in its discretion having regard to the facts of each case.

19. Order 18 Rule 4(2) gives the court the power to decide as to whether evidence of a witness shall be taken either by the court or by the Commissioner. An apprehension was raised to the effect that the court has no discretion and once it decides that the evidence will be recorded by the Commissioner then evidence of other witnesses cannot be recorded in court. We do not think that this is the correct interpretation of Sub-rule 4(2). Under the said sub-rule, the court has the power to direct either all the evidence being recorded in court or all the evidence being recorded by the Commissioner or the evidence being recorded partly by the Commissioner and partly by the court. For example, if the plaintiff want to examine 10 witnesses, then the court may direct that in respect of five witnesses evidence will be recorded by the Commissioner while in the case of other five witnesses evidence will be recorded in court. In this connection, we may refer to Order 18 Rule 4(3) which provides that the evidence may be recorded either in writing or mechanically in the presence of the Judge or the Commissioner. The use of the word 'mechanically' indicates that the evidence can be recorded even with the help of the electronic media, audio or audio-visual, and in fact whenever the evidence is recorded by the Commissioner it will be

advisable that there should be simultaneously at least an audio recording of the statement of the witnesses so as to obviate any controversy at a later stage.

20. Mr. Vaidyanathan drew our attention to the fact that by amendment in 1976, Rule 17A had been inserted in Order which gave an opportunity to a party to adduce additional evidence under the circumstances mentioned therein. He submitted that by the Amendment Act of 2002, this sub-rule has been deleted which may cause hardship to the litigants.

21. We find that in the Code of Civil Procedure, 1908, a provision similar to Rule 17A did not exist. This provision, as already noted, was inserted in 1976. The effect of the deletion of this provision in 2002 is merely to restore status quo ante, that is to say, the position which existed prior to the insertion of Rule 17A in 1976. The remedy, if any, that was available to a litigant with regard to adducing additional evidence prior to 1976 would be available now and no more. It is quite evident that Rule 17A has been deleted with a view that unnecessarily applications are not filed primarily with a view to prolong the trial.

22. Lastly, Mr. Vaidyanathan drew our attention to Rule 9 which was inserted in Order 41 which reads as follows:

"9. Registry of memorandum of appeal--(1) The Court from whose decree an appeal lies shall entertain the memorandum of appeal and shall endorse thereon the date of presentation and shall register the appeal in a book of appeal kept for that purpose.

(2) Such book shall be called the register of appeal."

23. The apprehension was that this rule requires the appeal to be filed in the court from whose decree the appeal is sought to be filed. In our opinion, this is not so. The appeal is to be filed under Order 41 Rule 1 in the court in which it is maintainable. All that Order 41 Rule 9 requires is that a copy of memorandum of appeal which has been filed in the Appellate Court should also be presented before the court against whose decree the appeal has been filed and endorsement thereof shall be made by the decreeing court in a book called the Register of Appeals. Perhaps, the intention of the Legislature was that the court against whose decree an appeal has been filed should be made aware of the factum of the filing of the appeal which may or may not be relevant at a future date. Merely because a memorandum of appeal is not filed under Order 41 Rule 9 will not, to our mind, make the appeal filed in the appellate court as a defective one.

24. No order contentions were raised. As already observed, if any difficulties are felt, these can be placed before the Committee constituted hereinabove. The Committee would consider the said difficulties and make necessary suggestions in its report. It is hoped that the amendments now made in the Code of Civil Procedure would help in expeditious disposal of cases in the trial courts and the appellate courts.

25. It would be open to the Committed to seek directions. The Committee is requested to file its report within a period of four months. To consider the report, list these petitions after four months. Copies of this judgment be sent to the Registrars of all the High Courts so that necessary action can be taken by the respective High Courts and any writ petition pending in those High Courts can be formally disposed of.

## CONSULTATION PAPER ON ADR AND MEDIATION RULES

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### Introduction

In the judgment of the Supreme Court of India in *Salem Bar Association vs. Union of India*, the Supreme Court has requested this committee to prepare draft model rules for Alternative Disputes Resolution (ADR) and also draft rules for mediation under section 89(2)(d) of the Code of Civil Procedure, 1908. Pursuant to the said judgment, we have prepared the following set of draft rules. They are in two parts – the first part consisting of the procedure to be followed by the parties and the Court in the matter of choosing the particular method of ADR. The second part consists of draft rules of mediation under section 89(2)(d) of the Code of Civil Procedure, 1908.

### (Draft) Alternative Dispute Resolution and Mediation Rules, 2003

In exercise of the rule making power under Part X of the Code of Civil Procedure, 1908 (5 of 1908) and clause (d) of sub-section (2) of section 89 of the said Code, the High Court of ..... is hereby issuing the following Rules:

#### Part I

#### Alternative Dispute Resolution Rules

##### Rule 1: Title:

These Rules in Part I shall be called the 'Alternative Dispute Resolution Rules 2003'.

##### Rule 2: Procedure for directing parties to opt for alternative modes of settlement:

- (a) The Court shall, after recording admissions and denials at the first hearing of the suit under Rule 1 of Order X, and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, formulate the terms and settlement and give them to the parties for their observations under sub-section (1) of Section 89, to be furnished to the Court within fifteen days of the first hearing.
- (b) At the next hearing, which shall be not later than fifteen days of the first hearing, the Court shall reformulate the terms of a possible settlement and direct the parties to opt for one of the modes of settlement of disputes outside the Court as specified in clauses (a) to (d) of sub-section (1) of Section 89 read with Rule 1A of Order X, in the manner stated hereunder,

Provided that the Court, in the exercise of such power, shall not refer any dispute to arbitration or to settlement through Lok Adalat or judicial settlement, under the Legal Services Authority Act, 1987, as envisaged under clauses (a) and (c) of sub-section (1) of sec. 89, without the written consent of all the parities to the suit.

**Rule 3: Persons authorized to take decision for the Union of India, State Governments and others:**

For the purpose of Rule 2, where one of the parties is the Union of India or the Government of a State or a Union Territory or a local authority or a Public Sector Undertaking or a statutory corporation or body or public authority, such parties shall be directed by the High Court to nominate a person or group of persons who will be authorized to take a final decision as the mode of Alternative Disputes Resolution it prefers to opt for and such decision shall be communicated to the concerned court within the period specified in these Rules by the said person or group of persons so authorized.

**Rule 4: Court to give guidance to parties while giving direction to opt:**

(a) Before directing the parties to exercise option under clause (b) of Rule 2, the Court shall give such guidance as it deems fit to the parties, by drawing their attention to the relevant factors which parties will have to take into account, before they exercise their option as to the particular mode of settlement, namely:

- (i) that it will be to the advantage of the parties, so far as time and expense are concerned, to opt for one of these modes of settlement rather than seek a trial on the disputes arising in the suit;
- (ii) that, where there is no relationship between the parties which requires to be preserved, it will be in the interests of the parties to seek reference of the matter to arbitration as envisaged in clause (a) of sub-section (1) of sec. 89.
- (iii) that, where there is a relationship between the parties which requires to be preserved, it will be in the interests of parties to seek reference of the matter to conciliation or mediation, as envisaged in clauses (b) or (d) of sub-section (1) of sec. 89.
- (iv) that, where parties are interested in a final settlement which may lead to a compromise, it will be in the interests of the parties to seek reference of the matter to judicial settlement including Lok Adalat as envisaged in clause (c) of sub-section (1) of section 89.
- (v) the difference between the different modes of settlement, namely, arbitration, conciliation, mediation and judicial settlement as explained below:

**'Arbitration'** means the process by which an arbitrator appointed by parties or by the Court, as the case may be, adjudicates the disputes between the parties to the suit and passes an award by the application of the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1990), in so far as they refer to arbitration.

**'Conciliation'** means the process by which a conciliator who is appointed by parties or by the Court, as the case may be, conciliates the disputes between the parties to the suit by the application of the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) in so far as they relate to conciliation, and in particular, in exercise of his powers under sections 67 and 73 of that Act, by making proposals for a settlement of the dispute and by formulating or reformulating the terms of a possible settlement; and has a greater role than a mediator.

**'Mediation'** means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties' own responsibility for making decisions which affect them.

**'Settlement including Lok Adalat'** means a final settlement by way of compromise before a Lok Adalat or before a suitable institution or person, which shall be deemed to be a settlement before a Lok Adalat by virtue of the Legal Services Authority Act, 1987 (39 of 1987).

**Rule 5: Procedure for reference by the Court to the different modes of settlement:**

- (a) Where all parties to the suit decide to exercise their option and to agree for settlement by arbitration, they shall apply to the Court, within fifteen days of the direction of the Court under clause (b) of Rule 2 and the Court shall, within fifteen days of the said application, refer the matter to arbitration and then the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings were referred for settlement by way of arbitration under the provisions of that Act;
- (b) Where all the parties to the suit decide to exercise their option and to agree for settlement by the Lok Adalat, they shall apply to the Court, within fifteen days of the direction under clause (b) of Rule 2 and the Court shall, within fifteen days of the application, transfer the matter to the Lok Adalat under sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and then all the other provisions of that Act shall apply as if the proceedings were referred for settlement by Lok Adalat under the provisions of that Act;
- (c) Where all the parties to the suit decide to exercise their option and to agree for judicial settlement, they shall apply to the Court within fifteen days of the direction under clause (b) of Rule 2 and then the Court shall, within fifteen days of the application, transfer the matter to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and then all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the proceedings were referred for settlement under the provision of that Act;
- (d) Where all the parties are unable to opt or agree to refer the dispute to arbitration, or Lok Adalat, or the judicial settlement, within fifteen days of the direction of the Court under clause (b) of Rule 2, they shall consider if they could agree for reference to conciliation or mediation, within the same period.
- (e) (i) Where all the parties opt and agree for conciliation, they shall apply to the Court, within fifteen days of the direction under Rule 2 and the Court shall, within fifteen days of the application refer the matter to conciliation and then the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply, as if the proceeding were referred for settlement by way of conciliation under the provisions of that Act;
- (e) (ii) Where all the parties opt and agree for mediation, they shall apply to the Court, within fifteen days of the direction under Rule 2 and the Court shall, within fifteen days of the application, refer the matter to mediation and then the Mediation Rules, 2003 in Part II shall apply.

- (f) Where under clause (d), all the parties are not able to opt and agree for conciliation or mediation, one or more parties may apply to the Court within fifteen days of the direction under clause (b) of Rule 2, seeking settlement through conciliation or mediation, as the case may be, and in that event, the Court shall, within a further period of fifteen days issue notice to the other parties to respond to the application, and
- (i) in case all the parties agree, the Court shall refer the matter to conciliation or mediation, as the case may be, as stated in clause (e);
  - (ii) in case all the parties do not agree and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties and that there is a relationship between the parties which has to be preserved, the Court shall refer the matter to conciliation or mediation, as the case may be.
- (g) (i) Where none of the parties apply for reference either to arbitration, or Lok Adalat, or judicial settlement, or for conciliation or mediation, within fifteen days of the direction under clause (b) of Rule 2, the Court shall, within a further period of fifteen days, issue notices to the parties or their representatives fixing the matter for hearing on the question of making a reference either to conciliation or mediation.
- (ii) After hearing the parties or their representatives on the day so fixed, the Court shall, whether parties agree or not, and if there exist elements of the settlement which may be acceptable to the parties, refer the matter to: (A) conciliation, if the Court considers that the matter is fit for conciliation and then the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply, as if the proceedings referred for settlement by way of conciliation under the provisions of that Act; or
- (B) mediation, if the Court considers that the matter is fit for mediation and then the provisions of the Mediation Rules, 2003 in Part II shall apply.

Rule 6: Appearance before the Court upon failure of attempts to settle disputes by conciliation or judicial settlement or mediation:

- (1) Where a suit has been referred for settlement under one of the modes referred to in clause (b) to (d) of sub-section (2) of section 89 read with Rule 1A of Order X and clauses (b) to (g) of Rule 5 of these Rules and has not been settled or where it is felt that it would not be proper in the interests of justice to proceed further with the matter, the suit shall be referred back to the Court with a direction to the parties to appear before the Court on a specific date.
- (2) Upon the reference of the matter back to the Court, the Court shall proceed with the suit in accordance with law.

**Rule 7: Training in alternative methods of resolution of disputes, and preparation of manual:**

- (a) The High Court shall take steps to have training courses conducted in places where the High Court and the District Courts or Courts of equal status are located, by requesting bodies recognized by the High Court or the Universities imparting legal education or retired Faculty Members or other persons who, according to the High Court are well-versed in the techniques of alternative methods of disputes and resolution, to conduct training courses for lawyers and judicial officers.
- (b) (i) The High Court shall nominate a committee of judges, faculty members including retired persons belonging to the above categories, senior members of the Bar, members of the Bar specially qualified in the techniques of alternative disputes resolution, for the purpose referred to in clause (a) and for the purpose of preparing a detailed manual of procedure for alternative dispute resolution to be used by the Courts in the State as well as by the arbitrators, members of the Lok Adalat, conciliators and mediators.
- (ii) The said manual shall describe the various methods of alternative dispute resolution, the manner in which any one of the said methods is to be opted for, the suitability of any particular method for any particular type of dispute and shall specifically deal with the role of conciliators and mediators in disputes which are commercial or domestic in nature or which relate to matrimonial, maintenance and child custody matters.
- (c) The High Court and the District Courts shall periodically conduct seminars and workshops on the subject of alternative dispute resolution procedures throughout the State or States over which the High Court has jurisdiction with a view to bring awareness of such procedures and to impart training to lawyers and judicial officers.
- (d) Persons who gain experience in the matter of alternative dispute resolution procedures, and in particular in regard to conciliation and mediation, shall be given preference for purposes of appointment in the matter of resolution of disputes by the said procedures.

**Rule 8: Applicability to other proceedings:** The provisions of these Rules may be applied to proceedings before the Courts, including Family Courts constituted under the Family Courts Act (66 of 1984), while dealing with matrimonial, maintenance and child custody disputes.

**PART II****(DRAFT) MEDIATION RULES****Rule 1: Title:**

These Rules in Part II shall be called the Mediation Rules, 2003.

**Rule 2: Appointment of mediator:**

- (a) Parties to a suit may all agree on the name of the sole mediator for mediating between them.
- (b) Where, there are two sets of parties and are unable to agree on a sole mediator, each set of parties shall nominate a mediator.
- (c) Where parties agree on a sole mediator under clause (a) or where parties nominate more than one mediator under clause (b), the mediator need not necessarily be from the panel of mediators referred to in Rule 3 nor bear the qualifications referred to in Rule 4 but should not be a person who suffers from the disqualifications referred to in Rule 5.
- (d) Where there are more than two sets of parties having diverse interests, each set shall nominate a person on its behalf and the said nominees shall select the sole mediator and failing unanimity in that behalf, the Court shall appoint a sole mediator.

**Rule 3: Panel of mediators:**

- (a) The High Court shall, for the purpose of appointing mediators between parties in suits filed on its original side, prepare a panel of mediators and publish the same on its Notice Board, within thirty days of the coming into force of these Rules, with copy to the Bar Association attached to the original side of the High Court.
- (b) (i) The Courts of the Principal District and Sessions Judge in each District or the Courts of the Principal Judge of the City Civil Court or Courts of equal status shall, for the purposes of appointing mediators to mediate between parties in suits filed on their original side, prepare a panel of mediators, within a period of sixty days of the commencement of these Rules, after obtaining the approval of the High Court to the names included in the panel, and shall publish the same on their respective Notice Boards.
  - (ii) Copies of the said panels referred to in clause (i) shall be forwarded to all the Courts of equivalent jurisdiction or Courts subordinate to the Courts referred to in sub-clause (i) and to the Bar associations attached to each of the Courts:
- (c) The consent of the persons whose names are included in the panel shall be obtained before empanelling them.
- (d) The panel of names shall contain a detailed Annexure giving details of the qualifications of the mediators and their professional or technical experience in different fields.

**Rule 4: Qualifications of persons to be empanelled under Rule 3:**

The following persons shall be treated as qualified and eligible for being enlisted in the panel of mediators under Rule 3, namely:

- (a) (i) Retired Judges of the Supreme Court of India;
  - (ii) Retired Judges of the High Courts;
  - (iii) Retired District and Sessions Judges or retired Judges of the City Civil Court or Courts of equivalent status.
- (b) Legal practitioners with at least fifteen years standing at the Bar at the level of the Supreme Court or the High Court; or the District Courts or Courts of equivalent status.

(c) Experts or other professionals with at least fifteen years standing; or retired senior bureaucrats or retired senior executives;

(d) Institutions which are themselves experts in mediation and have been recognized as such by the High Court.

**Rule 5: Disqualifications of persons:**

The following persons shall be deemed to be disqualified for being empanelled as mediators:

- (i) any person who has been adjudged as insolvent or persons
  - (a) against whom criminal charges involving moral turpitude are framed by a criminal court and are pending, or
  - (b) persons who have been convicted by a criminal court for any offence involving moral turpitude;
- (ii) any person against whom disciplinary proceedings have been initiated by the appropriate disciplinary authority which are pending or have resulted in a punishment.
- (iii) any person who is interested or connected with the subject-matter of dispute or is related to any one of the parties or to those who represent them, unless such objection is waived by all the parties in writing.
- (iv) any legal practitioner who has or is appearing for any of the parties in the suit or in any other suit or proceedings.
- (v) such other categories of persons as may be notified by the High Court.

**Rule 6: Preference:**

The Court shall, while nominating any person from the panel of mediators referred to in Rule 3, consider his suitability for resolving the particular class of dispute involved in the suit and shall give preference to those who have proven record of successful mediation or who have special qualification or experience in mediation.

**Rule 7: Duty of mediator to disclose certain facts:**

- (a) When a person is approached in connection with his possible appointment as a mediator, he shall disclose in writing to the parties, any circumstances likely to give rise to a justifiable doubt as to his independence or impartiality.
- (b) Every mediator shall, from the time of his appointment and throughout the continuance of the mediation proceedings, without delay, disclose to the parties in writing, about the existence of any of the circumstances referred to in clause (a).

**Rule 8: Cancellation of appointment:**

Upon information furnished by the mediator under Rule 6 or upon any other information received from the parties or other persons, if the Court, in which the suit is filed, is satisfied, after conducting such inquiry as it deems fit, and after giving a hearing to the mediator, that the said information has raised a justifiable doubt as to the mediator's independence or impartiality, it shall cancel the appointment by a reasoned order and replace him by another mediator.

**Rule 9: Removal or deletion from panel:**

(a) A person whose name is placed in the panel referred to in Rule 3 may be removed or his name be deleted from the said panel, by the Court which empanelled him, if:

- (i) he resigns or withdraws his name from the panel for any reason;

- (ii) he is declared insolvent by any Court or is declared of unsound mind;
- (iii) he exhibits or displays conduct, during the continuance of the mediation proceedings, which is unbecoming of a mediator;
- (iv) the Court which empanelled, upon receipt of information, if it is satisfied, after conducting such inquiry as it deem fit, is of the view, that it is not possible or desirable to continue the name of that person in the panel,  
provided that, before removing or deleting his name, under clause (iii) and (iv), the Court shall hear the mediator whose name is proposed to be removed or deleted from the panel and shall pass a reasoned order.

**Rule 10: Procedure of mediation:**

- (a) The parties may agree on the procedure to be followed by the mediator in the conduct of the mediation proceedings.
- (b) Where the parties do not agree on any particular procedure to be followed by the mediator, the mediator shall follow the procedure hereinafter mentioned, namely:
  - (i) he shall fix, in consultation with the parties, a time schedule, the dates and the time of each mediation session, where all parties have to be present;
  - (ii) he shall hold the mediation at any convenient location agreeable to him and the parties, as he may determine;
  - (iii) he may conduct joint or separate meetings with the parties;
  - (iv) each party shall, ten days before a session, provide to the mediator a brief memorandum setting forth the issues, which according to it, need to be resolved, and its position in respect to those issues and all information reasonably required for the mediator to understand the issue; such memoranda shall also be mutually exchanged between the parties;
  - (v) each party shall furnish to the mediator such other information as may be required by him in connection with the issues to be resolved.
- (c) Where there is more than one mediator, the mediator nominated by each party shall first confer with the party that nominated him and shall thereafter interact with the other mediators, with a view to resolving the disputes

**Rule 11: Mediator not bound by Evidence Act, 1872 or Code of Civil Procedure, 1908:**

The mediator shall not be bound by the Code of Civil Procedure, 1908 or the Evidence Act, 1872, but shall be guided by principles of fairness and justice, have regard to the rights and obligations of the parties, usages of trade, if any, and the circumstances of the dispute.

**Rule 12: Non-attendance of parties at sessions or meetings on due dates:**

- (a) The parties shall be present personally or through their counsel or power of attorney holders at the meetings or sessions notified by the mediator.
- (b) If a party fails to attend a session or a meeting notified by the mediator, other parties or the mediator can apply to the Court in which the suit is filed, to issue appropriate directions to that party to attend before the mediator and if the Court finds that a party is absenting himself before the mediator without sufficient reason, the Court may take action against the said party by imposition of costs or by taking action for contempt.
- (c) The parties not resident in India, may be represented by their counsel or power of attorney holders at the sessions or meetings.

**Rule 13: Administrative assistance:**

In order to facilitate the conduct of mediation proceedings, the parties, or the mediator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

**Rule 14: Offer of settlement by parties:**

- (a) Any party to the suit may, 'without prejudice', offer a settlement to the other party at any stage of the proceedings, with notice to the mediator.
- (b) Any party to the suit may make a, 'with prejudice' offer, to the other party at any stage of the proceedings, with notice to the mediator.

**Rule 15: Role of mediator:**

The mediator shall attempt to facilitate voluntary resolution of the dispute by the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to solve the dispute, emphasizing that it is the responsibility of the parties to take decision which effect them; he shall not impose any terms of settlement on the parties.

**Rule 16: Parties alone responsible for taking decision:**

The parties must understand that the mediator only facilitates in arriving at a decision to resolve disputes and that he will not and cannot impose any settlement nor does the mediator give any warranty that the mediation will result in a settlement. The mediator shall not impose any decision on the parties.

**Rule 17: Representation of parties:**

Parties may be present before the mediator personally or through their counsel or lawful power of attorney holders.

**Rule 18: Time limit for completion of mediation:**

On the expiry of sixty days from the date fixed for the first appearance of the parties before the mediator, the mediation shall stand terminated, unless the Court, which referred the matter, either suo motu, or upon request by any of the parties, and upon hearing all the parties, is of the view that extension of time is necessary or may be useful; but such extension shall not be beyond a further period of thirty days.

**Rule 19: Parties to act in good faith:**

While no one can be compelled to commit to settle his case in advance of mediation, all parties shall commit to participate in the proceedings in good faith with the intention to settle the disputes, if possible.

**Rule 20: Confidentiality, disclosure and inadmissibility of information:**

- (1) When a mediator receives factual information concerning the dispute from any party, he shall disclose the substance of that information to the other party, so that the other party may have an opportunity to present such explanation as it may consider appropriate,

Provided that, when a party gives information to the mediator subject to a specific condition that it be kept confidential, the mediator shall not disclose that information to the other party.

(2) Receipt or perusal, or preparation of records, reports or other documents by the mediator, while serving in that capacity, shall be confidential and the mediator shall not be compelled to divulge information regarding those documents nor as to what transpired during the mediation.

(3) Parties shall maintain confidentiality in respect of events that transpired during mediation and shall not rely on or introduce the said information in any other proceedings as to:

- (a) views expressed by a party in the course of the mediation proceedings;
- (b) documents obtained during the mediation which were expressly required to be treated as confidential or other notes, drafts or information given by parties or mediators;
- (c) proposals made or views expressed by the mediator;
- (d) admission made by a party in the course of mediation proceedings;
- (e) the fact that a party had or had not indicated willingness to accept a proposal;

(4) There shall be no stenographic or audio or video recording of the mediation proceedings.

**Rule 21: Privacy:** Mediation sessions and meetings are private; only the concerned parties or their counsel or power of attorney holders can attend. Other persons may attend only with the permission of the parties and with the consent of the mediator.

**Rule 22: Immunity:**

No mediator shall be held liable for anything bona fide done or omitted to be done by him during the mediation proceedings for civil or criminal action nor shall he be summoned by any party to the suit to appear in a Court of law to testify in regard to information received by him or action taken by him or in respect of drafts or records prepared by him or shown to him during the mediation proceedings.

**Rule 23: Communication between mediator and the Court:**

- (a) In order to preserve the confidence of parties in the Court and the neutrality of the mediator, there should be no communication between the mediator and the Court, except as stated in clauses (b) and (c) of this Rule.
- (b) If any communication between the mediator and the Court is necessary, it shall be in writing and copies of the same shall be given to the parties or their counsel or power of attorney.
- (c) Communication between the mediator and the Court shall be limited to communication by the mediator:
  - (i) with the Court about the failure of party to attend;
  - (ii) with the Court with the consent of the parties;
  - (iii) regarding his assessment that the case is not suited for settlement through mediation;
  - (iv) that the parties have settled the dispute or disputes.

**Rule 24: Settlement Agreement:**

- (1) Where an agreement is reached between the parties in regard to all the issues in the suit or some of the issues, the same shall be reduced to writing and signed by the parties or their power of attorney holder. If any counsel have represented the parties, they shall attest the signature of their respective clients.
- (2) The agreement of the parties so signed and attested shall be submitted to the mediator who shall, with a covering letter signed by him, forward the same to the Court in which the suit is pending.
- (3) Where no agreement is arrived at between the parties, before the time limit stated in Rule 22 or where, the mediator is of the view that no settlement is possible, he shall report the same to the said Court in writing.

**Rule 25: Court to fix a date for recording settlement and passing decree:**

- (1) Within seven days of the receipt of any settlement, the Court shall issue notice to the parties fixing a day for recording the settlement, such date not being beyond a further period of fourteen days from the date of receipt of settlement, and the Court shall record the settlement.
- (2) The Court shall then pass a decree in accordance with the settlement so recorded, if the settlement disposes of all the issues in the suit.
- (3) If the settlement disposes of only certain issues arising in the suit, the Court shall record the settlement on the date fixed for recording the settlement and shall include the terms of the said settlement in the judgment, while deciding the other issues.

**Rule 26: Fee of mediator and costs:**

- (1) At the time of referring the disputes to mediation, the Court shall, after consulting the mediator and the parties, fix the fee of the mediator.
- (2) As far as possible, a consolidated sum may be fixed rather than for each session or meeting.
- (3) Where there are two mediators as in clause (b) of Rule 2, the Court shall fix the fee payable to the mediators which shall be shared equally by the two sets of parties.
- (4) The expense of the mediation including the fee of the mediator, costs of administrative assistance, and other ancillary expenses concerned, shall be born equally by the various contesting parties or as may be otherwise directed by the Court.
- (5) Each party shall bear the costs for production of witnesses on his side including experts, or for production of documents.
- (6) The mediator may, before the commencement of mediation, direct the parties to deposit equal sums, tentatively, to the extent of 40% of the probable costs of the mediation, as referred to in clause (3), including his fee. The remaining 60% shall be deposited with the mediator, after the conclusion of mediation. The amount deposited towards costs shall be expended by the mediator by obtaining receipts and a statement of account shall be filed, by the mediator in the Court.

- (7) If any party or parties do not pay the amount referred to sub-rule (5), the Court shall, on the application of the mediator, or any party, issue appropriate directions to the concerned parties.
- (8) The expense of mediation including fee, if not paid by the parties, the Court shall, on the application of the mediator or parties, direct the concerned parties to pay, and if they do not pay, the Court shall recover the said amounts as if there was a decree for the said amount.

**Rule 27: Ethics to be followed by mediator:**

The mediator shall:

- (1) follow and observe these Rules strictly and with due diligence;
- (2) not carry on any activity or conduct which could reasonably be considered as conduct unbecoming of a mediator;
- (3) uphold the integrity and fairness of the mediation process;
- (4) ensure that the parties involved in the mediation are fairly informed and have an adequate understanding of the procedural aspects of the process;
- (5) satisfy himself/herself that he/she is qualified to undertake and complete the assignment in a professional manner;
- (6) disclose any interest or relationship likely to affect impartiality or which might seek an appearance of partiality or bias;
- (7) avoid, while communicating with the parties, any impropriety or appearance of impropriety;
- (8) be faithful to the relationship of trust and confidentiality imposed in the office of mediator;
- (9) conduct all proceedings related to the resolutions of a dispute, in accordance with the applicable law;
- (10) recognize that mediation is based on principles of self-determination by the parties and that mediation process relies upon the ability of parties to reach a voluntary, undisclosed agreement;
- (11) maintain the reasonable expectations of the parties as to confidentiality;
- (12) refrain from promises or guarantees of results.

**Rule 28: Transitory provisions:**

Until a panel of arbitrators is prepared by the High Court and the District Court as stated in Rule 2, the Courts, referred to in Rule 2, may nominate a mediator of their choice if the mediator belongs to the various classes of persons referred to in Rule 2 and is duly qualified and is not disqualified, taking into account the suitability of the mediator for resolving the particular dispute.



# भारत का राजपत्र

## The Gazette of India

असाधारण

## EXTRAORDINARY

भाग II — खण्ड 1

PART II — Section 1

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इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह अलग संकलन के रूप में रखा जा सके।  
 Separate paging is given to this Part in order that it may be filed as a separate compilation.

## MINISTRY OF LAW AND JUSTICE

(Legislative Department)

*New Delhi, the 9th January, 2009/Pausa 19, 1930 (Saka)*

The following Act of Parliament received the assent of the President on the 7th January, 2009, and is hereby published for general information:—

## THE GRAM NYAYALAYAS ACT, 2008

No. 4 OF 2009

[7th January, 2009.]

An Act to provide for the establishment of Gram Nyayalayas at the grass roots level for the purposes of providing access to justice to the citizens at their doorsteps and to ensure that opportunities for securing justice are not denied to any citizen by reason of social, economic or other disabilities and for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Fifty-ninth Year of the Republic of India as follows:—

## CHAPTER I

## PRELIMINARY

1. (1) This Act may be called the Gram Nyayalayas Act, 2008.

(2) It extends to the whole of India except the State of Jammu and Kashmir, the State of Nagaland, the State of Arunachal Pradesh, the State of Sikkim and to the tribal areas.

*Explanation.*—In this sub-section, the expression “tribal areas” means the areas specified in Parts I, II, II A and III of the Table below paragraph 20 of the Sixth Schedule to the

Short title,  
extent and  
commencement.

Constitution within the State of Assam, the State of Meghalaya, the State of Tripura and the State of Mizoram, respectively.

(3) It shall come into force on such date as the Central Government may, by notification published in the Official Gazette, appoint; and different dates may be appointed for different States.

**Definitions.**

2. In this Act, unless the context otherwise requires,—

(a) "Gram Nyayalaya" means a court established under sub-section (1) of section 3;

(b) "Gram Panchayat" means an institution (by whatever name called) of self-government constituted, at the village level, under article 243B of the Constitution, for the rural areas;

(c) "High Court" means,—

(i) in relation to any State, the High Court for that State;

(ii) in relation to a Union territory to which the jurisdiction of the High Court for a State has been extended by law, that High Court;

(iii) in relation to any other Union territory, the highest Court of criminal appeal for that territory other than the Supreme Court of India;

(d) "notification" means a notification published in the Official Gazette and the expression "notified" shall be construed accordingly;

(e) "Nyayadhikari" means the presiding officer of a Gram Nyayalaya appointed under section 5;

(f) "Panchayat at intermediate level" means an institution (by whatever name called) of self-government constituted, at the intermediate level, under article 243B of the Constitution, for the rural areas in accordance with the provisions of Part IX of the Constitution;

(g) "prescribed" means prescribed by rules made under this Act;

(h) "Schedule" means the Schedule appended to this Act;

(i) "State Government", in relation to a Union territory, means the administrator thereof appointed under article 239 of the Constitution;

(j) words and expressions used herein and not defined but defined in the Code of Civil Procedure, 1908 or the Code of Criminal Procedure, 1973 shall have the meanings respectively assigned to them in those Codes.

5 of 1908.  
2 of 1974.

## CHAPTER II

### GRAM NYAYALAYA

**Establishment  
of Gram  
Nyayalayas.**

3. (1) For the purpose of exercising the jurisdiction and powers conferred on a Gram Nyayalaya by this Act, the State Government, after consultation with the High Court, may, by notification, establish one or more Gram Nyayalayas for every Panchayat at intermediate level or a group of contiguous Panchayats at intermediate level in a district or where there is no Panchayat at intermediate level in any State, for a group of contiguous Gram Panchayats.

(2) The State Government shall, after consultation with the High Court, specify, by notification, the local limits of the area to which the jurisdiction of a Gram Nyayalaya shall extend and may, at any time, increase, reduce or alter such limits.

(3) The Gram Nyayalayas established under sub-section (1) shall be in addition to the courts established under any other law for the time being in force.

4. The headquarters of every Gram Nyayalaya shall be located at the headquarters of the intermediate Panchayat in which the Gram Nyayalaya is established or such other place as may be notified by the State Government.	Headquarters of Gram Nyayalaya.
5. The State Government shall, in consultation with the High Court, appoint a Nyayadhikari for every Gram Nyayalaya.	Appointment of Nyayadhikari.
6. (1) A person shall not be qualified to be appointed as a Nyayadhikari unless he is eligible to be appointed as a Judicial Magistrate of the first class.	Qualifications for appointment of Nyayadhikari.
(2) While appointing a Nyayadhikari, representation shall be given to the members of the Scheduled Castes, the Scheduled Tribes, women and such other classes or communities as may be specified by notification, by the State Government from time to time.	
7. The salary and other allowances payable to, and the other terms and conditions of service of, a Nyayadhikari shall be such as may be applicable to the Judicial Magistrate of the first class.	Salary, allowances and other terms and conditions of service of Nyayadhikari.
8. The Nyayadhikari shall not preside over the proceedings of a Gram Nyayalaya in which he has any interest or is otherwise involved in the subject matter of the dispute or is related to any party to such proceedings and in such a case, the Nyayadhikari shall refer the matter to the District Court or the Court of Session, as the case may be, for transferring it to any other Nyayadhikari.	Nyayadhikari not to preside over proceedings in which he is interested.
9. (1) The Nyayadhikari shall periodically visit the villages falling under his jurisdiction and conduct trial or proceedings at any place which he considers is in close proximity to the place where the parties ordinarily reside or where the whole or part of the cause of action had arisen:	Nyayadhikari to hold mobile courts and conduct proceedings in villages.
Provided that where the Gram Nyayalaya decides to hold mobile court outside its headquarters, it shall give wide publicity as to the date and place where it proposes to hold mobile court.	
(2) The State Government shall extend all facilities to the Gram Nyayalaya including the provision of vehicles for holding mobile court by the Nyayadhikari while conducting trial or proceedings outside its headquarters.	
10. Every Gram Nyayalaya established under this Act shall use a seal of the court in such form and dimensions as may be prescribed by the High Court with the approval of the State Government.	Seal of Gram Nyayalaya.

### CHAPTER III

#### JURISDICTION, POWERS AND AUTHORITY OF GRAM NYAYALAYA

2 of 1974.	11. Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or the Code of Civil Procedure, 1908 or any other law for the time being in force, the Gram Nyayalaya shall exercise both civil and criminal jurisdiction in the manner and to the extent provided under this Act.	Jurisdiction of Gram Nyayalaya.
5 of 1908.		
2 of 1974.	12. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any other law for the time being in force, the Gram Nyayalaya may take cognizance of an offence on a complaint or on a police report and shall—  (a) try all offences specified in Part I of the First Schedule; and  (b) try all offences and grant relief, if any, specified under the enactments included in Part II of that Schedule.	Criminal jurisdiction.

(2) Without prejudice to the provisions of sub-section (1), the Gram Nyayalaya shall also try all such offences or grant such relief under the State Acts which may be notified by the State Government under sub-section (3) of section 14.

Civil jurisdiction.

13. (1) Notwithstanding anything contained in the Code of Civil Procedure, 1908 or any other law for the time being in force, and subject to sub-section (2), the Gram Nyayalaya shall have jurisdiction to—

5 of 1908.

(a) try all suits or proceedings of a civil nature falling under the classes of disputes specified in Part I of the Second Schedule;

(b) try all classes of claims and disputes which may be notified by the Central Government under sub-section (1) of section 14 and by the State Government under sub-section (3) of the said section.

(2) The pecuniary limits of the Gram Nyayalaya shall be such as may be specified by the High Court, in consultation with the State Government, by notification, from time to time.

Power to amend Schedules.

14. (1) Where the Central Government is satisfied that it is necessary or expedient so to do, it may, by notification, add to or omit any item in Part I or Part II of the First Schedule or Part II of the Second Schedule, as the case may be, and it shall be deemed to have been amended accordingly.

(2) Every notification issued under sub-section (1) shall be laid before each House of Parliament.

(3) If the State Government is satisfied that it is necessary or expedient so to do, it may, in consultation with the High Court, by notification, add to any item in Part III of the First Schedule or Part III of the Second Schedule or omit from it any item in respect of which the State Legislature is competent to make laws and thereupon the First Schedule or the Second Schedule, as the case may be, shall be deemed to have been amended accordingly.

(4) Every notification issued under sub-section (3) shall be laid before the State Legislature.

Limitation.

15. (1) The provisions of the Limitation Act, 1963 shall be applicable to the suits triable by the Gram Nyayalaya.

36 of 1963.

(2) The provisions of Chapter XXXVI of the Code of Criminal Procedure, 1973 shall be applicable in respect of the offences triable by the Gram Nyayalaya.

2 of 1974.

Transfer of pending proceedings.

16. (1) The District Court or the Court of Session, as the case may be, with effect from such date as may be notified by the High Court, may transfer all the civil or criminal cases, pending before the courts subordinate to it, to the Gram Nyayalaya competent to try or dispose of such cases.

(2) The Gram Nyayalaya may, in its discretion, either retry the cases or proceed from the stage at which it was transferred to it.

Duties of ministerial officers.

17. (1) The State Government shall determine the nature and categories of the officers and other employees required to assist a Gram Nyayalaya in the discharge of its functions and provide the Gram Nyayalaya with such officers and other employees as it may think fit.

(2) The salaries and allowances payable to, and other conditions of service of, the officers and other employees of the Gram Nyayalaya shall be such as may be prescribed by the State Government.

(3) The officers and other employees of a Gram Nyayalaya shall perform such duties as may, from time to time, be assigned to them by the Nyayadhikari.

## CHAPTER IV

## PROCEDURE IN CRIMINAL CASES

2 of 1974.

**18. The provisions of this Act shall have effect notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any other law, but save as expressly provided in this Act, the provisions of the Code shall, in so far as they are not inconsistent with the provisions of this Act, apply to the proceedings before a Gram Nyayalaya; and for the purpose of the said provisions of the Code, the Gram Nyayalaya shall be deemed to be a Court of Judicial Magistrate of the first class.**

Overriding effect of Act in criminal trial.

2 of 1974.

**19. (1) Notwithstanding anything contained in sub-section (1) of section 260 or sub-section (2) of section 262 of the Code of Criminal Procedure, 1973, the Gram Nyayalaya shall try the offences in a summary way in accordance with the procedure specified in Chapter XXI of the said Code and the provisions of sub-section (1) of section 262 and sections 263 to 265 of the said Code, shall, so far as may be, apply to such trial.**

Gram Nyayalaya to follow summary trial procedure.

2 of 1974.

**(2) When, in the course of a summary trial, it appears to the Nyayadhikari that the nature of the case is such that it is undesirable to try it summarily, the Nyayadhikari shall recall any witness who may have been examined and proceed to re-hear the case in the manner provided under the Code of Criminal Procedure, 1973.**

2 of 1974.

**20. A person accused of an offence may file an application for plea bargaining in Gram Nyayalaya in which such offence is pending trial and the Gram Nyayalaya shall dispose of the case in accordance with the provisions of Chapter XXIA of the Code of Criminal Procedure, 1973.**

Plea bargaining before Gram Nyayalaya.

2 of 1974.

**21. (1) For the purpose of conducting criminal cases in the Gram Nyayalaya on behalf of the Government, the provisions of section 25 of the Code of Criminal Procedure, 1973 shall apply.**

Conduct of cases in Gram Nyayalaya and legal aid to parties.

39 of 1987.

**(2) Notwithstanding anything contained in sub-section (1), in a criminal proceeding before the Gram Nyayalaya, the complainant may engage an advocate of his choice at his expense to present the case of prosecution with the leave of the Gram Nyayalaya.**

Pronouncement of judgment.

**(3) The State Legal Services Authority, constituted under section 6 of the Legal Services Authorities Act, 1987, shall prepare a panel of advocates and assign at least two of them to be attached to each Gram Nyayalaya so that their services may be provided by the Gram Nyayalaya to the accused unable to engage an advocate.**

**22. (1) The judgment in every trial shall be pronounced by the Nyayadhikari in open court immediately after the termination of the trial or at any subsequent time, not exceeding fifteen days, of which notice shall be given to the parties.**

**(2) The Gram Nyayalaya shall deliver a copy of its judgment immediately to both the parties free of cost.**

## CHAPTER V

## PROCEDURE IN CIVIL CASES

5 of 1908.

**23. The provisions of this Act shall have effect notwithstanding anything contained in the Code of Civil Procedure, 1908 or any other law, but save as expressly provided in this Act, the provisions of the Code shall, in so far as they are not inconsistent with the provisions of this Act, apply to the proceedings before a Gram Nyayalaya; and for the purpose of the said provisions of the Code, the Gram Nyayalaya shall be deemed to be a civil court.**

Overriding effect of Act in civil proceedings.

**24. (1) Notwithstanding anything contained in any other law for the time being in force, every suit, claim or dispute under this Act shall be instituted by making an application to the Gram Nyayalaya in such form, in such manner, and accompanied by such fee, not exceeding rupees one hundred, as may be prescribed by the High Court, from time to time, in consultation with the State Government.**

Special procedure in civil disputes.

(2) Where a suit, claim or dispute has been duly instituted, a summons shall be issued by the Gram Nyayalaya, accompanied by a copy of the application made under sub-section (1), to the opposite party to appear and answer the claim by such date as may be specified therein and the same shall be served in such manner as may be prescribed by the High Court.

(3) After the opposite party files his written statement, the Gram Nyayalaya shall fix a date for hearing and inform all the parties to be present in person or through their advocates.

(4) On the date fixed for hearing, the Gram Nyayalaya shall hear both the parties in regard to their respective contentions and where the dispute does not require recording of any evidence, pronounce the judgment; and in case where it requires recording of evidence, the Gram Nyayalaya shall proceed further.

(5) The Gram Nyayalaya shall also have the power,—

(a) to dismiss any case for default or to proceed *ex parte*; and

(b) to set aside any such order of dismissal for default or any order passed by it for hearing the case *ex parte*.

(6) In regard to any incidental matter that may arise during the course of the proceedings, the Gram Nyayalaya shall adopt such procedure as it may deem just and reasonable in the interest of justice.

(7) The proceedings shall, as far as practicable, be consistent with the interests of justice and the hearing shall be continued on a day-to-day basis until its conclusion, unless the Gram Nyayalaya finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded in writing.

(8) The Gram Nyayalaya shall dispose of the application made under sub-section (1) within a period of six months from the date of its institution.

(9) The judgment in every suit, claim or dispute shall be pronounced in open court by the Gram Nyayalaya immediately after conclusion of hearing or at any subsequent time, not exceeding fifteen days, of which notice shall be given to the parties.

(10) The judgment shall contain a concise statement of the case, the point for determination, the decision thereon and the reasons for such decision.

(11) A copy of the judgment shall be delivered free of cost to both the parties within three days from the date of pronouncement of the judgment.

**25. (1)** Notwithstanding anything contained in the Code of Civil Procedure, 1908, the judgment passed by a Gram Nyayalaya shall be deemed to be a decree and it shall be executed by a Gram Nyayalaya as a decree of the civil court and for this purpose, the Gram Nyayalaya shall have all the powers of a civil court. 5 of 1908.

(2) The Gram Nyayalaya shall not be bound by the procedure in respect of execution of a decree as provided in the Code of Civil Procedure, 1908 and it shall be guided by the principles of natural justice. 5 of 1908.

(3) A decree may be executed either by the Gram Nyayalaya which passed it or by the other Gram Nyayalaya to which it is sent for execution.

**26. (1)** In every suit or proceeding, endeavour shall be made by the Gram Nyayalaya in the first instance, where it is possible to do so, consistent with the nature and circumstances of the case, to assist, persuade and conciliate the parties in arriving at a settlement in respect of the subject matter of the suit, claim or dispute and for this purpose, a Gram Nyayalaya shall follow such procedure as may be prescribed by the High Court.

(2) Where in any suit or proceeding, it appears to the Gram Nyayalaya at any stage that there is a reasonable possibility of a settlement between the parties, the Gram Nyayalaya may adjourn the proceeding for such period as it thinks fit to enable them to make attempts to effect such a settlement.

Execution of  
decrees and  
orders of  
Gram  
Nyayalaya.

Duty of Gram  
Nyayalaya to  
make efforts  
for concilia-  
tion and  
settlement of  
civil disputes.

(3) Where any proceeding is adjourned under sub-section (2), the Gram Nyayalaya may, in its discretion, refer the matter to one or more Conciliators for effecting a settlement between the parties.

(4) The power conferred by sub-section (2) shall be in addition to, and not in derogation of, any other power of the Gram Nyayalaya to adjourn the proceeding.

**27. (1)** For the purposes of section 26, the District Court shall, in consultation with the District Magistrate, prepare a panel consisting of the names of social workers at the village level having integrity for appointment as Conciliators who possess such qualifications and experience as may be prescribed by the High Court.

Appointment of Conciliators.

(2) The sitting fee and other allowances payable to, and the other terms and conditions for engagement of, Conciliators shall be such as may be prescribed by the State Government.

Transfer of civil disputes.

**28.** The District Court having jurisdiction may, on an application made by any party or when there is considerable pendency of cases in one Gram Nyayalaya or whenever it considers necessary in the interests of justice, transfer any case pending before a Gram Nyayalaya to any other Gram Nyayalaya within its jurisdiction.

## CHAPTER VI

### PROCEDURE GENERALLY

**29.** The proceedings before the Gram Nyayalaya and its judgment shall, as far as practicable, be in one of the official languages of the State other than the English language.

Proceedings to be in the official language of the State.

**30.** A Gram Nyayalaya may receive as evidence any report, statement, document, information or matter that may, in its opinion, assist it to deal effectively with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872.

Application of Indian Evidence Act, 1872.

1 of 1872.

**31.** In suits or proceedings before a Gram Nyayalaya, it shall not be necessary to record the evidence of witnesses at length, but the Nyayadhikari, as the examination of each witness proceeds, shall, record or cause to be recorded, a memorandum of substance of what the witness deposes, and such memorandum shall be signed by the witness and the Nyayadhikari and it shall form part of the record.

Record of oral evidence.

**32. (1)** The evidence of any person where such evidence is of a formal character, may be given by affidavit and may, subject to all just exceptions, be read in evidence in any suit or proceeding before a Gram Nyayalaya.

Evidence of formal character on affidavit.

(2) The Gram Nyayalaya may, if it thinks fit, and shall, on the application of any of the parties to the suit or proceeding, summon and examine any such person as to the facts contained in his affidavit.

## CHAPTER VII

### APPEALS

2 of 1974.

**33. (1)** Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any other law, no appeal shall lie from any judgment, sentence or order of a Gram Nyayalaya except as provided hereunder.

Appeal in criminal cases.

(2) No appeal shall lie where—

(a) an accused person has pleaded guilty and has been convicted on such plea;

(b) the Gram Nyayalaya has passed only a sentence of fine not exceeding one thousand rupees.

(3) Subject to sub-section (2), an appeal shall lie from any other judgment, sentence or order of a Gram Nyayalaya to the Court of Session.

(4) Every appeal under this section shall be preferred within a period of thirty days from the date of judgment, sentence or order of a Gram Nyayalaya:

Provided that the Court of Session may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the said period.

(5) An appeal preferred under sub-section (3) shall be heard and disposed of by the Court of Session within six months from the date of filing of such appeal.

(6) The Court of Session may, pending disposal of the appeal, direct the suspension of the sentence or order appealed against.

(7) The decision of the Court of Session under sub-section (5) shall be final and no appeal or revision shall lie from the decision of the Court of Session:

Provided that nothing in this sub-section shall preclude any person from availing of the judicial remedies available under articles 32 and 226 of the Constitution.

Appeal in civil cases.

34. (1) Notwithstanding anything contained in the Code of Civil Procedure, 1908 or 5 of 1908. any other law, and subject to sub-section (2), an appeal shall lie from every judgment or order, not being an interlocutory order, of a Gram Nyayalaya to the District Court.

(2) No appeal shall lie from any judgment or order passed by the Gram Nyayalaya—

(a) with the consent of the parties;

(b) where the amount or value of the subject matter of a suit, claim or dispute does not exceed rupees one thousand;

(c) except on a question of law, where the amount or value of the subject matter of such suit, claim or dispute does not exceed rupees five thousand.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Gram Nyayalaya:

Provided that the District Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the said period.

(4) An appeal preferred under sub-section (1) shall be heard and disposed of by the District Court within six months from the date of filing of the appeal.

(5) The District Court may, pending disposal of the appeal, stay execution of the judgment or order appealed against.

(6) The decision of the District Court under sub-section (4) shall be final and no appeal or revision shall lie from the decision of the District Court:

Provided that nothing in this sub-section shall preclude any person from availing of the judicial remedies available under articles 32 and 226 of the Constitution.

## CHAPTER VIII

### MISCELLANEOUS

Assistance of police to Gram Nyayalayas.

35. (1) Every police officer functioning within the local limits of jurisdiction of a Gram Nyayalaya shall be bound to assist the Gram Nyayalaya in the exercise of its lawful authority.

(2) Whenever the Gram Nyayalaya, in the discharge of its functions, directs a revenue officer or police officer or Government servant to provide assistance to the Gram Nyayalaya, he shall be bound to provide such assistance.

Nyayadhikaris and employees, etc., to be public servants.

36. The Nyayadhikaris and the officers and other employees of the Gram Nyayalayas shall be deemed, when acting or purporting to act in pursuance of any of the provisions of this Act, to be public servants within the meaning of section 21 of the Indian Penal Code. 45 of 1860.

**37.** The High Court may authorise any judicial officer superior in rank to the Nyayadhikari to inspect the Gram Nyayalayas within his jurisdiction once in every six months or such other period as the High Court may prescribe and issue such instructions, as he considers necessary and submit a report to the High Court.

Inspection of Gram Nyaya-layas.

**38. (1)** If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act, as may appear to it to be necessary or expedient for removing the difficulty:

Power to remove difficulties.

Provided that no order shall be made under this section after the expiry of a period of three years from the date of commencement of this Act.

**(2)** Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

**39. (1)** The High Court may, by notification, make rules for carrying out the provisions of this Act.

Power of High Court to make rules.

**(2)** In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the form and dimensions of the seal of the Gram Nyayalaya under section 10;

(b) the form, the manner and the fee for institution of suit, claim or proceeding under sub-section (1) of section 24;

(c) manner of service on opposite party under sub-section (2) of section 24;

(d) procedure for conciliation under sub-section (1) of section 26;

(e) qualifications and experience of Conciliators under sub-section (1) of section 27;

(f) the period for inspection of Gram Nyayalayas under section 37.

**(3)** Every notification issued by the High Court shall be published in the Official Gazette.

**40. (1)** The State Government may, by notification, make rules for carrying out the provisions of this Act.

Power of State Government to make rules.

**(2)** In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the salaries and allowances payable to, and the other terms and conditions of service of, the officers and other employees of the Gram Nyayalayas under sub-section (2) of section 17;

(b) the sitting fee and other allowances payable to, and the other terms and conditions for engagement of, Conciliators under sub-section (2) of section 27.

**(3)** Every rule made by the State Government under this Act shall be laid as soon as may be after it is made, before the State Legislature.

## THE FIRST SCHEDULE

(See sections 12 and 14)

## PART I

## OFFENCES UNDER THE INDIAN PENAL CODE (45 OF 1860), ETC.

- (i) offences not punishable with death, imprisonment for life or imprisonment for a term exceeding two years;
- (ii) theft, under section 379, section 380 or section 381 of the Indian Penal Code (45 of 1860), where the value of the property stolen does not exceed rupees twenty thousand;
- (iii) receiving or retaining stolen property, under section 411 of the Indian Penal Code (45 of 1860), where the value of the property does not exceed rupees twenty thousand;
- (iv) assisting in the concealment or disposal of stolen property, under section 414 of the Indian Penal Code (45 of 1860), where the value of such property does not exceed rupees twenty thousand;
- (v) offences under sections 454 and 456 of the Indian Penal Code (45 of 1860);
- (vi) insult with intent to provoke a breach of the peace, under section 504, and criminal intimidation, punishable with imprisonment for a term which may extend to two years, or with fine, or with both, under section 506 of the Indian Penal Code (45 of 1860);
- (vii) abetment of any of the foregoing offences;
- (viii) an attempt to commit any of the foregoing offences, when such attempt is an offence.

## PART II

## OFFENCES AND RELIEF UNDER THE OTHER CENTRAL ACTS

- (i) any offence constituted by an act in respect of which a complaint may be made under section 20 of the Cattle-trespass Act, 1871 (1 of 1871);
- (ii) the Payment of Wages Act, 1936 (4 of 1936);
- (iii) the Minimum Wages Act, 1948 (11 of 1948);
- (iv) the Protection of Civil Rights Act, 1955 (22 of 1955);
- (v) order for maintenance of wives, children and parents under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);
- (vi) the Bonded Labour System (Abolition) Act, 1976 (19 of 1976);
- (vii) the Equal Remuneration Act, 1976 (25 of 1976);
- (viii) the Protection of Women from Domestic Violence Act, 2005 (43 of 2005).

## PART III

## OFFENCES AND RELIEF UNDER THE STATE ACTS

(To be notified by the State Government)

## THE SECOND SCHEDULE

(See sections 13 and 14)

## PART I

## SUITS OF A CIVIL NATURE WITHIN THE JURISDICTION OF GRAM NYAYALAYAS

(i) *Civil Disputes:*

- (a) right to purchase of property;
- (b) use of common pasture;
- (c) regulation and timing of taking water from irrigation channel.

(ii) *Property Disputes:*

- (a) village and farm houses (Possession);
- (b) water channels;
- (c) right to draw water from a well or tube well.

(iii) *Other Disputes:*

- (a) claims under the Payment of Wages Act, 1936 (4 of 1936);
- (b) claims under the Minimum Wages Act, 1948 (11 of 1948);
- (c) money suits either arising from trade transaction or money lending;
- (d) disputes arising out of the partnership in cultivation of land;
- (e) disputes as to the use of forest produce by inhabitants of Gram Panchayats.

## PART II

CLAIMS AND DISPUTES UNDER THE CENTRAL ACTS NOTIFIED UNDER SUB-SECTION (1) OF SECTION 14  
BY THE CENTRAL GOVERNMENT

(To be notified by the Central Government)

## PART III

CLAIMS AND DISPUTES UNDER THE STATE ACTS NOTIFIED UNDER SUB-SECTION (3) OF SECTION 14 BY  
THE STATE GOVERNMENT

(To be notified by the State Government)

T. K. VISWANATHAN,  
Secy. to the Govt. of India.



## LAW COMMISSION OF INDIA

FOURTEENTH REPORT

REFORM OF JUDICIAL ADMINISTRATION  
(VOL. I—CHAPTERS 1-10)

MINISTRY OF LAW  
GOVERNMENT OF INDIA

misunderstood. That should not however, in our view, make the judge deny himself of all initiative in the matter of suggesting a compromise and deter him from helping the parties in arriving at a settlement in suitable cases. A competent and experienced judge who has learnt to make a proper use of the provisions of Order X will have no difficulty in perceiving cases pre-eminently suitable for a compromise. A few tactful words by the Judge at a suitable opportunity, without the appearance of taking a view on either side and without playing an unduly active role, may bring about the desired result in a more satisfactory and speedier way than a separate conciliation proceeding in the manner described and spread over several weeks. In our opinion the promotion of a compromise in suitable cases should be left largely to the initiative and the personality of the judge and to the parties and their lawyers. We would like to emphasize that the Bar can play a very useful role in bringing about a compromise.

"Lawyers perform a real service to their clients and to society and the courts when they make settlements that are right settlements, where there are two sides to a case, where the issue may well be in doubt, where the facts are honestly in conflict or where the law is unsettled, there is always some figure which is fair to both sides. It should be the lawyer's aim to make such a settlement if he can".<sup>1</sup>

39. Another proposal which was pressed upon us and which we have considered is, whether there should be a thorough-going pre-trial conference on the date of the hearing for the purpose of (a) a summary examination of parties and the hearing of the lawyers (b) the determination of the issues (c) a consideration of (i) documents to be produced, (ii) facts necessary to be proved and the manner of their proof (d) determining whether any witnesses other than those mentioned in the list may be called or examined on commission and similar matters. A provision for such a pre-trial conference is to be found in the Rules of Civil Procedure for the United States District Courts, Rule 16 which provides as follows:—

"In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses:

<sup>1</sup>American Bar Association Journal, May 1929, "The Trial of Cases", by Emory R. Buckner.

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions".

The working of this procedure as explained by the Chief Justice of the State of New Jersey in the United States is briefly as under<sup>1</sup>:

The plaintiff and then the defendant states what each expects to prove at the trial. The trial judge thereupon dictates for the pre-trial order the issues to be proved and if any amendments of the pleadings are necessary he orders them made. The Judge then explores what facts may be admitted. The Judge then finds out if the execution and admissibility of any documents are uncontested. The pre-trial order which incorporates the above matters is dictated in open Court and signed by the Judge and counsel. The trial Judge then orders preparation of briefs to be delivered in advance of the trial, if such briefs are necessary. The details of the procedure are to be found in New Jersey Manual of Pretrial Practice.

#### Advantages.

The advantages of pre-trial conference have also been explained by the same author.

"The remarkable thing about it all is that at the end of a pre-trial conference very often the plaintiff's lawyer for the first time understands the plaintiff's case..... Likewise the defendant's lawyer for the first time gets a true concept of his own and his adversary's case. Suddenly it dawns on each of them that instead of this being a case that the plaintiff can lose or the defendant can't lose, it begins to be one that has a monetary value in terms of a settlement.....month in and month out, in every country in our State three quarters of the cases are settled between the date of the pre-trial conference and the date

<sup>1</sup> See "The Challenge of Law Reform" by Arthur T. Vanderbilt p. 64.

when the case goes to trial two weeks later without the Judge saying a word about settlement".

40. The working of the system of pre-trial procedure which has been introduced in some States in the United States was examined by the Evershed Committee. The American system made it clear that the success of these pre-trial conferences depended for the most part on the personality of the Judge and his willingness to deal and aptitude for dealing with such proceedings. "No doubt" said the Committee, "it would be the same in England"<sup>1</sup>. We believe it would be the same in India as well. The Committee examined this procedure with reference to the Rules of Practice and Procedure in England and came to the conclusion that the existing rules relating to the summons for directions in Order 30 of the Rules of the Supreme Court give all the powers that are needed. The Committee took the view that the general adoption of the pre-trial conference procedure in all forms of proceedings would not be advisable in England. "The procedure has, undoubtedly its attractions particularly to those who have become accustomed to its working. After careful consideration we have reached a clear conclusion that it would not be appropriate for adoption in this country—certainly of long duration, possibly developing into a 'fishing not for the purpose of saving costs \* \* \* More than this, the procedure may become somewhat elaborate and expedition'"<sup>2</sup>.

41. As to the introduction of similar provisions for a position in similar procedure in India the witnesses before us have pointed out that the practice already obtains in a modified form under the provisions relating to the examination of parties and discovery and inspection under Orders X, XI and XII of the Civil Procedure Code. The provisions for the amendment of pleadings are found in Order VI Rules 16 and 17 of the Civil Procedure Code. Rule 16 gives power to the Court at any stage of the proceedings to order to be struck out or amended any matter in any pleading which may be (1) unnecessary, (2) scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit. Similarly the duty of framing precise issues is cast upon the court under the provisions of Order XIV and if these issues are framed after the preliminary examination of the parties and the reading of pleadings as already suggested, it would no doubt lead to a considerable simplification of the issues. Thus it can be said that the rules of the Civil Procedure Code amply provide for all the matters enumerated in Rule 16 of the Rules of the Civil Procedure for the United States District Courts.

Views of the  
Evershed  
Committee.

Provisions  
of Civil  
Procedure  
Code.

<sup>1</sup>American Bar Association Journal—January 1954, "Five Functions of the Lawyer".

<sup>2</sup>Final Report of the Committee on Supreme Court Practice and Procedure, page 73, para 216.

<sup>3</sup>Ibid., p. 24, para. 220.

} Introduction unnecessary.

42. An elaborate pre-trial conference of the nature contemplated above would, it was said, be needless waste of time. The same purpose could well be achieved by an examination of the parties under Order X of the Civil Procedure Code. We were informed by a senior Judge of the Madras High Court that the method of a pre-trial conference had been tried on the Original Side without much success. Conditions in our country, we think, are not yet ripe for the introduction of such an innovation which would throw upon the court the responsibility not only of examining the parties and settling the issues, but also of considering what documents need be produced or proved or of considering the facts necessary to be proved and the manner of their proof. The object of the pre-trial system is to define the scope of the dispute and ascertain the true issues which arise. Such a definition and clarification does in many cases tend to bring about a compromise. Order X of the Code of Civil Procedure already provides for the examination of the parties by the court before the framing of the issues. The object of such an examination is to get admission or denials of the allegations of fact made in the pleadings. The examination will have the effect of clearly defining and limiting the scope of the inquiry and focussing attention on the real points in dispute. If these provisions are carefully followed, they should result in bringing about the salutary consequences which are said to flow from a pre-trial conference. We do not therefore think it desirable to incorporate in our procedural laws the elaborate system of pre-trial conferences which obtains in some other countries.

#### **ATTENDANCE OF WITNESSES**

Summons to witnesses.

43. We shall next deal with the summoning and attendance of witnesses. Under the Code, parties are entitled at any time after the institution of the suit to obtain by an application to the court summonses to persons whose attendance is required either to give evidence or to produce documents. This is generally done after the issues have been framed and matters relating to discovery and inspection have been completed. In practice, the application for summoning the witnesses must be made at the earliest opportunity so that sufficient time may be left for service before the date fixed for hearing of the suit.

Non-service of witness summons.

44. Considerable delays arise from a failure to serve summonses on witnesses, even when the parties have filed their applications for witness summonses in time and paid the travelling and other expenses as required by law. The causes of these delays are generally speaking the same as those which lead to delays in the service of processes on the defendants. Measures similar to those indicated earlier have therefore to be adopted to remove these delays.



## LAW COMMISSION OF INDIA

### TWENTY-SEVENTH REPORT

(THE CODE OF CIVIL PROCEDURE, 1908)

December, 1964

GOVERNMENT OF INDIA • MINISTRY OF LAW

26. Order VII, rule 14 provides that where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented. Where the plaintiff relies on any other documents (whether in his possession or power or not), as evidence in support of his claim, he has to enter such documents in a list to be added or annexed to the plaint. The Fourteenth Report<sup>1</sup> recommended, that a similar provision should be made in the case of a defendant. We feel, that the distinction between a document upon which the plaintiff relies cannot properly be made in the case of a written statement. The only manner in which such a distinction can be made is between documents on which a defendant bases his defence and other documents on which he relies as evidence in support of his defence. In our opinion such a distinction would be unrealistic and impractical. A written statement merely answers the claim made in the plaint. In practice, it would be difficult to distinguish between documents on which the defence "is based" from other documents of purely evidentiary value. We, however, think that a defendant should enter in a list to be added or annexed to the written statement all documents on which he relies in support of his defence.

27. The framing of issues is an important step in the framing trial of a suit. Sufficient attention is often not paid to this matter. The result is, that in most cases some unnecessary issues are raised which delay the completion of the trial. The framing of issues should be done carefully after a detailed consideration of the pleadings and the examination of the parties, and the other materials referred to in Order XIV, rule 1(5) and rules 3 and 4. Even where what are known as "consent issues" are put in by the Advocates of the parties, the presiding officer should satisfy himself that they—

- (i) bring out all the points in controversy; and
- (ii) raise no unnecessary issues which would delay the trial.

This could be achieved by a strict observance of the provisions of Order XIV.

28. Before the issues are framed, some kind of a weeding out process seems to be necessary. This is done both in England and in America. In England the object is achieved by what is known as summons for directions<sup>2</sup>. The original side rules of High Courts also contain such a provision<sup>3</sup>. The object of a summons for directions is a general stock-taking of the case with a view to arriving at the essentials of the dispute. In America the same

Documents to be filed by defendant.

<sup>1</sup>14th Report, Vol. I, page 316, para. 32.

<sup>2</sup>Appendix I, Order 8, rule 1.

<sup>3</sup>Order 25, rules 1 to 4, R.S.C. (Revisions), 1962.

<sup>4</sup>See, e.g. Bombay High Court Original Side Rules (1957), rule 147.

object is achieved by what are known as "pre-trial conferences". The relevant rule relating to pre-trial conferences is in the following terms<sup>1</sup>:

"In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider—

- (1) the simplification of the issues;
- (2) the necessity or desirability of amendments to the pleadings;
- (3) the possibility of obtaining admission of fact and of documents which will avoid unnecessary proof;
- (4) the limitation of the number of expert witnesses;
- (5) the advisability of a preliminary reference of issues to a master for findings to be used in evidence when the trial is to be by jury;
- (6) such other matters as may aid in the disposition of the action."

In America, pre-trial conferences have resulted in a large number of arrears being wiped out<sup>2</sup>. The Law Commission has, in the Fourteenth Report,<sup>3</sup> rejected the proposal for pre-trial conferences. It was of the opinion, that Order X which provides for the examination of parties by the court, can serve the same purpose. We generally agree with this view.

**Examina-  
tion  
under  
Order X.**

29. The object of the examination under Order X is to ascertain precisely the matters which are in dispute between the parties. If a proper use is made of the provisions contained in this Order, the Judge will, at an early stage of the suit, be in a position to sift the chaff from the grain, and to pinpoint his attention on the matters on which the parties are at variance. A complete grasp of the case at an early stage of the suit will enable the Judge, when the suit comes up for hearing, to dispose of it expeditiously. It will enable him to narrow down the issues between the parties, and eliminate the need for recording formal or irrelevant evidence. The parties to the suit can also benefit by the examination under Order X. After such examination, they will know exactly which of their contentions have survived the examination and what they

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<sup>1</sup>Rules of Civil Procedure for the United States District Courts, Rule 16 (14th Report, Vol. I, pages 321-322).

<sup>2</sup>See articles in the Annual Magazine of the American Judicature Society, October—December 1956, particularly the one under the caption "Calendar Decongestion in the Southern Districts of New York" by Irving R. Kaufman.

<sup>3</sup>14th Report, Vol. I, pages 311—313.

## Structural Procedural Matrix of Civil Procedure Code of India

Pleadings-ADR-Differential Management Centric & Trial Based

# ANCESTRY AND MECHANICS OF CIVIL PROCEDURE CODE, 1908

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(Pleading-Discovery-Summary Judgment-Trial)      (Pleading-Discovery-Summary Judgment-Trial)      (Pleading-Discovery-Summary Judgment-Trial)

<b>Code of Civil Procedure, 1858</b>  (388 Section)	<b>Code of Civil Procedure, 1877</b>  (653 Section)	<b>Code of Civil Procedure, 1908</b>
<p><b>PLEADINGS.</b></p> <p>a) Pleadings (Section 1 to 124)  DISCOVERY  (Litigant Conducted Investigation).</p> <p>b) Oral examination of the parties: Interrogation-in-person; Deposition. (125 to 127).</p> <p>c) Filing of proposed exhibits by the contesting parties, and their inspection by the court</p> <p>d) Framing of Issues (139 to 141)  EQUITY SHORTCUTS</p> <p>e) Summary Judgment (142 to 145)  TRIAL</p> <p>f) Trial (149 to 198)</p> <p>EQUITY SHORTCUTS</p> <p>j) Summary Judgment (Order 15, Rule 3) <ul style="list-style-type: none"> <li>• Judgment on admission (Order-12, Rule-6)</li> <li>• When defendant appears (Order-9, Rule-8)</li> <li>• Parties not at issue (Order-15, Rule-1)</li> <li>• When plaintiff does not disclose cause of action (Order-7, Rule-11)</li> </ul> </p> <p>k) Trial. Chapter XII to XVII</p>	<p><b>PLEADINGS.</b></p> <p>a) Pleadings (Section 1 to 116)  DISCOVERY  (Litigant Conducted Investigation).</p> <p>b) Oral examination of the parties: Interrogation-in-person; Deposition. (117 to 120).</p> <p>c) Discovery of facts through interrogatories (121 to 127)</p> <p>d) Discovery of documents (128 to 130)</p> <p>e) Inspection of documents (130 to 135)</p> <p>f) Admission of facts.</p> <p>g) Admission of documents.</p> <p>h) Tendering of documents (Order 12, Rule 2).</p> <p>i) Tendering of proposed exhibits, and their inspection by the court (Order 13)</p> <p>j) Framing of issues on the basis of pleadings, depositions and documents (Order 14)  EQUITY SHORTCUTS</p> <p>k) Summary Judgment (Order 15, rule-3) <ul style="list-style-type: none"> <li>• Judgment on admission (Order-12, Rule-6)</li> <li>• When defendant appears (Order-9, Rule-8)</li> <li>• Parties not at issue (Order-15, Rule-1)</li> <li>• When plaintiff does not disclose cause of action (Order-7, Rule-11)</li> </ul> </p>	<p><b>PLEADINGS.</b></p> <p>a) Pleadings (Order 1 to 9)  DISCOVERY  (Litigant Conducted Investigation).</p> <p>b) Oral examination of the parties: Interrogation-in-person; Deposition. (Order 10).</p> <p>c) Discovery of facts through interrogatories (Order 11, rule 1 to 11)</p> <p>d) Discovery of documents (Order 11, Rule 12 to 14)</p> <p>e) Inspection of documents (Order 11, Rule 15 to 19)</p> <p>f) Admission of facts (Order 12, Rule).</p> <p>g) Admission of documents (Order 12, Rule 2).</p> <p>h) Tendering of proposed exhibits, and their inspection by the court (Order 13)</p> <p>i) Framing of issues on the basis of pleadings, depositions and documents (Order 14)  EQUITY SHORTCUTS</p> <p>j) Summary Judgment (Order 15, rule-3) <ul style="list-style-type: none"> <li>• Judgment on admission (Order-12, Rule-6)</li> <li>• When defendant appears (Order-9, Rule-8)</li> <li>• Parties not at issue (Order-15, Rule-1)</li> <li>• When plaintiff does not disclose cause of action (Order-7, Rule-11)</li> </ul> </p> <p>k) Trial (Order 16 to 20).</p>

# TITLES

OF

## ACTS PASSED BY THE LEGISLATIVE COUNCIL OF INDIA,

IN THE YEARS 1859-61.

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### TITLES OF ACTS PASSED IN 1859.

- Act No. I.—An Act for the amendment of the law relating to Merchant Seamen.
- II, to amend Act XXX of 1858 (to provide for the administration of the Estate, and for the payment of the debts of the late Nabob of the Carnatic.)
- III, for conferring Civil jurisdiction in certain cases upon Cantonment Joint Magistrates, and for constituting those Officers Registers of Deeds.
- IV, to make further provision for the removal of Prisoners.
- V, to empower the holders of Ghatwalee lands in the District of Beerbhoom to grant leases extending beyond the period of their own possession.
- VI, to empower the Governor of Bombay in Council to appoint a Magistrate for certain Districts within the Zillah Ahmedabad.
- VII, to alter the Duties of Customs on goods imported or exported by Sea.

PRICE 6 ANNAS.

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ACT No. VIII of 1859.

OF THE EXAMINATION OF THE PARTIES.

125. At the first hearing of the suit, and if necessary at any subsequent hearing, any party who appears in person or is present in Court, or the pleader of any party who appears by a pleader, or if the pleader be accompanied by another person able to answer all material questions relating to the suit, then such other person, may be examined orally by the Court. Such examination shall (unless Oath.

the pleader be the person examined) be upon oath or affirmation or otherwise according to the provisions of the law for the time being in force in relation to the examination of witnesses. The substance of

Substance of the examination to be written. the examination shall be reduced to writing and form part of the record.

126. If any party who appears in person or is present in Court shall without lawful excuse refuse to answer any material question relating to the suit which the Court may think proper to put to such party, the Court may pass judgment against him, or make such other order in relation to the suit as it may deem proper in the circumstances of the case.

127. If the pleader of any party who shall appear by a pleader shall refuse or be unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall attend in person on such day; and if the party so directed to attend shall without lawful excuse fail to appear in person on the day to be so appointed, the Court may pass judgment against him, or make such other order in relation to the suit as it may deem proper in the circumstances of the case.

OF THE PRODUCTION OF DOCUMENTS.

128. The parties or their pleaders shall bring with them, and have in readiness at the first hearing of the suit to be produced when called upon by the Court, all their documentary evidence of every description which may not already have been filed in Court, and all documents, writings, or other things which may have

ACT No. VIII of 1859.

have been specified in any notice which may have been served on them respectively within a reasonable time before the hearing of the suit ; and no documentary evidence of any kind, which the parties or any of them may desire to produce, shall be received by the Court at any subsequent stage of the proceedings, unless good cause be shown to its satisfaction for the non-production thereof at the first hearing.

129. All exhibits produced by the parties shall be received and inspected by the Court ; but it shall be competent to the Court, after inspection, to reject any exhibit which it may consider irrelevant or otherwise inadmissible, recording the grounds of such rejection.

130. If the exhibit be a deed, instrument, or writing chargeable with stamp duty under any Regulation or Act for the time being in force, and it shall appear to the Court that the deed, instrument, or writing, although written on stamp paper, does not bear a sufficient stamp, the Court shall nevertheless receive the same in evidence saving all just exceptions on other grounds, if the party producing it or requiring its production shall pay into Court the deficiency of the stamp duty and a penalty equal to ten times the amount of the deficiency. Provided that, if it shall appear to the Court that there are reasonable grounds for believing that the deed, instrument, or writing was not properly stamped with the intention of evading the stamp laws, the Court may reject the same.

131. An entry of the fact of such payment and of the amount thereof shall be made in a book to be kept in the Court, and shall also be endorsed on the back of such deed, instrument, or writing under the signature of the Judge of the Court. The Court shall at the end of every month make a return to the Collector of Revenue of the District of the monies (if any) which it has so received by way of duty or penalty, distinguishing between such monies, and stating the number and title of the suit, and the name of the party from whom such monies were received, and the date (if any) and description of the document, for the purpose of identifying the same ; and the Court shall pay over the said monies to the Collector of Revenue, or to such person as he may

## ACT No. VIII of 1859.

may appoint to receive the same ; and the Collector of Revenue, or other proper authority, shall, upon production of the deed, instrument, or writing, with the endorsement hereinbefore mentioned, cause such additional stamp as may be necessary to be affixed to such deed, instrument, or writing in respect of the sums so paid as aforesaid.

132. When an exhibit is received by the Court and admitted in evidence, Admitted exhibits to be marked and filed. it shall be endorsed with the number and title of the suit, the name of the party producing it, and the date on which it was produced, and shall be filed as part of the record. Provided that if the exhibit be an entry in any shop book or other book, the party on whose behalf such book is produced Proviso. shall furnish a copy of the entry, which copy shall be endorsed as aforesaid, and shall be filed as part of the record, and the book shall be returned to the party producing it.

133. No stamp duty shall be leviable in respect of the production or filing of any exhibit, any thing contained in any Regulation or Act notwithstanding. No stamp duty in respect of the production or filing of exhibits.

134. When an exhibit is rejected by the Court, it shall be endorsed in the manner specified in Section 132 with the addition of the word "rejected" and the endorsement shall be subscribed by the Judge. The exhibit shall then be returned to the party who produced it, unless the Court shall think proper, for special reasons (as on suspicion of Unless detained by the Court. forgery), to detain it.

135. When the time for preferring an appeal from the decision passed in the suit has elapsed, or if an appeal has been preferred from such decision then after the appeal has been finally disposed of, any person, whether a party to the suit or not, who may be desirous of receiving back any exhibit produced by him in the suit, shall be entitled, on application to the Court in which such exhibit may be, to receive back the same, unless the further use of such exhibit has been superseded by the terms of the decree, or the Court has directed it to be detained for purposes of public justice. After the time for appeal has elapsed, exhibit admitted in evidence may be returned.

136. Any

## ACT No. VIII OF 1859.

136. Any exhibit may be returned before the time mentioned in the last

Exhibit may be returned before the time limited, for special reasons.

Certified copy to be kept.

preceding Section, if the Court in which the document

may be shall think proper, for special reasons, to order its return. But in every case a copy, properly certified,

and made at the expense of the applicant, shall be substituted for the original in the record of the suit.

137. Whenever an exhibit once received by a Court of Justice and ad-

Receipt to be given for returned exhibit.

mitted in evidence is returned, a receipt shall be given by the party receiving it in a receipt-book kept for the purpose.

138. Any Civil Court may of its own accord, or upon the application of

Court may send for papers from its own records or from other public Offices or Courts.

(not being documents relating to affairs of State the production of which may

Except State papers.

be contrary to good policy), and inspect the same, when the inspection of such record or papers shall appear likely to elucidate the facts of the suit before the Court, and to promote the ends of justice.

## OF THE SETTLEMENT OF ISSUES.

139. At the first hearing of the suit the Court shall enquire and ascertain

Framing of issues.

upon what questions of law or fact the parties are at issue, and shall thereupon proceed to frame and record the issues

of law and fact on which the right decision of the case may depend. The Court may frame the issues from the allegations of fact which it collects from the oral examination of the parties or their pleaders, notwithstanding any difference between such allegations of fact and the allegations of fact contained in the written statements, if any, tendered by the parties or their pleaders.

140. If the Court shall be of opinion that the issues cannot be correctly

Court may examine witnesses or documents before framing the issues.

framed without the examination of some person other than the persons already before the Court, or without the reading of some document not produced by any of

such persons, it may adjourn the framing of the issues to a future day, to be fixed by the Court, and may compel the attendance of such person, or

the

## ACT No. VIII OF 1859.

the production of the document by the person in whose hands it may be, by summons or other suitable process.

141. At any time before the decision of the case, the Court may amend  
 Amendment of issues. the issues or frame additional issues on such terms as to it  
 Additional issues. shall seem fit, and all such amendments as may be necessary  
 for the purpose of determining the real question or con-  
 troversy between the parties shall be so made.

## OF ISSUES BY AGREEMENT OF PARTIES.

142. When the parties to a suit are agreed as to the question or questions  
 Questions of fact or law of fact or of law to be decided between them, they may  
 may by agreement be stated by the parties in state the same in the form of an issue, and enter into an  
 the form of an issue. agreement in writing, which shall not be subject to any  
 stamp duty, that upon the finding of the Court in the affirmative or the  
 negative of such issue, a sum of money specified in the agreement, or to be  
 ascertained by the Court upon a question inserted in the issue for that pur-  
 pose, shall be paid by one of the parties to the other of them, or that upon such  
 finding some property specified in the agreement, and in dispute in the suit, shall  
 be delivered by one of the parties to the other of them, or that upon such finding  
 one or more of the parties shall do or perform some particular legal act, or shall  
 refrain from doing or performing some particular act, specified in the agree-  
 ment, and having reference to the matter in dispute.

143. If the Court shall be satisfied, after an examination of the parties or  
 Court if satisfied that their pleaders, and taking such evidence as it may deem  
 the agreement was execut- proper, that the agreement was duly executed by the par-  
 ed bona fide, may give ties and that the parties have a *bona fide* interest in the  
 judgment. decision of such question, and that the same is fit to be tried and decided, it may  
 proceed to record and try the same, and deliver its finding or opinion thereon  
 in the same manner as if the issue had been framed by the Court, and may, upon  
 the finding or decision on such issue, give judgment for the sum so agreed on  
 or so ascertained as aforesaid, or otherwise according to the terms of the agree-  
 ment ; and upon the judgment which shall be so given, decree shall follow and  
 may be executed in the same way as if the judgment had been pronounced in  
 a contested suit.

WHEN

## ACT No. VIII OF 1859.

## WHEN THE SUIT MAY BE DISPOSED OF AT THE FIRST HEARING.

144. If at the first hearing of a suit it shall appear that the parties are

If the parties are not at issue on any question of law or fact, the Court may at once give judgment.

145. When the parties are at issue on some question of law or fact, and issues

If the parties are at issue on questions of law or fact, have been framed by the Court as hereinbefore provided, if the Court shall be satisfied that no further argument or

evidence than such as the parties or their pleaders can at once supply is required upon any such of the issues of law or fact as may be sufficient for the decision of the suit, the Court, after hearing such argument and evi-

Court, if satisfied, may determine the issues and give judgment. dence, may proceed to determine such issue or issues, and if the finding thereon is sufficient for the decision, may pro-

nounce judgment accordingly, whether the summons shall have been issued for the settlement of issues only or for the final disposal of the suit ; otherwise the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence or for such further argument as the case may require. Provided that if the summons shall have

Proviso where summons is for final disposal. been issued for the final disposal of the suit and either party shall fail without sufficient cause to produce the evidence on which he relies, the Court may at once give judgment.

## OF ADJOURNMENTS.

146. The Court may, if sufficient cause be shown, at any stage of the suit,

Court may grant time, or adjourn to a future day. grant time to the parties, or to either of them, and may from time to time adjourn the hearing of the suit ; and in all such cases the Court shall fix a day for the further

hearing of the suit. Provided that in all such cases the party applying for

Proviso.

time shall pay the costs occasioned by such adjournment, unless the Court shall otherwise direct.

147. If on any day to which the hearing of the suit may be adjourned,

How Court is to proceed if the parties fail to appear on the day fixed. the parties or either of them shall not appear in person or by pleader, the Court may proceed to dispose of the suit in the manner specified in Section 110, Section 111, or Sec-

tion 114 as the case may be, or may make such other order as may appear to be just and proper in the circumstances of the case.

148. If

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148. If either party to a suit to whom time may have been granted shall fail to produce his proofs, or to cause the attendance of his witnesses, or to perform any other act for which time may have been allowed, the Court shall proceed to a decision of the suit on the record, notwithstanding such default.

OF SUMMONING WITNESSES.

149. The parties or their pleaders may, at any time after the issue of the summons to the defendant, if the summons be for the final disposal of the suit, or after the issues have been recorded, if the summons to the defendant be for the settlement of issues only, obtain, on application to the Court, summonses to witnesses or other persons to attend either to give evidence or to produce documents, and in any such summons the names of any number of persons may be inserted.

150. No stamp duty shall be leviable in respect of any application for the summons of a witness or other person to attend either to give evidence or to produce a document, anything contained in any Regulation or Act notwithstanding.

151. The person applying for a summons shall pay into Court such a sum of money as shall appear to the Court to be reasonable, to defray the travelling and other expenses of each witness or other person mentioned in the summons, in passing to and from the Court in which he may be required to attend, and for one day's attendance. If the Court be a subordinate Court, regard shall be had, in fixing

the scale of such expenses, to the rules (if any) established by the Court to which such Court shall be immediately subordinate. The sum so paid into Court shall be tendered to the witness or other person at the time of serving the summons, if it can be served personally. If it shall appear to the Court that the sum paid

into Court on account of the travelling and other expenses of the witness or other person in passing to and from the Court is not sufficient to cover such expenses, the Court may direct such further sum to be paid to the witness or other person as may appear to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the goods of the person ordered to pay the same,

or

## ORDER XIII

### PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS

**1.** *Documentary evidence to be produced at first hearing.*—(1) The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.

(2) The Court shall receive the documents so produced: Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

**1**[(3) On production of documents under this rule, the Court may call upon the parties to admit or deny the documents produced in the Court and record their admission or, as the case may be, denial.]

**Leg Am 1.** Added by Act of 1994.

**High Court Amendments.—N.W.F.P.**: The following rule is substituted: "All documentary evidence shall be produced by the parties or their pleaders in the method and at the time prescribed in Orders 7 and 8 : provided that after the settlement of issues the Court may fix a date not being more than 30 days after such settlement, within which the parties may present supplementary lists of documents on which they rely".

**IHA:** Orr; Pat.

**Comp. Ref.:** 1882, S. 138, 140; 1877 S. 138; 140; 1859, S. 128, 129.

**Cross Ref.:** App. H. 5; L1-1G; LVI-150.

**Documents at first hearing.** The rule only applies to documents in the possession or power of a party (*a*), and in relation to such document, the rule is mandatory and all documents upon which the plaintiff intends to rely must be produced at the first hearing (*b*), though non-compliance with the rule can be condoned under rule 2 *post* (*c*).

Under Order 7 rule 14, the plaintiff, and under Order 8 rule 1 as amended in the Punjab, the defendant, is required to produce alongwith the plaint and written statement respectively, the documents on which the claim is based or on which the defence is based (*ca*). Further, on the first date of hearing the parties are required to bring all documents on which they rely, and which have in accordance with the aforesaid two rules, been entered in the list of reliance filed along with the plaint or written statement, or which they have been ordered to produce under Order 11 rule 14(*cb*). See also Order 5 rule 7. The object behind Order 13 rule 1, is to obviate the possibility of the parties presenting forged or suspicious documents at later stages of the suit when the points in dispute stands formulated (*d*).

In an ordinary suit the date of first hearing is the date on which issues are settled (*e*). See notes under Order 9 rule 8. 'Produce' does not mean to file, but only to have the documents in court (*f*). Where the party does not produce the documents in accordance with this rule, the court may not receive them at a latter stage. See rule 2 *post*. See Order 9 rule 8 for meaning of the term

#### Order 13.

- (a) P 1994 L 298; A 1929 PC 99; A 1961 Raj. 21; A 1925 C 1149; 23 SWR 29.
- (b) 1999 SCMR 951; 1999 MLD 3018; 1999 MLD 2160; P 1994 L 298; A 1956 B 129.
- (c) P 1956 L 252; A 1918 PC 11; A 1956 B 129; A 1933 L 892; A 1926 C 1.
- (ca) P 2003 SC 849; 1991 SCMR 1935; 2002 CLC 655; P 1994 L 298.
- (cb) 1991 SCMR 1935; P 2004 AJK 43; 2002 CLC 655; P 1994 L 298.
- (d) P 1994 L 298; 1990 MLD 1934; A 1931 Pat. 275; 29 B 173.
- (e) P 2004 AJK 43; A 1926 M 347.
- (f) 12 CWN 312.

'hearing'. See also Appendix H, Form No. 5.

2. *Effect of non-production of documents.*--No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof, and the Court receiving any such evidence shall record the reasons for so doing.

Comp. Ref.: 1882, S. 139; 1877, S. 138, 139; 1859, S. 128.

**Effect of non-production.** No documentary evidence in possession or power of a party not produced at the first date of hearing should be received in evidence subsequently, unless good cause is shown for earlier non-production (*fa*). The object of rule 1 is to prevent fraud and not to penalize parties for non-production of documents in time (*g*). Accordingly where the genuineness of the document is beyond doubt, it ought not to be shut out of evidence if produced at a late stage (*h*). Private documents are ordinarily not allowed to be produced at a belated stage (*ha*). The rule of exclusion will not apply if the party was not aware of the existence of the document (*i*), or if it was not in the possession or power of the party (*j*). The court should not exclude documents if sufficient cause for their earlier non-production is shown (*k*), or if they are above suspicion (*l*), as for instance, official records (*m*), or even private documents whose genuineness is beyond doubt (*n*), or where the defendant raises no objection to their late production (*na*) and the rule should be interpreted to further the ends of justice (*o*). The other side should thereafter be given a fair opportunity to meet such document (*p*). The rule should be liberally construed so as to advance

- (*fa*) P 2003 SC 849; 1999 SCMR 951; 1995 SCMR 951; 2001 YLR 1185; P 1994 L 298; 1990 SCMR 964.  
(*g*) 1999 CLC 1142; 1994 CLC 64; 1990 MLD 1934; P 1984 L 139; P 1984 AJK 41; P 1959 L 597; P 1956 L 252; P 1952 BJ 1; A 1976 SC 461; A 1931 PC 143; A 1928 Pat. 537; 22 B 173. See 1987 CLC 1246.  
(*h*) 2003 CLC 1579; 2003 CLD 1497; P 2003 K 148; 2001 YLR 2272; 1999 CLC 1142; 1996 MLD 1158; 1995 MLD 1164; P 1995 AJK 5; 1994 MLD 1984; 1992 CLC 1627; P 1990 AJK 12; 1987 CLC 244; P 1984 AJK 41; P 1981 K 255; P 1981 K 596; P 1956 L 252; P 1957 L 803; P 1949 PC 270; A 1918 PC 11; A 1946 N 337; A 1928 M 516; A 1924 C 1059. See 1991 MLD 2622 1986 CLC 858; P 1985 K 95.  
(*ha*) 1994 SCMR 1945; 1990 MLD 1934 See 1990 CLC 1877.  
(*i*) A 1929 PC 99.  
(*j*) A 1925 C 1149; A 1922 Pat. 569.  
(*k*) 1994 CLC 1085; 1992 CLC 1627; 1990 CLC 1877; P 1990 AJK 12; 1987 CLC 244; P 1984 AJK 41; P 1981 K 255; P 1981 K 596; P 1963 L 501; P 1950 L 597; P 1956 L 252; A 1976 SC 461; A 1931 M 512. See 1986 CLC 858.  
(*l*) 1994 CLC 1085; P 1984 L 139; P 1959 K 568; P 1956 L 252; A 1950 PC 68; A 1929 PC 99; A 1940 M 540; A 1930 Pat. 603; A 1926 M 347.  
(*m*) P 2002 SC 446; 1993 SCMR 1079; 1999 CLC 1142; 1994 CLC 2287; P 1993 CLC 1158; P 1993 L 492; P 1984 AJK 41; P 1966 P 113; P 1956 L 252; P 1949 PC 270; A 1950 PC 68; A 1929 PC 99.  
(*n*) 1999 CLC 1142; 1994 CLC 1085; 1993 MLD 2295; P 1990 AJK 12; P 1981 K 596; P 1961 L 643; P 1956 L 252; A 1930 Pat. 603; A 1924 Pat. 208.  
(*na*) 1998 SCMR 704; 1993 CLC 2409.  
(*o*) 1996 CLC 833; 1995 MLD 1164; P 1981 K 596; P 1977 AJK 78; P 1956 L 252; 22 B 173. See 1991 MLD 2622.  
(*p*) P 1977 AJK 78; A 1957 Pat. 688; A 1927 N 269 See P 1957 L 803.

the unless mala fide is established (qa). A general order refusing to accept any document is bad(r). Once permission is granted under rule 2, no adverse presumption can be drawn on account of late production (s), and as has been seen in the notes under Order 11 rule 12, no adverse presumption can be drawn on account of non-production of documents for the production of which notice under Order 11 rule 14 was not given. The discretion of the court in permitting production of a document under rule 2 is to be exercised keeping in view whether the document is authentic, the reasons for delay in production and the effect of the production of such document in evidence at a late stage (t). Delayed production by itself should not be a ground for refusal to permit production, and the court should examine the nature of evidence to be produced (ta). Where a party was unaware of the existence of a document its production may be allowed (u). Even an appellate court may allow late admission of documents (v). See notes under Order 7 rule 18. Good cause for reception in evidence in spite of non-production in time must be shown (w), and reasons for allowing production under rule 2 should be recorded (x). The order can be challenged under Section 105(xa).

**Appeal.** As the powers under rule 2 are discretionary (y), the appellate court will not interfere (z), unless the discretion was perversely or improperly exercised (a). A revision will also not lie (b).

**3. Rejection of irrelevant or inadmissible documents.**—The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

Comp. Ref.: 1832, S. 140; 1877, S. 140; 1859, S. 129.

**Rejection of documents.** Documents may be filed either under Order 7 rule 14 or Order 8 rule 1 alongwith the plaint or written statement respectively, or under Order 13 rule 1 at the first hearing of the suit, or under Order 13 rule 2 at a subsequent hearing. The court can reject *in limine*, at the time they are filed, documents which are irrelevant or inadmissible (c). This rule empowers a court to reject at any subsequent stage documents which are irrelevant or inadmissible (d). The court is thus empowered to retain only such documents as are admissible

- (qa) 1994 CLC 64; 1990 CLC 1877.
- (r) P 1981 K 255; P 1956 L 252.
- (s) A 1928 Pat. 294.
- (t) 1990 SCMR 964; P 2004 AJK 43; 1999 CLC 1142; 1999 CLC 710; 1999 MLD 3018; P 1992 L 291; P 1985 K 95; 1985 CLC 2252; P 1984 AJK 41; P 1978 AJK 78; P 1959 L 597; P 1957 L 803; P 1956 L 252; P 1949 PC 270, See P 1983 L 365.
- (ta) 2003 CLC 1519; 1989 ALD 88 See 1989 SCMR 1818.
- (u) A 1929 PC 99 See A 1976 SC 461.
- (v) P 1957 L 803.
- (w) 1990 SCMR 964 P 1959 L 597; P 1956 L 252.
- (x) P 1994 L 298; P 1959 L 597; A 1939 R 98; A 1931 Pat. 275.
- (xa) 1989 CLC 427.
- (y) P 1966 P 113; P 1956 L 252; A 1933 S 892.
- (z) 1994 SCMR 1945; 2002 YLR 2569; 1994 CLC 2287; P 1985 K 95; A 1933 R 174; A 1933 L 892; A 1926 C 106.
- (a) 1999 CLC 1142; 1994 MLD 1984; A 1939 R 98; A 1933 L 892; A 1926 M 347; A 1926 C 1. See 1991 MLD 2622.
- (b) 1969 SCMR 965; 1986 SCMR 864; P 2003 Q 128; 2001 YLR 2272; 1985 CLC 2252; P 1965 AJK 46; P 1953 L 501; P 1954 L 608 See 1999 CLC 1142; P 1993 L 492; P 1983 L 385; 1990 ALD 338; P 1982 BJ 5; N 1980 UC 334; P 1959 L 597; 1987 CLC 1246.
- (c) A 1933 L 271; A 1928 Pat. 537.
- (d) A 1933 L 271; A 1928 Pat. 537; 11 SWR 350.

and are relevant (e). It is the duty of the court to exclude all irrelevant and inadmissible evidence even if no objection is raised (f). Objections to admissibility should be raised during the trial (g), and should be determined as and when raised (h), and should not be reserved until judgment is given (i). See rule 6 post. In appealable cases, the court should admit documents the inadmissibility whereof is not free from doubt (j). Objection to mode of proof must be taken before a document is marked as an exhibit (k). Where objection to mode of proof was not raised during the trial, it will not be allowed to be raised for the first time in appeal (l), unless the law prohibits such documents being received in evidence (m). Where objection relates to admissibility and not to mode of proof, it can be taken up in appeal (n). An order under rule 3 can be challenged under Section 105 (o). A document marked as an exhibit without objection becomes admissible in evidence (p). Where in an appealable case it is doubtful whether the document is admissible or not, it is better to admit than to exclude the document (q). A document admitted without objection cannot afterwards be questioned as being under-stamped (r). Foreign documents should be got stamped in accordance with Section 18 of the Stamp Act (s). See notes under rule 4 post.

4. *Endorsements on document admitted in evidence.*--(1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:-

- (a) the number and title of the suit,
- (b) the name of the person producing the document,
- (c) the date on which it was produced, and
- (d) a statement of its having been so admitted:

and the endorsement shall be signed or initialed by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the

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- (e) 21 SWR 76.
  - (f) 1981 CLC 1055; 19 A 76 PC; A 1921 Pat. 61.
  - (g) P 2001 SC 58; P 1968 SC 140; P 1956 K 363; A 1943 PC 83; A 1954 TC 209 FB; A 1935 A 293; A 1928 L 428.
  - (h) A 1956 C 205; 17 C 173 PC.
  - (i) A 1957 AP 60; 25 C 401; 17 C 173.
  - (j) 12 A 1 FB.
  - (k) PLJ 1986 SC 337; P 1986 SC AJK 120; P 1968 SC 140; PLJ 1999 L 1770; P 1984 L 287; A 1943 PC 83; A 1958 Or. 26. See 1986 CLC 96.
  - (l) 1996 SCMR 1329; 1986 SCMR 903; PLJ 1986 SC 337; PLJ 1985 SC 104; P 1984 SC 200; 1983 SCMR 849; P 1969 SC 136; P 1968 SC 140; 1986 CLC 96; P 1986 L 148; P 1985 Q 263; 1985 CLC 968; 1985 CLC 1385; P 1984 L 287; PLJ 1983 L 138; 1983 CLC 414; P 1977 L 763; PLJ 1980 Bwp. 117; P 1969 Q 13; P 1961 D 596; A 1943 PC 83; 34 C 1059 PC; A 1954 TC 109 FB; A 1936 Pat. 634; A 1935 A 293; 11 B 320 See P 1963 D 486.
  - (m) P 2003 SC 411; A 1936 Pat. 634; See P 1961 D 596.
  - (n) A 1955 Raj. 45. See 1983 SCMR 849.
  - (o) 18 SWR 511.
  - (p) 1983 SCMR 849; P 1968 SC 140.
  - (q) 12 A 1.
  - (r) P 1954 L 525 See 1996 SCMR 1329; P 1968 SC 140.
  - (s) P 1954 L 525.

endorsement thereon shall be signed or initialed by the Judge.

IHA: B.  
Comp. Ref.: 1882, S. 141; 1877, S. 141; 1859, S. 132.

**Endorsement on documents.** Unless the court rejects a document when it is filed in court, or at a later stage under rule 3, admissibility of documents is ordinarily determined when they are proved and tendered in evidence (t). The endorsement 'admitted' means that the document is admitted in evidence as proved (u). An express order to this effect is not necessary (ua). Documents should not be endorsed until they are proved (v). Mere marking of a document as an exhibit does not dispense with the requirement of proving it (va). But merely because a document admitted in evidence is not given an exhibit mark, does not mean it should be excluded from evidence (w). An unexhibited public document on the record ought not to be shut out of consideration by the court (wa). Attested copies of the judgment and decree of a previous suit filed with pleadings, can be read in evidence without having been exhibited (wb). Photocopies of documents cannot be exhibited, without the leave of the court to lead secondary evidence (wc). However, where un-exhibited documents are not shown to have been admitted by the opposite party, who was also not given an opportunity to object to them, it cannot be said that such documents form a part of the record (wd). Where a document has been marked as an exhibit in an interlocutory application, it cannot be deemed to have been admitted in evidence in the suit (x). Endorsement does not mean that the question of admissibility has been conclusively considered(y). Objection as to formal proof of documents must be taken at the earliest stage (ya). A party is entitled to accept and get exhibited any document produced and relied upon by the other party (z). Documents admitted by both the parties need not be formally tendered in evidence(a). Where a document has been marked as an exhibit, it becomes admissible in evidence(b). Once an under-stamped document is admitted in evidence it cannot subsequently be questioned(c). See the underlined cases for method of proving documents (d). Where the court

- (t) P 1968 SC 140; A 1931 L 546 See P 1973 SC 160.
- (u) A 1943 PC 83; A 1928 L 432.
- (ua) A 1966 A 392 FB.
- (v) 2003 CLC 504; 2002 YLR 2660; A 1928 L 432.
- (va) 2003 MLD 67; 2003 CLC 504; A 1971 SC 1865.
- (w) P 1992 SC 822; P 1988 SCA JK 35; 2003 CLC 547; 2002 CLC 749; 2001 YLR 2230; P 1994 L 399; 1992 CLC 2524; 1991 CLC 1606; P 1990 AJK 29; 1989 MLD 1099; PLJ 1987 L 521; 1987 CLC 2151; PLJ 1986 L 55; P 1975 L 1170; N 1979 Civ. 207; A 1956 A 124; A 1937 Pat. 222; A 1933 S 379; A 1929 R 211 See 1992 SCMR 2182; 1993 SCMR 1137; 1993 CLC 1158; P 1975 K 817.
- (wa) P 2002 SC 446; 1989 SCMR 818; P 2003 L 255; 1993 CLC 1158 See P 1992 SC 822.
- (wb) P 1989 SC AJK 45.
- (wc) P 2003 SC 410.
- (wd) P 2003 K 148; 1985 CLC 2644; P 1975 K 817.
- (x) A 1961 Pat. 242; A 1935 M 888.
- (y) A 1929 M 522; A 1927 L 679; A 1919 N 141; 16 IC 834 L See 2000 YLR 2678; 2000 YLR 2962.
- (ya) P 1968 SC 140; P 1988 SC AJK 35; 1989 ALD 364; P 1975 L 1170; PLJ 1976 L 55.
- (z) P 1961 BJ 96; P 1954 L 635.
- (a) 1993 SCMR 1137; 1992 CLC 2524; A 1942 L 180 See P 1973 SC 160; PLJ 1975 K 265; P 1975 L 1170; P 1963 K 397 See 1987 CLC 2151.
- (b) P 1969 SC 136; P 1968 SC 140; P 1991 K 414. See P 1973 SC 160.
- (c) P 1971 SC 516; P 2004 L 95; 2000 CLC 296; P 1977 K 285; P 1977 K 49; P 1961 D 102; P 1961 D 596; P 1956 D 14; P 1954 L 525; A 1961 SC 1995. See 1986 CLC 343.
- (d) P 1973 SC 160; P 1969 SC 477; 2002 CLC 655; 1992 CLC 2524; PLJ 1975 K 265; P 1952 BJ 22.

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admits a document in evidence, it is to endorse the document in accordance with rule 4 (e). Where admission of a document in evidence is not objected to, the document may be taken to have been admitted and proved and objections cannot be allowed to be raised for the first time at the appellate stage (ea). The provisions of this rule are mandatory (f), and where they are not complied with, the document cannot be considered in evidence (g). However, where the endorsement is omitted by act of court, the parties cannot be penalized for the same (h).

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**5. Endorsements on copies of admitted entries in book, accounts and records.**--(1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where a document admitted in evidence in the suit is an entry in a letter-book or a shop-book or other account in current use, the party on whose behalf the book or account is produced may furnish a copy of the entry.

(2) Where such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished--

(a) where the record, book or account is produced on behalf of a party, then by that party, or

(b) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party.

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it.

IHA: B; G.

Comp. Ref.: 1882, S. 141A; 1877, S. 141; 1859, S. 132.

**6. Endorsements on documents rejected as inadmissible in evidence.**--Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialed by the Judge.

Comp. Ref.: 1882, S. 142; 1877, S. 142; 1859, S. 134.

Cross Ref.: LI-IG. 10.

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- (e) P 1988 SCAJK 35; 2003 MLD 1900; 2002 YLR 2706; 2001 YLR 51; 2001 YLR 2230; 2000 CLC 296; 2000 YLR 2962; P 1994 L 399; A 1943 PC 83.
- (ea) P 1969 SC 136; P 1968 SC 140; P 1988 SC AJK 35; P 1978 SC AJK 6; 2004 CLC 348; 2004 MLD 1492; P 1991 K 414; 1990 ALD 771; 1989 ALD 364; P 1978 L 52; P 1977 L 267; P 1977 K 285; P 1977 L 763; P 1975 L 1170; P 1967 D 638; A 1943 PC 83; A 1935 L 628 See P 2003 SC 411; P 1973 SC 160.
- (f) P 1988 SCAJK 35; P 1952 BJ 22; A 1916 PC 27; A 1918 A 244; 16 IC 834.
- (g) P 2002 SC 84; 1992 SCMR 2182; P 2003 K 148; 1982 CLC 1949; PLJ 1975 K 265; P 1952 B 22; A 1928 L 142; A 1927 L 115; A 1924 L 548 See P 2003 SC 410; P 1988 SCAJK 35; 1993 CLC 1158; P 1967 D 216; P 1961 BJ 96; P 1968 SC 140; A 1916 PC 27.
- (h) P 1988 SCAJK 35; P 1994 L 399; P 1975 L 1170; P 1972 K 175; P 1967 D 216. See 1993 CLC 1158.

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**7. Recording of admitted and return of rejected documents.**--(1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

IHA: AP; K; MP; M.

Comp. Ref.: 1882, S. 142A; 1877, 142; 1859, S. 134.

**Admitted documents.** Only documents admitted in evidence form part of the record of the suit (i). Other documents, should be returned to the person producing them (j). Documents produced and relied upon by a party can be got exhibited by the opposite party (k). See rule 9 post.

**8. Court may order any document to be impounded.**--Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit.

Comp. Ref.: 1882, S. 143.

**9. Return of admitted documents.**--(1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same,--

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred, or, if an appeal has been preferred, when the appeal has been disposed of:

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so:

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless.

(2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it.

**High Court Amendments-Lahore**--To sub-rule (1), add the following further proviso: "Provided further that the cost of such certified copy shall be recoverable as a fine from the party at whose instance the original document has been produced." (24-11-1972).

IHA: AP; B; G; HP; K; MP; Orr. Pat; Pu.

Comp. Ref.: 1882, S. 144; 1877, S. 144; 1859, S. 135-137.

Cross Ref.: L1-IG,21

**Return of documents.** Documents not placed on record are returned under rule 7 *ante*. Those placed on record are returned under this rule. A document forming part of the record can

(i) A 1961 Pat. 242; 14 A 356.

(j) P 1954 L 635; A 1931 L 546; 5 C 317. See A 1936 O 298.

(k) P 1961 B 96; P 1954 L 635.

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be returned unless such document has become void by force of the decree. The copy substituted must be a certified copy (l). Only the party filing the document is entitled to receive it back (la). The act of returning is purely ministerial and where the application is in order, the documents must be returned (m). Documents should not be returned until expiry of time for appeal, or until the appeal is finally disposed of by the appellate court (n).

**10. Court may send for papers from its own records or from other Courts.**—  
(1) The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit.

Comp. Ref.: 1882, S. 137; 1877, S. 137; 1859, S. 138.

**Notes.** Record of the suit includes documents which have been exhibited in evidence, those which have been filed with the plaint and those produced under Order 13 and copies of the above can be obtained under this rule (o). See also Section 165 of the Evidence Act. Even documents called from the records of a court have to be proved in accordance with the law, prior to their being received in evidence (p). Documents can be sent from any court (q). Ordinarily such documents may be proved by producing a copy thereof unless the opposite party refuses to admit such a copy when the provisions of this rule may be utilized (r). The civil court has no power to send for the records from public departments (ra).

**11. Provisions as to documents applied to material objects.**—The provisions herein contained as to documents shall, so far as may be, apply to all other material objects predicable as evidence.

IHA: A.

Comp. Ref.: 1882, S. 145.

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- (l) 26 B 522. See 2004 CLD 399.
  - (la) 1982 CLC 2191.
  - (m) A 1921 C 433.
  - (n) A 1942 O 145.
  - (o) A 1961 Pat. 242.
  - (p) A 1951 Raj. 167; A 1941 O 341; A 1931 L 119.
  - (q) P 1955 D 25; 32 PR 1874.
  - (r) A 1931 L 119.
  - (ra) 1989 CLC 1813.

## ORDER XIV

### SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON

1. *Framing of issues.*--(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds : (a) issues of fact, (b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, assertion upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

*Comp. Ref.: 1882, S. 146; 1877, S. 146; 1859, S. 139.*

*Cross Ref.: LI-IF I to 4, 14, 15.*

**Issues.** The pleadings of the parties is the first stage of a suit. The pleadings may be clarified by the statements of the parties under Order 10 and thereafter additional material may be brought on the record by the inspection and discovery of documents under Order 11, and their production under Order 13. Further the parties may be required to admit or deny documents and facts under Order 12. In addition the statements of the parties or their witnesses may be recorded under Order 14 rules 1 and 4 respectively. On the basis of all this material the court is to frame issues (a), in respect of those material propositions of fact or law alleged by one party and either denied or not admitted by the other (b), notwithstanding that no written statement has been filed (ba). For this purpose the Court can examine the parties (bb). See notes under Order 18 rule 1 for onus of proof. The court may also in the framing of issues take into consideration the evidence led in the suit (c).

It is the duty of the judge himself to frame proper issues (d). So that the parties may know the controversy, the disputed fact on which evidence is to be led and to enable an effective

#### Order 14.

- (a) 1989 CLC 1883; P 1985 K 152; P 1961 BJ 27; P 1958 L 614.
- (b) 1994 MLD 925; P 1988 Q 60; 1986 CLC 2652; PLJ 1979 L 466; A 1943 A 184; A 1936 N 177; A 1921 L 360; 68 IC 106.
- (ba) 1989 CLC 1883; 1989 CLC 1949 See 1988 MLD 290
- (bb) P 1978 SC AJK 60.
- (c) A 1953 C 657; 16 B 533.
- (d) P 2003 SC 184; 2001 SCMR 772; 1997 SCMR 1849; 2000 CLC 1018; 2000 CLR 1731; P 1999 L 465; 1994 CLC 2208; 1994 CLC 897; P 1993 L 1; 1992 MLD 1439; P 1987 L 63; 1985 CLC 1448; P 1985 P 38; PLJ 1985 L 276; N 1978 Civ. 1126; P 1961 D 65; P 1960 L 181; A 1950 Mys. 33 FB; A 1938 M 329; A 1935 L 251; 26 B 360.

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judgment to be rendered (da). Trial commences after the framing of issues (db). Where the parties are not satisfied, it is their duty to get proper issues framed (dc). Where a material point not raised in the pleadings comes to the notice of the court, during the course of evidence, the court can frame an issue regarding it and try it (e). See notes under rule 5 post. The object of framing issues is to ascertain the real dispute between the parties by narrowing down the area of conflict and determining where the parties differ (f). The onus of proving facts is on the party that desires relief on the basis of existence of such facts, unless the law presumes existence of such facts (g). See Chapter VII of Evidence Act, 1872.

The framing of issues is one of the most important stages of the trial for the following amongst other reasons:-

(o) Under Order 18 rule 2 the parties are required to prove the issues and not the pleadings generally (i). Where a matter not pleaded is put in issues the suit must be decided on the issues as framed (j).

(o) Under Order 20 rule 5 the court is bound to give a decision on each issue framed (k), and not to decide matters on which no issues have been framed (l). However, no finding need be given on an issue not relied upon by either party (m). Where no evidence is led on an issue framed, the court may decide against the side on which the onus of proof was placed (ma).

(o) The appellate court also decides the appeal on the basis of the issues framed by the subordinate court (n). See Order 41 rule 31.

Issues are to be framed on the basis of material enumerated in rule 3, and only with regard to material propositions of law or fact as defined in sub-rule (2). Distinct and separate issues are to be framed for each material proposition (o), in dispute (p). Inconsistent issues should not be framed (q). The mere fact than an allegation is made and denied does not mean that the proposition is material (r). In accordance with sub-rule (6) the court is not bound to frame issues regarding matters which are not denied (s). See Order 8 rule 5. The mere fact that an issue has not been framed, does not mean that the party admits those facts (sa). The parties may abandon

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- (da) 2000 CLR 1731.
  - (db) 2003 MLD 57.
  - (dc) 1988 SCMR 4; 1994 CLC 2208; 1994 CLC 897; P 1993 L 1; P 1988 L 264.
  - (e) A 1953 C 657; 20 B 569; 16 B 533.
  - (f) P 1999 L 465; 1984 CLC 1093; A 1956 SC 231.
  - (g) P 1986 SC AJK 109; P 1954 L 480.
  - (i) P 2000 SCMR 1172; P 2000 L 157; P 1999 L 465; 22 C 324 PC; 21 A 53 PC; A 1950 Mys. 33 FB; A 1959 Pu. 297; A 1943 S 242; A 1912 C 338 See 1992 SCMR 1229.
  - (j) A 1930 PC 205.
  - (k) 1999 CLC 1808; P 1992 P 173; P 1992 AJK 4; 16 B 545; 21 SWR 407.
  - (l) P 1992 SC 180; 1990 SCMR 1229; 1989 SCMR 1719; A 1971 SC 361; A 1968 SC 534; A 1956 SC 593; A 1946 M 180; A 1943 A 184; A 1925 L 571. See 1989 SCMR 1634; 1989 MLD 3206; P 1971 SC 82.
  - (m) P 1958 L 63.
  - (ma) 2000 SCMR 1647.
  - (n) P 1992 P 173; 12 C 239 PC; 7 A 1 PC.
  - (o) P 2001 L 157; P 1999 L 465; P 1991 P 17; P 1986 SC AJK 109; P 1985 P 38; P 1983 L 253; P 1979 L 304; A 1948 N 170; A 1943 Pat. WN 117.
  - (p) P 1991 P 17; A 1924 N 156.
  - (q) 13 M 549.
  - (r) 1986 CLC 2652; 1984 CLC 2599; 48 CWN 635.
  - (s) PLJ 1976 L 466; 26 B 735; 23 SWR 158.
  - (sa) 26 B 360.

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issues, but an issue of law can always be raised (sb). No issues are to be framed with regard to matters admitted by the defendants, and the court will pronounce judgment respecting matters which are admitted (t). See notes under Order 12 rules 1 and 6 and Order 15 rule 1.

Where proper issues are not framed by the trial court, the appellate court can remand the case for framing of proper issues or after itself framing proper issues (u), unless the issues had been framed with the consent of the parties (v), or the parties have not been prejudiced (w). See Order 41 rules 25 and 27. If no issues are framed at all and the parties are prejudiced, it will be a material irregularity (x). The parties can, as a matter of right, claim the framing of an issue upto the time of the final disposal of a suit and no question of waiver or abandonment can arise (xa). When the parties have fully led evidence, it is for the court to arrive at proper conclusions and the matter of onus of proof loses its significance (xb). Onus of proving a negative plea is sufficiently discharged by a statement to this effect, whereafter it is for the other party to prove the fact (xc). However, mere omission to frame issues is by itself not fatal where substantial justice has been done (y), and where this irregularity has not affected the merits of the case, the appellate court will not remand the case (z). See Section 99. For instance the parties may have been aware of the points requiring determination and have led evidence and the matter have been decided by the court (b). If parties go to trial deliberately on issues which disclose a case not made out in the pleadings, the suit should be determined on those issues, notwithstanding the defect in the form of pleadings (c). However, no amount of evidence can be looked into upon a plea which was never put forward (d). Issues may be raised, amended or struck out at any stage of the proceedings. See rule 5 post and Order 41 rule 24. Where the trial of two suits has been consolidated common issues can be framed (da).

- (sb) 1981 CLC 121; A 1954 SC 263; A 1960 Orr. 146; A 1943 O 17; A 1935 L 71; A 1919 M 698 See P 1982 L 763.
- (t) 1994 CLC 879; A 1960 Pu. 62; 11 M 367.
- (u) P 2003 SC 184; 2001 SCMR 772; 1989 SCMR 1719; P 1993 L 1; 1985 CLC 2028; 15 C 684 PC; 11 MIA 25; A 1921 M 701.
- (v) 1990 SCMR 1229; 1989 SCMR 1719; (73) IA supp. Vol. 212.
- (w) P 2003 SC 271; P 1997 SC 308; 1993 SCMR 2018; 1988 SCMR 4; 2002 YLR 2227; 2000 CLC 1018; P 1998 P 36; 1995 CLC 43; 1994 MLD 925; 1990 ALD 487; P 1982 K 639; 1982 LN 371; P 1980 L 324; 77 PR 1903. See P 1990 SC 180
- (x) P 1971 SC 82; 1989 MLD 4104; 1985 CLC 2028; 6 M 1 PC; 11 MIA 25; 9 A 147 FB; See 1998 SCMR 964; 1993 SCMR 2208; 1989 SCMR 1719; P 1982 L 763; P 1993 L 1.
- (xa) P 1992 SC 180; P 1982 L 763 See 1999 SCMR 786; 2001 YLR 1373.
- (xb) 2004 SCMR 1219; P 1973 SC 834; 2003 YLR 819; 1994 MLD 925; P 1990 L 37; 1989 MLD 4228; 1987 CLC 1125; P 1984 SC AJK 138; A 1920 PC 67 See 1985 CLC 1063.
- (xc) P 1972 SC 25; 1989 ALD 279.
- (y) P 2003 SC 271; 1988 SCMR 4; P 2003 L 35; 2000 CLC 1018; 1992 MLD 482; P 1982 K 639; P 1998 L 431; 1982 CLC 1480; P 1961 L 35; 13 MIA 573; A 1921 PC 84; A 1953 C 657; A 1941 P 59; A 1934 L 300; A 1925 O 383; 77 PR 1093.
- (z) 1993 SCMR 2018; 1988 SCMR 4; 2000 CLC 1018; A 1959 C 181. See 1985 CLC 2028.
- (b) 2004 SCMR 1219; 2004 SCMR 1130; P 2003 SC 271; P 1997 SC 308; 1993 SCMR 2018; 1985 SCMR 1; P 1971 SC 82; 2003 CLC 1684; 1998 CLC 1216; 1998 CLC 1439; 1998 CLC 2047; 1995 CLC 43; 1994 MLD 925; 1990 CLC 1617; 1990 ALD 494; 1989 ALD 4104; 1988 CLC 1127; P 1988 L 126; 1987 CLC 1125; PLJ 1983 L 97; P 1982 K 639; P 1961 L 35; P 1956 L 596; A 1956 SC 593; 29 A 184 PC; 11 C 379 PC; A 1934 L 300. See P 1992 SC 180.
- (c) A 1930 PC 205; A 1951 SC 177; A 1959 C 181.
- (d) A 1950 PC 68; A 1949 PC 43; A 1930 PC 57; A 1956 SC 593; A 1959 Pu. 297.
- (da) P 1999 K 354.

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**Appeal.** A revision lies on the question of wrong allocation of burden of proof (*e*) or non framing of a necessary issue (*ea*).

**2. Issues of law and of fact.**--Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

**Comp. Ref.**: 1882, S. 146; 1877 S. 146; 1859, S. 139.

**Cross Ref.**: RSC 25.2, O. 15.3.

**Issues of law and fact.** Ordinarily the court has discretion in disposing of the issues in any order it considers proper (*f*). However, in appealable cases the court should decide on all issues to avoid remand (*g*), and where an issue of law going to the root of the case and capable of being decided without recording evidence is raised the court is bound to decide such issue first (*h*). This rule is mandatory in this sense (*ha*). Even where issues of law and fact have both been framed, the court may, at a subsequent stage under Order 15 rule 3 decide only such issues which will dispose of the whole suit first (*i*). A preliminary issue should be decided first and not reserved for arguments at the conclusion of the trial of the suit (*j*). Issues regarding jurisdiction and court fee should ordinarily be determined as preliminary issues but not doing so would not vitiate proceedings (*ja*). See Order 15 rule 3.

If an issue requires the production of evidence for its determination, the court should not treat it as a preliminary issue (*k*). It can be a preliminary issue if it can be decided on the basis of separate evidence (*ka*). If a mixed issue of law and fact is raised, the court may not treat it as a preliminary issue (*l*). The court should try together all the issues requiring evidence (*m*), unless the finding on any one of them will render the trial of the others unnecessary (*n*). Whilst a preliminary objection relates to the entire suit, it should not normally touch upon the merits of the case (*o*). See Order 41 rule 23. The following are the instances of preliminary issues:-

An issue regarding the jurisdiction of the court (*p*), an issue respecting court fee (*q*), an

- (e) P 1963 L 455; P 1960 L 181.
- (ea) 1994 CLC 2208 See 1998 SCMR 964; 1993 SCMR 2018.
- (f) P 1995 K 416; A 1950 M 596; A 1933 A 749.
- (g) 1993 CLC 633; 1990 ALD 510; 1982 CLC 1956; A 1950 M 596; A 1943 B 83; A 1932 B 1.
- (h) 2004 MLD 943; 2000 CLC 904; P 1996 L 528; 1996 MLD 55; 1990 MLD 2049; 1990 ALD 510; 1990 MLD 1794; P 1975 L 425; A 1962 A 572; A 1958 Pu. 409; A 1939 L 158; A 1936 Pat. 250; A 1932 Pat. 25; A 1932 B 1.
- (ha) 2004 MLD 943; A 1932 Pat. 25.
- (i) P 1984 Q 101; A 1922 M 321 See A 1921 Pat. 467.
- (j) 1989 CLC 1918; P 1984 Q 101; P 1975 L 425; A 1963 AP 232; A 1962 A 572 See P 1976 L 1433.
- (ja) 2001 CLC 899; 2000 MLD 1155; 1985 CLC 2846; P 1984 Q 101; N 1982 Civ. 110; P 1975 L 886; See 1983 LN SC 55.
- (k) P 1995 SC 629; P 1996 L 528; P 1995 K 416; 1994 MLD 940; 1983 LN SC 55; P 1949 L 185; A 1932 B 128; A 1932 Pat. 344 See A 1954 C 588.
- (ka) P 1996 L 528; P 1961 D 412 See 1993 CLC 633; P 1976 L 1433.
- (l) 1993 CLC 633; A 1950 M 213; A 1932 B 128.
- (m) P 1996 L 528; 1993 CLC 633; P 1976 L 1433; A 1956 B 721; A 1943 B 83; A 1932 B 128; A 1925 Pat. 674; A 1923 Pat. 344.
- (n) P 1961 D 412; A 1956 B 721.
- (o) P 1949 L 185.
- (p) 2000 mld 1155; P 1996 L 528; 1990 MLD 2049; 1990 MLD 1794; N 1982 N 110; P 1975 L 886; P 1975 L 425; A 1962 A 572; A 1952 B 365. See 1983 LN SC 55.

burden of proof (e) or non

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sing of the issues in any d decide on all issues to se and capable of being such issue first (h). This have both been framed, such issues which will first and not reserved for rsidiction and court fee so would not vitiate

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cting court fee (q), an

43 B 83; A 1932 B 1.  
MLD 2049; 1990 ALD  
09; A 1939 L 158; A

62 A 572 See P 1976

982 Civ. 110; P 1975

L N SC 55; P 1949 L

B 83; A 1932 B 128;

982 N 110; P 1975 L

issue respecting absence of cause of action (see Order 7 rule 10) (r); questions relating to limitation provided that the facts are not disputed (s), an issue regarding res judicata.(sa)

A decision on a preliminary issue cannot be re-opened at the time of pronouncing final judgment (t). However, a party can ask the court to determine a preliminary issue assuming the fact as stated in the pleadings to be correct, and in the event of an adverse decision, can at a subsequent stage of the suit disprove such facts (u).

**Appeal.** An improper exercise of discretion under rule 2 is revisable (v).

**3. ✓ Materials, from which issues may be framed.**—The Court may frame the issue from all or any of the following materials:

(a) allegations made on oath by the parties, or by any persons present or their behalf, or made by the pleaders of such parties;

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;

(c) the contents of documents produced by either party.

Comp. Ref.: 1882, S. 147; 1877, S. 147; 1859, S. 139.

Cross Ref.: LI-IF: 6.

**Framing of issues.** Apart from the pleadings and examination of the parties under rule post, issues may be framed on the basis of the materials referred to in rule 3 (w). Issues can be framed on the oral examination of the parties (x), or on the basis of oral objections (y). Before framing an issue on fraud, coercion, undue influence etc., it is the duty of the court to examine the parties to determine the precise nature of the plea (z). The issues should not be contrary to the pleadings of the parties (a). However, as has been explained in the notes under rule 1, issues can be framed from materials other than the pleadings (b).

**Appeal.** No appeal lies against refusal to frame an issue (c), but a revision may lie (d).

**4. Court may examine witnesses or documents before framing issues.**—

Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without inspection of some document not produced in the suit, it may adjourn the framing of issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

(q) 1990 MLD 2049; 1990 MLD 1794; PLJ 1975 L 305; A 1962 A 549.

(r) A 1939 L 158.

(s) 1990 MLD 1794; 1990 MLD 2049; A 1935 L 982 See P 1976 L 132.

(sa) 1989 CLC 1718

(t) 1992 SCMR 846; A 1938 A 113.

(u) 40 C 598 PC; A 1948 N 334.

(v) P 1996 L 528; 1989 CLC 1718; P 1975 L 425; P 1961 D 412; A 1936 Pat. 250; See 1989 CLC 1718; PLJ 1975 L 305.

(w) 10 M 375. See PLJ 1983 SC AJK 53.

(x) P 1961 BJ 27; 51 IC 1007; 11 C 407.

(y) 24 C 306.

(z) A 1953 SC 225.

(a) A 1950 PC 68; 15 C 684 PC; 11 MIA 7; A 1940 N 94.

(b) P 1961 BJ 27; P 1958 L 614; 11 C 318 PC; A 1925 M 169; A 1919 C 186; 11 C 407; 5 B 609.

(c) 34 M 1 FB; 4 C 531.

(d) A 1947 Pat. 45.

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Comp. Ref.: 1882, S. 148; 1877, S. 148; 1859, S. 140.  
Cross Ref.: LI-IF, 3, 12, 13.

**Notes.** Where the facts alleged in the pleadings do not clearly indicate what plea is intended to be taken, it is the duty of the court to examine the parties, clarify the position and settle the appropriate issues (e). See notes under rules 1 and 3 *ante*. Statement for clarification of pleadings can be recorded under Order 10, and for this purpose the parties can be examined. Under this rule any person may be examined and any document summoned for purposes of correctly framing issues (ea). Where a party in its examination admits a contention, no issue need be framed in that behalf (eb).

**5. Power to amend, and strike out, issues.**--(1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

Comp. Ref.: 1882, S. 149; 1877, S. 149; 1859, S. 141.

**Amendment etc. of issues.** The powers of a court in relation to framing, striking out and amending issues is somewhat analogous to the powers vesting in it in relation to adding, striking out and transposing parties to a suit under Order 1 rule 10. The court has inherent power to take cognizance of questions going to the root of the case at any stage of the case (f). For this purpose proper issues must be framed (g). Subject to the terms of rule 3 (h), rule 5 authorizes the court to add, amend or strike out issues. The first part of rule 5 vests a discretion in the court whilst the second part is mandatory in its terms (i). See notes under Section 153 and Order 6 rule 17.

**Discretionary powers.** Where no injustice would result the court may frame or amend an issue on a point not contained in the pleadings (j). It should not do so if as a result, the nature of the suit would be altered (k), or where it would permit the making out of a case not put by the parties (l). Nor can the court by framing issues allow the parties to alter their stand by raising inconsistent pleas (m).

**Mandatory Powers.** The latter part of rule 5 makes it mandatory upon the court to amend or frame issues necessary for determining matters in controversy between the parties (n), where the issues as framed do not bring out the real point in controversy (o), or do not cover the entire controversy (p). The mere fact that the party did not press it, is no ground for not framing the issue (pa).

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- (e) A 1953 SC 225.
  - (ea) 2001 MLD 948; 2000 CLC 655.
  - (eb) 1988 MLD 2069.
  - (f) 2004 MLD 1316; 35 M 607 PC; A 1922 Pat. 514.
  - (g) P 1961 K 486; A 1934 A 273; A 1919 M 471.
  - (h) 1991 MLD 981; A 1940 N 94.
  - (i) 2004 MLD 1316; P 1980 K 412; 35 M 607 PC See P 1989 L 523; A 1914 S 40.
  - (j) 24 M 367 PC; A 1925 C 1157; 5 C 64; 5 B 609.
  - (k) 13 B 664.
  - (l) P 1958 L 63; A 1940 N 94.
  - (m) 27 A 1 PC; 14 A 366 PC.
  - (n) 1982 LN 279; P 1980 K 412; P 1960 L 181; 35 M 607 PC; A 1947 Pat. 45.
  - (o) PLJ 1980 K 254; 19 B 374.
  - (p) 6 MIA 393.
  - (pa) 1982 LN 279; P 1961 D 65 See 2000 SCMR 1058.

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**At any stage.** The power vested in a court under rule 5 can be exercised at any stage prior to the final disposal of the case (q). Even the appellate court can exercise powers under Order 14 rule 5 where the case cannot be disposed of on the basis of issues as already framed (r). See Order 41 rules 24 to 26. But an appellate court may refuse to entertain an objection regarding issues if it is raised for the first time in appeal (s). Where new issues are framed, additional evidence should be recorded (t). Where issues have not been properly framed, the appellate court can reframe them and remand the case for a decision afresh (ta). See notes under Order 41 rules 23, 25 and 27.

**Appeal.** In appropriate cases a revision may be competent (tb). See notes under Rule 1.

**6. Questions of fact or law may by agreement be stated in form of issues.**--Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,--

(a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement; or

(b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or

(c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

Comp. Ref.: 1882, S. 150; 1877, S. 150; 1859, S. 142.

Cross Ref.: O. 36.1.

**7. Court, if satisfied that agreement was executed in good faith, may pronounce judgment.**--Where the Court is satisfied, after making such inquiry as it deems proper,--

(a) that the agreement was duly executed by the parties,

(b) that they have a substantial interest in the decision of such question as aforesaid, and

(c) that the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court;

and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement; and, upon the judgment so pronounced, a decree shall follow.

Comp. Ref.: 1882, S. 151; 1877, S. 151; 1859, S. 143.

Cross Ref.: O. 36.1.

**Notes.** The provisions of rules 6 and 7 are analogous to those of Order 36. See Form No. 1.

(q) P 1992 SC 180; P 1999 L 465; P 1991 K 205; 1991 MLD 981; 1991 MLD 1284; 1990 CLC 502; P 1982 L 763; A 1980 K 412; P 1963 K 397; 35 M 607 PC; A 1930 N 225; 5 B 609.

(r) 1999 SCMR 786; P 1994 P 16; 1990 ALD 400; 1882 AWN 93; 18 SWR 297.

(s) 1990 MLD 355; 1990 ALD 217; P 1980 L 324; P 1967 L 1171.

(t) 1984 CLC 1395; A 1937 L 73 See 1999 SCMR 786.

(ta) 2001 YLR 930.

(tb) 2001 YLR 231; 1989 LN 873; P 1982 L 763.

**Appendix H.** The provisions of rules 6 and 7 permit the parties to frame issues of fact or law and submit them for trial in a pending suit. They allow adjustment or compromise between the parties consequent upon the opinion of the court on an issue of fact or law, submitted to the court by the parties (u). It is an alternative to compromise under Order 23 rule 3.

**Appeal.** A decree under rule 7 is appealable (v).

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- (u) 16 B 202.  
(v) 1886 AWN 233 Contra 29 C 306.

**Order 15**  
(a) 1993  
(b) 12 SV  
(c) 25 B  
(ca) 1996  
(d) A 195  
(e) P 198

**ORDER XV****DISPOSAL OF THE SUIT AT THE FIRST HEARING**

**1. Parties not at issue.**--Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment.

Comp. Ref.: 1882, S. 152; 1877, S. 152; 1859, S. 144.

**First hearing.** See notes under Order 9 rule 8. Where the parties are not at issue, the court may pronounce judgment forthwith (a). The court must be satisfied as to the good faith and identity of the parties (b). See notes under Order 12 rule 6.

**2. One of several defendants not at issue.**--Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants.

Comp. Ref.: 1882, S. 153; 1877, S. 153.

**Notes.** Where one of the several defendants appears and admits judgment, it will not bar further proceedings against the other defendants (c) and where the liabilities are several, the Court can decree the suit against the admitting defendant (ca). If admission is not made, the Court cannot presume that the parties are not at issue without resorting to the provisions of Order 10 rule 1 (d).

**3. Parties at issue.**--(1) Where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit.

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects.

(2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case requires.

Comp. Ref.: 1882, S. 154; 1877, S. 154; 1859, S. 145.

**Notes.** Under Order 14 rule 2, the court may in the first instance frame issues of law only (e). Under this rule where issues of law and fact have both been framed, the court may

**Order 15**

- (a) 1993 MLD 1836; 1990 CLC 1609; A 1947 S 105 See 2001 CLC 99.
- (b) 12 SWR 432.
- (c) 25 B 378. See 1990 CLC 1609.
- (ca) 1996 MLD 681.
- (d) A 1953 TC 220 FB.
- (e) P 1984 Q 101; A 1991 Pats 467.



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#### 14. Strengthening the Judicial System.

In order to ensure reduction in the caseload, fair and speedy trial, there should be gradual increase in the number of judges. The possibility of establishing the evening shift to clear backlog may also be considered. A special package of increased emoluments and fringe benefits will give birth to a new judicial culture.

#### 15. Reforms in CPC.

The Lahore High Court in the year 2001, approved certain amendments in Orders V, VIII, IX-A, XVI of the First Schedule of the Code of Civil Procedure, 1908 which were promulgated through Notification No. 300 Rules/XI-Y-26 dated 2.10.2001 to ease effective service of courts summons, check frequent adjournments for submission of written statements, fixation of intermediate dates for amendments of pleadings, and to take other necessary steps to avoid interference in courts' proceedings. The amendments are:

1. In Rule 10-A of Order V of the Code, another mode of service, "through courier messenger" has been added beside the existing mode of sending summons through post. The courier service in present days is the most effective, speedy and reliable mechanism of transmitting message from one place to another. This amendment may help in curtailing court delays normally caused due to ineffective mode of service.

2. Order VIII of the Code deals with submission of written statement and set off which generally is abused causing delay. The provision has been amended by adding a further proviso after the existing one as under:-

Provided further that not more than two adjournments shall be granted for presenting the written statement.

3. Order IX of the Code, dealing with appearance of parties and consequence of non-appearance is commonly abused which unnecessarily prolongs litigation ie. where a suit is dismissed under rule 2 or

rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an Order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his not paying the court fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the court shall make an Order setting aside the dismissal and shall appoint a day for proceeding with the suit.

To avoid fresh suit on the same cause of action a new sub rule (2) after rule 4 of Order IX of the Code is added as under:-

- (2) The provision of section 5 of the limitation Act, 1908 (IX of 1908) shall apply to applications under sub-rule (1).

This amendment has saved the parties from bringing fresh suit on the same cause of action.

4. By addition of Order IX-A in the Code a new and very important concept of case management has been introduced which is generally followed in developed countries to check belated compilation of suits and to rectify faults at initial stage of hearing as under:-

#### **Intermediate Dates**

1. Fixation of Intermediate dates.- After the close of the pleadings, the Court shall fix:-

- (a) a day by which parties shall apply for orders of the Court with regard to any of the following matters, namely:-

Pleadings, further and better particulars, admissions, discoveries, inspection of documents or of movable or immovable property and the mode by which particular facts may be proved;

- (b) another day by which parties may reply such applications; and
  - (c) a third day on which, unless the hearing is adjourned, the applications shall be disposed of.
2. Applications regarding pleadings, etc., their replies and disposal.- "No opportunity shall be given to any party for making any such application as aforesaid or for submitting a reply thereto after the expiry of the day fixed for that purpose, unless the time is enlarged under the provisions of this Code; but nothing herein shall affect the right of the parties to make such applications before the closing of the pleadings".
5. The addition of new Rule 4-A in Order XII of the Code has increased the power of Court to call any party without being asked by the plaintiff/ defendant. The amendment is as under:

"4-A. Power of Court to record admission of documents and facts.- Notwithstanding that no notice to admit documents or facts has been given under Rules 2 and 4 respectively, the Court may, at any stage of the proceedings before it, of its own motion, call upon any party to admit any document or fact and shall in such a case, record whether the party admits or refuses or neglects to admit such document or fact".

The new addition has given suo moto jurisdiction to the courts to record admission of documents and facts. In fact the provision of Rule 4 was aimed at to resolve the facts based on documents to save courts precious time, but is seldom applied by the parties primarily on account of their vested interests. Now, the courts may invoke this jurisdiction, hopefully giving required results.

(16)

6. Summoning of witness and presenting a witness in the court is yet another cause often abused to prolong a case. The forum of summoning a witness has further been improved by amending rule (1) of Order XVI of the Code as under:-

"Summons to attend to give evidence or produce document: (1) Not later than seven days after the settlement of issues, the parties shall present in court a certificate of readiness to produce evidence, alongwith a list of witness whom they propose to call either to give evidence or to produce documents".

- (2).....  
(3).....

These amendments has far reaching effect for speedy disposal of cases and to eliminate delays on technical grounds.

These amendments may be considered for adoption by the High Court of Balochistan, Sindh and Peshawar, as they would help in quick processing and expeditious dispensation of justice.

#### **16. Reforms Through Administrative Measures.**

- (1) A system of pre-trial hearing be introduced wherein at the preliminary stage of trial, small claims and minor disputes, subject to consent of the parties, be referred for resolution through mediation, conciliation arbitration or any other appropriate mode of alternative dispute resolution.
- (2) Miscellaneous proceedings i.e. filing of written statement, reply, entry of attendance of parties be entrusted to the Reader of the court and the presiding officer should deal with recording of evidence, hearing of arguments and writing of judgments. The Reader must be fully qualified and trained. In the existing system where a judge has large cause list, his time is

consumed for attending to the miscellaneous work. A judge should however keep a hawk eye on working of his Reader to avoid any possibility of delay or miscarriage of justice.

- (3) Every court should have its own copying facility so that delay in obtaining judgments/decree for appeal/execution is avoided.
- (4) Order V rules 10, 10-A and 20 of the Code of Civil Procedure 1908 provide different modes of service including service by registered post, acknowledgement due, through electronic device of communication, telegram, telephone, phonogram, telex, urgent mail service, public courier service etc. Sometime back the process serving agency was manned by non-official persons receiving their remuneration from out of process fee. The task of process serving can again be franchised on the pattern of Britain where service on a respondent is effected by the Master and a claim is treated to be filed only after service on the respondent.
- (5) In case an appeal is partly accepted, the same should not be remanded back to trial court, rather the point in issue be decided by the court of appeal.
- (6) At the first date of hearing, pleading of parties must be carefully examined to remove any legal defect in pleadings and persuade the parties to agree on an appropriate alternative mode of dispute resolution.
- (7) A one time process fee should be fixed so that delay in trial, due to dismissal of suit for non-payment of process fee is avoided.
- (8) Atmosphere conducive to efficient working may be provided. This will include provision of properly furnished courtrooms with temperature controlling devices like Air-conditioners and Heaters.

- (9) A whole time public prosecutor should be provided to each court.
- (10) Session Court may have powers to fix adequate fee for payment to state counsel, appointed by them in Sessions cases. For this purpose, necessary funds be made available to District and Sessions Courts.
- (11) Litigant public should not be unnecessarily summoned for court proceedings and should be respected by the court staff. They may be provided with public utilities in the court premises including proper sitting arrangements.
- (12) District and Session Judges may be given relaxation in output of judicial work because of administrative and other workload, which they have to bear.
- (13) Computer network in the District linked with the High Court may be established.
- (14) A working library may be provided to each court.
- (15) Arrangements may be made for supply of Federal and Provincial gazettes to the courts.

**NJPMC's Observations:**

A letter was received from the Prime Minister Secretariat regarding to the Prime Minister's address to the Nation on 11 March 2003. The letter contained a policy statement of the Prime Minister on the administration of justice and solicited suggestions of the Chief Justice of Pakistan for strengthening the capacity of the judicial system. Accordingly, the Secretariat of Law & Justice Commission of Pakistan prepared a draft Report and placed it before the National Judicial Policy Making Committee in its meeting held on 27 September 2003 at Islamabad for consideration. The meeting deliberated upon the draft Report and had it approved with the following observations (extract from the Minutes of Meeting):-



- After the pleadings are closed, there comes the stage of producing documentary evidence before issues are settled but nobody bothers to produce documentary evidence at this stage.
- Little use is made of the provisions for discovery and inspection of documents and for serving interrogatories. If these provisions are properly used, the controversy between the parties can often be narrowed before the cases go for trial. However, what usually happens is that when the suit comes on for trial, the advocates sit down in the Court, open their brief case, probably for the first time, and begin laboriously to prepare lists of documents, etc. All the while the poor judge sits idly on the Bench, helplessly looking on. Countless hours are wasted in this way.

The system of pretrial conferences is an internationally acknowledged mode or expeditious and effective disposal of cases. It obliges the court/judge to become fully involved and play a more activist role, at the pretrial stage. The purpose is to prevent the parties or their counsels - or for that matter, the ministerial staff of the court - to indulge in or resort to tactics, which may hamper/impede, the speedy disposition of cases. Pretrial proceedings, if properly conducted, would result in the proper preparation of the case for trial, eliminating thereby undue delays in disposal. It helps to prevent irrelevant/ unnecessary issues being framed and non-essential (factual, expert and documentary) evidence being included in the trial. An important objective of the pretrial hearing is to encourage/facilitate the parties to try and reach an out-of-court amicable settlement of the dispute. In brief, pretrial proceedings aim at achieving the following objectives:-

1. Prompt service of summons to ensure the appearance of parties and/or witnesses.
2. precise issues to be framed, so as to avoid unnecessary/irrelevant issues/matters being included for determination.



- 3- Amendment of pleadings so as to include only the essential and exclude the non-essential material therefrom.
- 4- To set time lines i.e. a case scheduling order
- 5- Seeking clarifications from parties with regard to obtaining admissions of facts and/or documents.
- 6- Restricting/limiting the number of factual and expert witnesses to the mere essential.
- 7- Constituting Commissions for recording evidence, carrying inspections and discovery/production of facts/documents.
- 8- Obtaining stipulation or admission of fact and/or documents to avoid the obtaining of unnecessary/irrelevant proof.
- 9- Encourage the parties to try and reach an out-of-court, amicable settlement of disputes, through any of the alternative means of dispute-resolution, viz. arbitration, conciliation and mediation, etc.

Pretrial conference is mandatory in Fiji, Hong Kong, Martial Islands, Micronesia, Philippines and the United States. In countries where pretrial proceedings are mandatory, the courts are bound to apply such procedures and the parties obliged to comply. For default on the part of a party, sanctions can be imposed. Whereas, most of the states, however, prescribe specific, and at times, fairly detailed procedure on the subject, e.g. Queensland (Australia), South Australia, Western Australia, Hong Kong, Nigeria, Philippines, Singapore and the United States.

The present laws/rules in Pakistan do not prevent judges from calling the parties to preliminary hearings to thoroughly scrutinize their pleadings. There do exist some sketchy provisions in the CPC on the subject e.g. scrutiny of the plaint and written statement for the determination of material issues, amendment of



pleadings for clarity and seeking stipulations/admissions of facts/documents etc.

It is pertinent to mention that the two previous reports on civil law, namely Justice S. A. Rahman's Law Reform Commission Report (1958-59) and Justice Hamood-ur-Rahman's Law Reform Commission Report (1967-70), recommended the initiation of formal pretrial hearings for expeditious resolution of preliminary issues, thereby helping to quicken the pace of trial.

The Code of Civil Procedure, 1908, binds the defendant to submit the written statement 'at or before the first hearing or within time not exceeding thirty days as the Court may permit. But in most cases, the defendant intentionally does not comply with the time-limit provision for filing written statement. It is observed that number of frivolous applications are filed before filing written statement, which causes unnecessary delay in the disposal of proceedings.

One of the reasons for delay in disposal of suits is grant of frequent and unnecessary adjournments. Grant of adjournment is in discretion of the court in aid of justice and not to encourage improper and delaying tactics [1993 MLD 2149]. It must be judicious [1988 CLC 654; 1984 CLC 3080; PLD 1987 Lah. 650] based on some sufficient cause [1980 CLC 1588]. It is not meant to be exercised very liberally [1998 CLJ 770].

Furthermore, in the execution stage, judgment-debtors take advantage of technicalities and adopt dilatory tactics and make application with intent to delay the execution. The entire judicial process in civil suit's has been brought to disrepute by the manner and method of executing proceedings that protract over decades and others are unintentional.



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## A. Civil Justice System

- i. The time limit for filing written statement specified by the Code should be strictly followed. The Code of the Civil Procedure provides that the defendant shall present his written statement at or before the first hearing or within such time not exceeding thirty days as the Court may permit. But in fact, the Court grants times to file the written statement as the rule is directory. A strict time limit of two months is to be fixed for filing written statement or reply after the first date of hearing. Compliance
- ii. Order X Rule 2 of Code of Civil Procedure, mandates the Court to examine orally such of the parties to the suit appearing in person or present in Court, as it deems fit with a view to elucidate the matters in controversy in the suit. It is seen that the Courts do not always examine the parties in terms of the statutory provision. It is likely that if the parties are thoroughly examined with reference to the averments made in the pleadings, they will admit many facts, thereby reducing the necessity of recording evidence. The Court should, therefore, always direct personal appearance of the parties with a view to examine them under Order X Rule 2 of the Code of Civil Procedure.
- iii. The provisions of Order XI of Code of Civil Procedure, providing for discovery by interrogation, production and inspection of documents are not used frequently. If full use of these provisions is made, unnecessary evidence can be curtailed and trial can be expedited.
- iv. It shall be mandatory by law for judges to conduct preliminary scrutiny on the very first hearing, as soon as a plaint is placed before a judge.



- v. Pretrial hearings shall be made mandatory which shall also provide "A Case Scheduling Order" along the lines of Rule 16 of Federal Rules of Civil Procedure in the United States.
- vi. After filing the plaint, the process fee is not paid for a long time resultantly, that the summons to the defendant are not served within time. Order XLVIII shall be amended to provide a specific timeline for payment of process fee.
- vii. Little use is made of the provisions for discovery and inspection of documents and for serving interrogatories. If these provisions are properly used, the controversy between the parties can often be narrowed before the cases go for trial. Code of Civil Procedure shall be amended to provide for a maximum period of ninety days for producing discoveries and inspection of documents and for serving interrogatories. (*Linear Attorney*)
- viii. Order XVII of the CPC which deals with adjournments needs to be revised. (*Att.*)
- ix. Trial Court shall pronounce a judgment within thirty days, failing which strict disciplinary action shall be taken against the judge;
- x. First Appeal against the decree or order shall be decided within forty five days.
- xi. First and/or second Appeals by the High Court(s), and the hearing of the cases before it in its revisional and constitutional jurisdiction shall be decided within sixty days.
- xii. Revisions are a great source of delays. No such power exists in the United Kingdom and the United States of America. Revision powers as given in Section 115 CPC, 1908, should be altogether abolished.
- xiii. Intra court appeal within High Court should be abolished. Let there be direct appeal from order of the High Court to Supreme Court because experience has shown that after going through intra court appeal, 90%

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#### 6. Inordinate Delay caused due to the Non-Service of Summons

The first stage at which cases get stuck after institution of plaint is that of service of summons. Relying upon dilatory tactics, parties often evade service of summons quite successfully for several months, if not years. This happens due to a number of reasons. For one, the process serving agency of most courts is corrupt, under-funded, under-staffed and inefficiently managed. Further, at present, the law does not recognize electronic modes of service such as service through recorded telephone calls, registered SMSs and secured email. Also, the process serving agency of the civil courts is not linked with the National Database Registration Authority (NADRA) for the said purpose. Finally, the law does not require parties to provide all particulars, e.g. address of place of business or employment, etc.

#### 7. Lack of a Preliminary Scrutiny of Cases

Under the law, courts already enjoy the mandate to reject cases which do not "disclose a cause of action" or are "barred by law" or by limitation (see Order VII Rule 11 of the CPC). In practice, though, judges do not exercise these powers unless moved to do so by one of the litigating parties. This often happens at the stage when the case has already progressed quite far and significant court time has been wasted and much suffering has been caused to the other party.

#### 8. Abuse of Interim Injunctions

Soon after instituting a plaint, parties apply to the court for an *ad interim* injunction. Often these applications are based on very weak grounds and are made with a malicious intent to cause vexation to other party. The penalty for granting interim injunction on false grounds is stated in Section 95 of the Code of Civil Procedure, 1908; however, this penalty has proven insufficient for deterring abuse of this process.

#### 9. Delays caused by a lack of Case Scheduling

Law reform studies from all over the common law world converge on this point: the key to fighting delay in an adversarial legal system lies in proactive case management by judges. It is only when judges fully take charge of the cases on their docket that the pace of trial can pick up.

Experience in the US, UK and other common law jurisdictions shows that the most important tool in a judge's case management tool-kit is a "Case Scheduling Order". The effectiveness of a Scheduling Order was first demonstrated in the United States where it was introduced in 1984 through amendment to Rule 16 of Federal Rules of Civil Procedure. Subsequently,

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England's famous Woolf Reforms also emphasized its importance and introduced it in the UK's legal system.

Presently, case scheduling is not a part of the practice of our courts. When parties enter into litigation neither the judge in-charge of the case nor the lawyers involved lay down any stage-wise deadlines. This absence of a road-map not only causes litigant parties much mental anguish, it also contributes to delay.

It was pointed out to the Committee that Order IX-A of the CPC which was introduced in 2001, was inspired by the idea of a Case Scheduling Conference in the US. However, its drafting is extremely faulty and fails to convey what it seeks to achieves. It is the main reason why no case law has developed so far on Order IX-A.

#### **h. Delays Caused by Endless Adjournments**

In today's Pakistan, the practice in the subordinate courts is that dozens of adjournments are sought and granted in every single case. Even a written application is not required for seeking adjournments, leave alone a reasoned application backed up by evidence. Nor is there any requirement of providing the other party prior notice of a request for adjournment.

Despite the tremendous importance of this phenomenon for the legal system, there exists little research on the extent, causes and consequences of the grant of adjournments. Nonetheless, it is clear from the feedback of stakeholders that adjournments comprise the largest contributing factor in causing delays in the dispensation of justice in the lower courts. Order XVII Rule 2 already provides for the levy of costs upon the party seeking adjournments. However, such costs are almost never awarded.

#### **i. Absence of Cut-off Deadlines**

The CPC does not provide the maximum time that a court is allowed to take from the institution of a plaint to decreeing it. The CPC does mention the deadlines of a few stages of the civil process. For instance, the maximum time allowed for filing Written Statement after service of plaint upon a defendant is 30 days. Likewise, a list of witnesses has to be provided 7 days after framing of issues. But many of these deadlines are no longer appropriate in view of today's fast-paced society.

#### **j. Stay of Suits on account of filing of Appeals**

Parties often file appeals against interlocutory orders. During the pendency of such appeals, trials are stayed because the file is not available with the trial court.

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well as the same information about the defendant, as far as it is possible for them to provide it.

- d) Process serving agencies should also be provided access to NADRA data (regarding a party's residence) and PTA data (regarding a party's Mobile Number).

#### e. Mandatory Preliminary Scrutiny of Cases at the time of institution

The Committee therefore recommends that:

- a) It should be mandatory for court's institution staff to conduct the most basic scrutiny at the time the plaint is being filed, possibly using a checklist devised for this purpose, keeping in view all the relevant provisions of the CPC. Plaintiff should be returned with office objections, if necessary. In this regard, the model already being used in the constitutional courts could be gainfully reproduced.
- b) It should be mandatory to conduct preliminary scrutiny under Order VII Rule 11 of the CPC upon the very first hearing, as soon as a plaint is presented before a judge. The presiding officer shall pass a detailed order regarding cause of action, maintainability and limitation, etc.

#### f. Punitive and Preventive Measures against Abuse of Interim Injunctions

The Committee recommends that Section 95 should be directory in nature, instead of being discretionary. The word "may" should be replaced with the word "shall". It is also recommended that the penalty for obtaining temporary injunction on insufficient grounds should be increased to Rs 1 lac.

#### g. Improving Case Management through Implementing a Case Scheduling Order

The Committee recommends that a Case Scheduling Conference along the lines of Rule 16 Federal Rules of Civil Procedure (FRCP) may be made mandatory. Upon completion of pleadings, the Court should, in consultation with the parties, lay down a stage-wise schedule in a Scheduling Order, possibly using guidelines provided by the relevant High Court. Once a schedule has been set, lawyers of both parties should be held responsible to it. In this regard, Order IX-A of the CPC would need to be re-structured. A model Case Scheduling Order should also be added to the CPC as a specimen. Once the requisite amendments have been made in the law, trainings should be conducted to help judges implement the same. If implemented properly, this amendment alone can drastically speed up case disposal and help curb delay.

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#### **h. Setting and Monitoring Cut-off Deadline**

The Committee recommends that:

- a) the stage-wise deadlines already provided for in the CPC be thoroughly revised and reduced where appropriate. Where stage-wise deadlines are not provided, they should be provided;
- b) the maximum time-limit before which Courts must decide cases be laid down in the law by the legislature; time-limits should be set out for all the various tiers of the judicial system;
- c) at present, reasonable time-limits would be as follows: 6 months for small claims; 1 year for all other civil suits; all civil courts must decide cases within these time limits; and
- d) in case a civil court exceeds this statutory time-limit, it should be required to submit an explanation to the High Court about the cause of such delay and the High Court should closely monitor the proceedings of such cases till the final judgment is not pronounced

#### **i. Curtailing the Number of Adjournments**

The Committee recommends that the relevant rule of Order XVII be amended to ensure imposition of heavy compensatory costs on parties obtaining adjournments, catering for the actual expenses incurred by the other party. In addition, the Committee recommends that in each tehsil and district, a Bar-Bench Liaison Committee be constituted comprising of two senior officer-bearers of the Bar and the senior judge to find out the modalities for curbing dilatory tactics. The Committee is pleased to note that stakeholders from the various elected bodies of lawyers demonstrated a growing realization that the present level of delay is unwarranted and unsustainable and they would be willing to cooperate with the judiciary and government in tackling this issue.

#### **j. Civil Suits not to be Stayed during Pendency of Appeals**

The Committee recommends that the trial of the main case should not be stayed during the pendency of appeals against interlocutory orders. The appellant should be required to provide certified copy of the record to the appellate court. The appellate should not summon the original record from the trial, so that the trial court may continue with the trial proceedings unimpeded. Amendments be made to this effect in the Code of Civil Procedure, 1908.

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# The Evershed Report and English Procedural Reform

Charles E. Clark  
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## THE EVERSHED REPORT AND ENGLISH PROCEDURAL REFORM

CHARLES E. CLARK

LAST July the Lord High Chancellor presented to Parliament the *Final Report of the Committee on Supreme Court Practice and Procedure*, already commonly known as the *Evershed Report* from its chairman and principal draftsman, Sir Raymond Evershed, the distinguished Master of the Rolls. This is a bulky, close-printed document of 380 pages, available from Her Majesty's Stationery Office (Cmd. 8878) for the price of eleven shillings net. And it is a mine of information, certainly worth much more than its modest cost, to any student of procedure and procedural reform. In fact it seems to this reviewer quite the best account available of day-to-day high-court activities and the problems thereof in that country from which we take our law.

It is interesting, but not too strange, that this is so. Obviously the *Report* was not written for the instruction of American lawyers who are not likely to look to such a source for their information. Yet the Committee was observing a going system which it was set to improve; and to explain what it was studying and would change, it had to set forth the existing system. And so this is a report direct from the firing line presented in a reasonably objective way, though perhaps not unnaturally tinged with the conservatism we expect from lawyers and—to perhaps considerably less degree—from the English people generally. Thus if Americans wish to know the operation of the English circuit or assize system, the reasons for the lengthy oral arguments before the Court of Appeal, the impingement of the automobile on the staid High Court of Justice, the activities of barristers and solicitors, of "leaders" and "juniors," indeed a multitude of other practical activities and problems of English justice, here is the place to find it. One could have wished for an index; American readers are likely to flounder if they seek to locate discussion of a particular topic. But the difficulty is mitigated by a Complete Summary of Recommendations and Conclusions in twenty-four pages and 229 paragraphs near the end of the *Report*; and the style is not too dreary for a meaty report to make reading it through too painful.<sup>1</sup>

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<sup>1</sup> In fact there is considerable liveliness in the interstices of the discussion; one might almost feel that our English brethren, for all their love of pomp and circumstance which leads them to tolerate and pay for outworn court symbolism of various forms, yet like a quiet jest at undue solemnity. In particular they appear to have an addiction to expressions which border on the cutes: the "leap-frog" scheme of appeal direct to the House

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Beyond the voluminous and complete character of the *Report* itself and the inevitable debate as to the efficacy of its recommendations, several other features may arouse the interest of American readers. First is the nature of the Committee itself. It was appointed by the Chancellor on April 22, 1947. During its six years of activity its personnel had surprisingly few changes for one whose number was so large and so distinguished, with many members carrying obvious burdens of both public and private character. Its number was twenty-three, including three High Court justices in addition to the chairman, with representatives from the barristers, leaders as well as juniors, solicitors, King's Bench and Chancery Masters, together with members of Parliament (including Labor members), accountants, directors of the Bank of England, a civil engineer, writers and scholars. Americans may like to recognize, among others, their illustrious compatriot, Professor Arthur L. Goodhart, Master of University College, Oxford, and editor of the *Law Quarterly Review*; Sir A. P. Herbert, the noted author; Mr. Geoffrey Crowther, editor of *The Economist*; and Professor T. H. Marshall, famous political scientist of the London School of Economics.<sup>2</sup> So far as this reviewer is aware, nothing like so varied and yet withal so distinguished a group of talents has been brought to the service of law reform in this country, though the explanation lies (in his judgment) in lack of invitation, rather than lack of willingness to serve.

Next we may remark on the low cost of the entire operation. The estimated cost of preparation of the *Report* and the three interim reports already published, including the expenses of the Committee, is £1,883, 15s., 1½d., of which £1,381, 16s., 10½d. is the estimated cost of printing and publishing the reports.<sup>3</sup> In American ventures of at all comparable nature, budget items for travel expense and hotel bills for committee meetings would run far beyond such sums, not to speak of such general costs as salaries and stenographic, clerical and publication expenses. Even with the savings resulting from the general centering of all things legal in London, the completion of so substantial a

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of Lords, eschewing the Court of Appeal; the "preliminary canter" of the American pre-trial conference; and the repeated exhortation to lawyers and judges for a more "robust" exercise of powers and authority already conferred or now recommended or brave hopes that they will now be "robustly" applied. Such expressions occur throughout the Final Report.

<sup>2</sup> One may perhaps comment on the substantial impact of that School upon pending procedural reform. Of the four members who filed a minority Addendum, calling for greater action—discussed below—three owe allegiance, either by present activity or prior training, to that School, while the most acute criticism of the Report to date comes from Professor Gower, as also discussed below. Lord Chorley's interest is well known; much of the present activity is previewed in his article, "Procedural Reform in England" in David Dudley Field Centenary Essays 98 (1949).

<sup>3</sup> Cmd. No. 8878 at 2 n. (1953).

task at a total expense of a little over \$5,000 and a cost of printing of less than \$4,000 seems truly amazing.

A third item deserving of notice preliminarily is the nature of the task set before and accepted by the Committee. For its prime focus was the *cost* of litigation. Specifically in its Terms of Reference from the Lord Chancellor it was directed to "enquire into the present practice and procedure of the Supreme Court . . . and to consider what reforms of such practice and procedure should now be introduced, whether by legislation or otherwise, for the purpose of reducing the cost of litigation and securing greater efficiency and expedition in the despatch of business."<sup>4</sup>

Commissions or committees to work for the improvement of law administration are not a new thing in English history. During only the present century there appear to have been some half dozen directed to the activities of the High Court of Justice, not to speak of others concerned with lower courts or specific subjects of law or legal justice. In fact this Committee's Terms of Reference required consideration of the activities of two such bodies. First were the three reports in 1933-36, Cmd. 4265, 4471 and 5066, of the Hanworth Committee on the Business of Courts under the chairmanship of Lord Hanworth, originally Master of the Rolls. This Committee was "to consider the state of business in the Supreme Court, and to report whether greater expedition in the dispatch of business, or greater economy in the administration of justice in the Court, is practicable."<sup>5</sup> And the Peel Royal Commission on the Despatch of Business at Common Law, 1934-36, under the chairmanship of Earl Peel, was concerned, as its name indicates, with the fusion or division of courts "with a view to greater despatch" of court business; its Report, Cmd. 5065, was made in 1936. Each of these bodies, composed of leading High Court justices and King's Counsel, with overlapping personnel in the shape of Baron Hanworth, the Master of the Rolls, and Sir Claud Schuster, the Lord Chancellor's Permanent Secretary for the Courts (later Baron Schuster), gave its attention to organization and calendars of the High Court Divisions. In certain aspects they disagreed, for example as to the absorption of the Probate, Divorce, and Admiralty Divisions into the other two divisions of the High Court. The Evershed Committee takes up in greater detail these same problems, with many additional ones. Its general trend, like that of the Peel Commission, is against present change in the court structure so long as the divorce jurisdiction

<sup>4</sup> Id. at 4.

<sup>5</sup> Cmd. No. 4265 at 3 (1933); Cmd. No. 4471 at 2 (1933); Cmd. No. 5066 at 2 (1936). The variation in the spelling of "dispatch" may be an English idiosyncrasy. See notes 1 and 4.

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remains as it is, although it does concede a rather strong case for an Admiralty and Commercial Court.

It will be noticed that this, though the "Final," is also the fourth Report of the Committee. The three interim reports, from 1949 to 1952, were briefer in scope and accomplishment. The first, Cmd. 7764, issued in 1949, is the most important; it recommended some expansion of the jurisdiction of the County Courts, chiefly by extending the limits from a maximum of £200 to £300, and it made suggestions of fixed dates for trials in the High Court—an important and troublesome problem, indeed.<sup>6</sup> The second, Cmd. 8176, issued in 1951, dealt with admiralty and chancery procedures and had some interesting suggestions for reducing the bulk and making manageable the English "White Book" or Annual Practice.<sup>7</sup> The third, Cmd. 8617, in 1952, dealt with a particular local court.<sup>8</sup>

How well has the Committee accomplished its over-all task? Enough has been said to indicate the completeness of the *Report* and the scholarly nature of its attention to details. And the number of its specific recommendations is great. The 229 numbered paragraphs of recommendation already referred to, in cumulative force are undoubtedly substantial. True, some are not extensive, touching such matters as permission to a witness to sit while giving testimony; some are negative, such as rejection of the American system of pre-trial or of written briefs on appeal. But the sheer bulk is impressive. If candor compels an expression of some disappointment that the Committee has stopped with measures less than bold, yet lack of boldness must be considered an occupational disease of reformers. Any one who has watched or participated in the slow and halting progress of reform in this country will realize that there are very few in a position to cast stones. And such a judgment is only that expressed by the four minority members in their Addendum and apparently by the Committee's own public and constituency. As Professor Gower observes in his able critique, discussed below, "professional reaction to the final report has been a mixture of disappointment and relief."<sup>9</sup>

<sup>6</sup> See Gower, Interim Report of Committee on Supreme Court Practice and Procedure (Cmd. 7764), 12 Mod. L. Rev. 483 (1949). See also 99 L.J. 493 (1949); 203 L.T. 149 (1949); 16 Sol. 223 (1949); 93 Sol. J. 568 (1949); and Gower, The Cost of Litigation, 17 Mod. L. Rev. 1 (1954), which is discussed in the text below.

<sup>7</sup> It also discussed certain other procedures, as that of the Court of Protection and before Official Referees, as well as "Court Fees"—their nature, amount and taxation. See Cmd. No. 8176 at 52-60 (1951). See also 14 Mod. L. Rev. 325 (1951); 101 L.J. 171 (1951).

<sup>8</sup> The Durham Palatine Court. See Gower, The Cost of Litigation, 17 Mod. L. Rev. 1 (1954).

<sup>9</sup> Gower, *supra* note 8, at 2, referring "to a general feeling that the recommendations are less far-reaching than are needed and had been expected." Of how many American

In attempting to give American readers some idea of the nature of this *Report*, and its wealth of information for students of procedure and reform, it is not my purpose to indulge in an extensive discussion and criticism of the recommendations presented. Such an attempt would be presumptuous; we do not have and cannot have the full knowledge of all ramifications of the problem to make the assay of value. I shall limit my review to such matters as seem of interest and point in our American setting. Nor will I try to deal with all or even a majority of the recommendations; here, too, I shall endeavor to set forth only some main trends, stressed by the Committee, as high lights of its proposals and efforts.

In its own appraisal the Committee seems to put most emphasis upon what it names and defines as the "New Approach." This appears to be an attitude of litigants, which necessarily means of counsel, toward the development of "less costly litigation"—an attitude which is to be urged strongly in any event, but is to be encouraged particularly through the device of the originating summons procedure. In the words of the *Report*, "To encourage a 'new approach' towards less costly litigation—(a) the originating summons procedure should be made more generally available and an analogous new procedure (by writ) should be introduced for use particularly in the Queen's Bench Division, and (b) the powers of the Master on the summons for directions should be considerably strengthened."<sup>10</sup>

The background of this recommendation was a finding by the Committee that for the simplest High Court witness action lasting about one day the taxed costs will be not less than between £150 to £200, one-third being numerous very small items and the balance consisting of the solicitor's "instructions for brief" and counsel fees.<sup>11</sup>

reports could the same be said! See also Goodhart, *The Cost of Litigation*, 69 L.Q. Rev. 463 (1953) (a note by the Editor); Elliott, *Judicial Administration*, 1953 Annual Surv. Am. L. 814-15, 29 N.Y.U.L. Rev. 155, 156 (1954); Keeton, *The Evershed Report on Practice and Procedure*, 20 Sol. 213 (1953); 216 L.T. 365 (1953); 103 L.J. 471, 490 (1953); 97 Sol. J. 499, 580, 598, 617, 646, 676 (1953). Both Professors Gower and Goodhart refer to an address by Lord Cooper, Lord President of the Court of Session, to the Society of Public Teachers of Law in September, 1953, which has not been available to the writer.

<sup>10</sup> Cmd. No. 8878 at 37 (1953).

<sup>11</sup> Cmd. No. 8878 § 77 (1953). See also id. § 682, where it is said that the successful party will probably not need to pay his own solicitor, in the absence of special circumstances, more than £25 to £30 beyond the taxed costs thus recovered. Professor Gower, concluding that "[t]aking the lowest figures this means that the loser will have to pay £325," goes on to say, "Anyone with experience will agree that this is an unusually low figure for a disputed Queen's Bench action, and that in most cases the loser will have to pay at least twice that sum." Gower, *supra* note 8, at 18. It is hard for an American to imagine having to pay \$1,800-\$2,000 for the privilege of losing a "relatively small action" or "the simplest" witness action in a court of general jurisdiction. See also Mullins, *In Quest of Justice*, c. 11, *The Lawyer's Bill* (1931).

And this was supported by the further findings that the bill of costs increases directly with the passage of time and the costs increase directly with the length of time occupied by the trial. Hence some way was sought, by encouraging the parties to disclose at an early stage the true nature of the issue between them, to expedite the setting down of an action and to curtail the length of trial. But since "exhortations" to adopt a "new approach" may by themselves be inadequate, something more is necessary to remove the "screen" behind which each side marshals his forces for the day of trial and the other may not penetrate. So the Committee carefully examined the possibilities of a new approach, which, by removing this atmosphere of secrecy, would make a stock-taking process natural and at the same time eliminate many of the steps now taken almost as a matter of course before trial. This new approach is to be achieved in two ways: first, by change in the initiation and later conduct of a segment of cases in the High Court, and second, for cases where this is inappropriate, by a strengthening of the summons for direction and the Court's ancillary powers.<sup>12</sup>

The first step involves a further development of the "originating summons" procedure, now used in the Chancery Division in a certain group of cases such as those for the construction of a deed or other written instrument and for declaration of rights under it, and the establishment of an analogous (though not identical) new procedure by writ in the Queen's Bench Division. In either case the main features of the new procedure seem to be two: first, a less formal and more expeditious method of initiating the action than by the older writ of summons; and second, a further procedure whereby the plaintiff's statement of claim, supported by affidavits, will justify him in asking a Master to set down the action for trial, very likely in the short cause list, without further pleadings. Excepted from these procedures are to be cases of fraud, slander and the like, and in the Queen's Bench Division, the important personal injury actions (except those asking for approval of a settlement involving a person under disability). The actions thus eligible for it are those involving construction of a statute, regulation or document; or where the sole or principal question is of law; or, under the originating summons procedure, where there is no substantial dispute of fact or where evidence can be given by affidavit; or, under the analogous new procedure by writ, where the action can be properly tried on affidavits.<sup>13</sup>

When the Committee turned, for the remaining actions, to the strengthening of the practice of "the summons for directions" before a Master, it expressed consciousness "of treading again a well-worn

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<sup>12</sup> Cmd. No. 8878 §§ 77-80 (1953).

<sup>13</sup> Id. §§ 81-103.

path."<sup>14</sup> For recommendations of a similar import had been made in the Hanworth and Peel reports; and it might have added that the practice has been widely discussed and admired in America, where it served as a stimulus to developing the "pre-trial" procedure, best symbolized by the famous Rule 16 of the Federal Rules of Civil Procedure.<sup>15</sup> But the first thing the Committee does is to consider and reject (for compelling reasons of cost, as we shall see) the American pre-trial, the procedure for discovery by examination successful in British Columbia, and the summons for immediate relief used in South Australia. Of course certain of the matters to be settled by the Master on giving his directions do parallel Federal Rule 16, and undoubtedly these experienced court officials do assist in the simplification of the case and the expediting of the trial—prime objectives of the American device. But the Committee concurred with the Peel Commission in holding that the summons for directions should be generally heard by a Master, and not a judge. In this and in other ways, coupled with the outright rejection, it showed it was not ready for the American system. Perhaps its most interesting suggestion here is toward certain attempts to limit expense; a suggestion for later consideration that taxable costs should be limited to one fee for counsel and solicitor on a summons for direction, save where the Court otherwise directs in exceptional circumstances; a provision that the Master should certify whether or not the case is fit for the employment of two counsel, and a limitation of taxable costs accordingly; and a declination of any attempt to settle the lawyer's fee bill to his own client.<sup>16</sup> Interesting, also, is the discussion and rejection of proposals for both more detailed and less detailed pleadings, for more and for less discovery, and so on.<sup>17</sup>

To an American observer the trend and direction of these recommendations seems unmistakable and in the same general direction toward which are headed such advanced American systems as the federal courts and the American states which have adopted the federal procedure.<sup>18</sup> But it seems only correct and proper to say that they appear

<sup>14</sup> Id. ¶ 209.

<sup>15</sup> See, e.g., Greenbaum & Reade, *The King's Bench Masters and English Interlocutory Practice* (1932); McCormick, *Lights and Shadows in English Justice*, 18 A.B.A.J. 608 (1932); Millar, *A Septennium of English Civil Procedure, 1932-1939*, 25 Wash. U.L.Q. 525 (1940); Millar, *Civil Procedure of the Trial Court in Historical Perspective* 229-36 (1952); Clark, *Cases on Modern Pleading* 529, 530 (1952). The literature on the American pre-trial—monographs, essays, articles—is already so voluminous as to defy citation.

<sup>16</sup> Recommendations appear in Cmd. No. 8878 ¶ 246 (1953). See also id. §§ 209-46.

<sup>17</sup> Id. §§ 105-208.

<sup>18</sup> The Federal Rules of Civil Procedure of course apply in the far-flung system of federal courts, including those of the District of Columbia; beyond this they have been fully adopted and apply in Alaska, Arizona, Colorado, Kentucky, Minnesota, Nevada, New Jersey, New Mexico, Puerto Rico and Utah, and, for both courts of law and equity, though separately adopted for each, in Delaware. Substantial portions of the practice,

to constitute in total effect a somewhat halting and less than forthright approach to the end really in view. Recalling the long leadership of England in procedural reform, and particularly in initiating such steps as the summary judgment and the summons for directions,<sup>19</sup> one may well feel that there is some falling off in boldness of attack. The procedures of the new approach seem hardly as effective as the now complete summary judgment of the American jurisdictions noted; moreover, without the direct and immediate control of the judge, successful operation of the system may actually go no further than the exhortations to the parties and counsel may accomplish—a weak reed, indeed! And the complications of the process seem enough to slow it down—representing a tendency away from the simplification of process, pleading and court structure which is a keystone of our ideas of reform in law administration.<sup>20</sup> Instead of one simple form of process and pleading directed to bringing the action before a single court, we see here in the High Court alone (not to think of the County and other courts) a total of four processes and procedures, two each for each Division of the Court. The lines of demarcation must be clearer than have seemed possible in the history of procedure or else entanglement seems indicated.

The Committee points out that it has been concerned, "almost entirely," with civil procedure.<sup>21</sup> But even on its own terms as to scope, American experience in court reform would suggest a further and major omission, namely, as to court organization and simplification of structure, together with the establishment of a directing head. With us the argument for the "integrated" court, covering all divisions of court operation and subject to central control through an administrative

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notably the discovery section, and to a lesser extent that of party joinder, have been taken over in widely separated states, e.g., Florida, Iowa, Louisiana, Maryland, Missouri, New York, Pennsylvania, South Dakota, Texas and Washington; individual federal rules have been adopted in other states, such as California, Connecticut and North Dakota; while the pre-trial rule, Fed. R. Civ. P. 16, has been quite widely adopted. See Clark, "Clarifying" Amendments to the Federal Rules?, 14 Ohio St. L.J. 241, 243 (1953); Clark, The Federal Rules in State Practice, 23 Rocky Mt. L. Rev. 520 (1951).

<sup>19</sup> On the former see Clark & Samenow, The Summary Judgment, 38 Yale L.J. 423 (1929); Millar, A Septennium of English Civil Procedure, 1932-1939, 25 Wash. U.L.Q. 525, 536 (1940). And for the American practice see Clark, The Summary Judgment, 36 Minn. L. Rev. 567 (1952), and the many references given in Clark, Cases on Modern Pleading 502, 507 et seq. (1952). On the former, see note 15 supra. Compare in general Sunderland, The English Struggle for Procedural Reform, 39 Harv. L. Rev. 725 (1926); Clark, Code Pleading 17-21 (2d ed. 1947).

<sup>20</sup> This has been often discussed in American legal literature; see, e.g., references given in Elliott, *supra* note 9; Vanderbilt, The Essentials of a Sound Judicial System, 48 Nw. U.L. Rev. 1 (1953); 1953 Conference of Chief Justices, 26 State Govt. 241 (1953); Clark, Code Pleading 54-71 (2d ed. 1947). For references to particular court reorganizations, see note 22 *infra*.

<sup>21</sup> Cmd. No. 8878 § 5 (1953).

office and under the direction of a chief justice, has been found compelling; and the examples in New Jersey and Puerto Rico suggest the real accomplishments of such a reorganization of the judicial system.<sup>22</sup> The Committee's assignment to consider practice and procedure in the Supreme Court of course tended to confine the scope of its activities. Thus the fact that another committee had just reported extensively on procedure in the County Courts<sup>23</sup> undoubtedly served to stress the existing boundaries. But complete separation of course proved impossible and this Committee did make recommendations covering the extension of jurisdiction of the County Courts and broadening the appeals therefrom to the High Court.<sup>24</sup> Moreover, the Committee does consider extensively the organization of the High Court, notably with respect to distribution of the Probate, Divorce, and Admiralty Divisions and with appeals to the Court of Appeal and to the House of Lords, although it concludes against any change of structure.<sup>25</sup>

Since the Committee shows that it was somewhat intrigued by the American devices for simplification of the litigious process, as well as similar projects from Canada and Australia, why was not more of an attempt made at comparative evaluation and possible choice for experimentation at least of those which seem most promising? Such a course would have been most profitable for American reformers. It must be conceded that a great deal of our planning must look to the future for proof, since it lies still so largely in the realm of endeavor, rather than accomplishment. Certainly none of us can afford to brag unduly or to point with too much pride to an execution which is yet far short of

<sup>22</sup> Vanderbilt, The Reorganization of the New Jersey Courts, 34 Chi. Bar Record 161 (1953); Clark & Rogers, The New Judiciary Act of Puerto Rico: A Definitive Court Reorganization, 61 Yale L.J. 1147 (1952); Snyder, New Puerto Rico Judicial System is Modern and Efficient, 36 J. Am. Jud. Soc'y 134 (1953); Clark & Clark, Court Integration in Connecticut: A Case Study of Steps in Judicial Reform, 59 Yale L.J. 1395 (1950); Clark (E.), Realistic Court Reform—A Study of Pending Proposals, 27 Conn. B.J. 11 (1952).

<sup>23</sup> This was a Committee on County Court Procedure, headed by Austin-Jones, J., with Final Report, Cmd. No. 7668 (1949). See comments in 12 Mod. L. Rev. 354 (1949); 99 L.J. 241, 255 (1949); 206 L.T. 84 (1948); 207 L.T. 291, 307 (1949); 16 Sol. 153 (1949); 94 Sol. J. 543 (1950). Its interim report, Cmd. No. 7468 (1948), was commented on in 11 Mod. L. Rev. 470 (1948).

<sup>24</sup> See note 6 supra, referring to Cmd. No. 7764 (1949); also Cmd. No. 8878 §§ 552-61 (1953). The recommendation for more extensive review on the facts is criticized in Gower, *supra* note 8, at 11, 12, 19. The proposals for sound recording, Cmd. No. 8878 § 560 (1953), are similar to, though not as far-reaching as, those adopted in the P.R. Judiciary Act § 19, ¶ 4 (1952), discussed in Clark & Rogers, *supra* note 22, and Snyder, *supra* note 22.

<sup>25</sup> Cmd. No. 8878 §§ 472-564 (1953), dealing with Rights of Appeal; id. §§ 565-630, Procedure on Appeal; id. §§ 874-923, Distribution of Business in the High Court. Its proposals for "leap-frogging" the Court of Appeal and going direct to the House of Lords on certificate of a judge of the High Court in a limited class of cases appear in the earlier section, id. §§ 483-504, 510(c), 517, 537, 543, 562.

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## THE EVERSHED REPORT

promise. But if the general level of objective is as yet quite discouragingly low, there is still enough reaching for the stars to give a lift to the entire movement; and it would have been exhilarating to have found support from our leaders of the past. The answer may be found in the limited Terms of Reference for the Committee's activities, which were originally defined by the Chancellor as not to include the question of fusion of the profession and were so interpreted throughout.<sup>26</sup> But as the minority's Addendum<sup>27</sup> shows, a request for more extensive attack could have been made and it could have been buttressed by conclusions drawn from the extensive investigations it had conducted. The failure to attempt it highlights one of the key problems now presented in English legal and professional life—the present organization of the legal profession and its effect on the prime question before the Committee, that of the cost of litigation.

In rejecting the American pre-trial conference the Committee pointed out the general agreement that for its successful operation it needed not only judges of some skill and experience, but also lawyers of competence to represent their clients completely, even to the point of full admissions as to details of their case.<sup>28</sup> This meant, so the Committee concluded (quite inevitably), that the litigant's solicitor must brief a team of barristers not merely for trial, but also for the "preliminary canter" of the pre-trial. And this meant in many cases actually doubling the already heavy burden of counsel fees (taxed, as we have seen, against the losing side) and, in all cases pretired, a very substantial increase. Small wonder that the Committee, whose task it was to reduce the cost of litigation, paused.<sup>29</sup> And the caution thus shown seems to be identical with that disclosed in other parts of the *Report*.

It may seem to be drawing too extensive a deduction to hold, from the reasons for its conclusion here stated, that respect for the traditional division of the profession into solicitors and barristers was so completely a restraining influence as to prevent even consideration of revamping of the court structure. Quite probably a statement here in terms of cause and effect is too sweeping; rather the cause may be in traditional respect for settled institutions which requires that both profession and courts be left untouched. Nevertheless it seems clear that a crusading spirit as to one would have carried over to bring about a reform of the other. But such an experienced observer as Pro-

<sup>26</sup> Id. §§ 24, 29, 765.

<sup>27</sup> Addendum by Sir Thomas Barnes, Mr. Crowther, Dr. Fletcher and Professor Marshall, id. at 314-18.

<sup>28</sup> This is surely true; it is illustrated by a recent American case of dismissal of an action for want of such representation at pre-trial. *Stanley v. City of Hartford*, 103 A.2d 147 (Conn. 1954).

<sup>29</sup> Cmd. No. 8878 §§ 214, 223 (1953). See particularly id. § 221.

fessor Gower, noting the important effects of the "divided profession" on the cost of litigation, has this to say: "Reading the Evershed Report one is struck by the number of fertile proposals which had to be rejected solely or mainly because of the divided profession."<sup>30</sup> As examples he lists not only the pre-trial conference already considered, but also appeals by filing written briefs and limitation of costs on the basis of a proportion of the amount at stake. Both of these are of such interest as to deserve further comment.

On the use of written briefs the Committee had the advantage of hearing evidence from Mr. Justice Frankfurter and John W. Davis, from whom they gained an impression of by no means wholehearted favor for the American system and some envy of the system of unrestricted oral argument, not possible in American courts in view of the amount and pressure of appellate work. The Committee thought, too, that the English system of unrestricted oral argument led to greater unanimity of opinion and less dissent. But the strongest objection, in its view, rested upon the absence of anything like American legal firms, permitting of team work in the preparation of briefs, and the need that all court activity be conducted by the barrister.<sup>31</sup> So here its recommendations are limited to such matters as cutting down upon the long and tedious practice of reading even formal written documents at the opening of an argument of perhaps several days' duration in the Court of Appeal.<sup>32</sup> The writer is bound to say that he is not as convinced as are many of his colleagues of the virtues of oral argument, quite possibly because it is rarely presented by an advocate approaching the training and grace of an English barrister; he fears, too, his patience would disappear on the oral reading of long documents more quickly perusable in chambers. But be that as it may, one concludes that the system disclosed is designed for more leisurely days where expense was less. This, too, it seems, is a type of legal procedure not adjustable with ease to the automobile and airplane age.<sup>33</sup>

The question of costs is of course quite crucial. In England, as we have seen, the principle of substantial indemnity is followed to provide for recovery of counsel fees and litigation expenses as a part of the taxed costs. As between party and party, costs are taxed at a somewhat lower rate than prevails in the case of solicitor and own

<sup>30</sup> Gower, *supra* note 8, at 22.

<sup>31</sup> Cmd. No. 8878 § 574 (1953); see generally id. §§ 568-75.

<sup>32</sup> Ibid. See also id. §§ 583-98. Suggestions for limitations upon the reading of reserved judgments in open court are contained in id. §§ 599-601.

<sup>33</sup> The automobile appears to have hit the High Court, for the Report is concerned with the fact that more than 40 per cent of all actions tried in the Queen's Bench Division are "personal injuries actions," id. § 58; and a special Section, V, id. §§ 321-72, is devoted to the discussion (and substantial rejection, as impracticable or otherwise undesirable) of various procedures for the more effective disposition of such cases.

client costs, so that not all the cost of a lawsuit is thus recoverable by the winner. But this system is quite other than that prevailing here, where our statutory taxable costs have become largely nominal over the years and without connection with the value of the litigation.<sup>34</sup> The Committee considered various plans from abolishing the English system of indemnity to control of the own client relationship, and a minority at least favored a Canadian system of costs proportionate chiefly to the amount at stake, but with some regard to the time involved. Eventually, however, it contented itself with recommending retention of the existing system subject to some minor improvements.<sup>35</sup> So as to the employment of counsel its recommendations are limited. It will be noticed that in a case worthy of the attention of a Queen's Counsel, he must be accompanied by a "Junior," so that there is required on each side, in addition to the solicitors and any additional expert aid, such as accountants, as may be needed in particular types of actions, two highly trained barristers. The Committee did make some suggestions for reducing the taxed costs where a Master ruled that two counsel were unnecessary and with certain other reductions in special instances, of which the two most important are a reduced scale of "refresher" fees after the original retainer and a descending fractional scale in place of the present "two-thirds" rule under which the junior is entitled to a retainer equal to two-thirds that paid his leader.<sup>36</sup> These recommendations, it is said, are those which have been received with the "least enthusiasm" by members of the Bar.<sup>37</sup>

Here, however, the four minority members of the Committee would go much farther in various steps for control of this most substantial part of the cost of litigation. Thus they would abolish the two-thirds rule entirely and permit reimbursement to the junior on the same basis as to the leader. They attack the anomaly of the absence of any contractual relationship between the barrister and the lay client and the absence of direct legal liability to the person to be served who must foot the bills. They also suggest, as do indeed the majority, that the question of partnerships between barristers is worthy of consideration. And finally, while accepting the ruling that consideration of any proposal for fusion of the two branches of the profession was outside the Committee's Terms of Reference, they went on to say that it "ought

<sup>34</sup> The classic exposition is in Goodhart, Costs, 38 Yale L.J. 849 (1929). See also Cmd. No. 8878 §§ 764-873 (1953), and note 11 *supra*; Note, Use of Taxable Costs to Regulate the Conduct of Litigants, 53 Col. L. Rev. 78 (1953).

<sup>35</sup> Cmd. No. 8878 §§ 678-763 (1953). For recommendation of some litigation at public expense, see *id.* §§ 631-77.

<sup>36</sup> *Id.* §§ 764-873; see also *id.* § 246; for the minority views see *id.* at 314-18.

<sup>37</sup> Goodhart, The Cost of Litigation, 69 L.Q. Rev. 463, 464 (1953). And see also Gower, *supra* note 8, at 2, 14.

to be considered forthwith by an appropriate body constituted for the purpose with appropriate terms of reference," and that if that was undertaken two other questions of equal importance should be examined, namely, the reorganization of the circuit system and decentralization of the Supreme Court. And they go on to point out how closely the existing system is tied to the division of the profession and suggest that decentralization of court business would imply a fundamental reorganization of the profession.<sup>38</sup>

"Among the suggestions which are being canvassed some such as fusion of the legal profession, and the decentralization of the High Court are hardy annuals." So said Lord Chorley when he was with us in 1948.<sup>39</sup> In discussions of reform in England, these questions come up recurrently. Many writers and distinguished advocates have recommended fusion; but it is obviously a subject to be approached gingerly. It reminds me of the difficulty in my own state of Connecticut of attacking the firmly entrenched probate fees from estates as the support of the entire system of probate courts—a system likewise to the advantage of the few who are richly rewarded and to the disadvantage of the many who are not and of the general public which bears the cost.<sup>40</sup> That system, however, lacks the positive benefits of the English plan where a superior brand of legal service is afforded for those who can afford it. Surely every judge must envy the English organization; for his British colleague is at all times attended and advised by highly competent lawyers, the reverse of our system, where the ablest lawyers tend to eschew the courtroom for the greater rewards of office practice. But the English system seems truly aristocratic both in the sense of its high standard of competence and in its limitation to the few. We are told that, while solicitors generally are busy, 80 per cent of the barristers are not, and it is said that there are not more than perhaps 100 really successful barristers; but the example and the hope suggested by the 20 per cent minority and the forces of tradition are such that the profession does not support fusion.<sup>41</sup> So the exponents of reform in law administration have usually limited themselves to saying that (a) fusion must come, (b) it will not come soon, and (c) nothing can really be done to hasten it.<sup>42</sup> Even Professor Gower, who

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<sup>38</sup> Cmd. No. 8878 at 314-18 (1953) (addendum by the four minority members), and see also id. ¶ 28. Professor Gower's discussion, *supra* note 8, at 13-17, is valuable here as elsewhere.

<sup>39</sup> In his essay, *supra* note 2, at 112.

<sup>40</sup> Discussed in articles cited in note 22 *supra*.

<sup>41</sup> Gower, *The Future of the English Legal Profession*, 9 Mod. L. Rev. 211, 232 (1946); Whitney, *Inside the English Courts*, 3 The Record 365 (1948); 21 Tenn. L. Rev. 32 (1949).

<sup>42</sup> Jackson, *The Machinery of Justice in England* 200-02 (1940); Mullins, *In Quest of Justice* 403, 411-19 (1931); Chorley, *supra* note 2, at 112.

at one time looked upon fusion as a near-possibility if aided by a shove from the Government, now seems to think that view overoptimistic, and is disposed to settle for lesser reforms.<sup>43</sup> Even admitting the strong pressure against change, this does seem to us a little strange; for have not the English been willing to attempt many things forbidden to American reformers ranging from reorganizing industry to remaking the medical profession? Moreover, as we know, they are engaged in extensive plans now to supply aid through governmental help to indigent persons, the legal aid scheme, which, as the Committee points out, tends to worsen the lot of those in the middle income brackets.<sup>44</sup> And finally what is left to a reformer if he may not hope and dream and plan in the light of dreams? For sometimes he does wake up to find that his dreams have surprisingly come true. That is the way of reform.

At any rate, Professor Gower's lesser proposals<sup>45</sup> certainly are worthy of careful study against the background of the *Report* itself. They are an attempt to provide for the decentralization of the High Court before fusion. Their heart is the conferment of unlimited jurisdiction on the County Courts, with limitation of the original civil jurisdiction of the High Court to cases where both parties agree to the case being heard there, and with appeal from the County Court on questions of law only.<sup>46</sup> The basic step of substituting the County Court as the main trial court would seem sound; there is little reason for duplicating courts unless one is to be made in some way aristocratic, the dispenser of more expensive justice. Bringing the courts back to the general public and away from the present centralization in London is in line with modern American theories. It should be noted that the concept of an integrated court is not the same as that of a centralized court, operating in a single metropolitan area. It is a *directed* court

<sup>43</sup> His original prophecy of the approach of fusion was contained in his article, *supra* note 41, which called forth interesting comments in 81 Ir. L.T. 61 (1947) and 64 So. Afr. L.J. 220 (1947). He now says, Gower, *supra* note 8, at 22, n.93: "the writer no longer believes, as he did in his callow youth (see 9 M.L.R. at pp. 221 et seq.), that any Government would have the courage to fuse the profession whether its leaders liked it or not."

<sup>44</sup> Cmnd. No. 8878 § 20 (1953); Gower, *supra* note 8. The legal aid scheme is discussed, *inter alia*, in Thompson, Developments in the British Legal Aid Experiment, 53 Col. L. Rev. 789 (1953); Joyce, How the New Legal Aid Service Works in England, 20 U. of Chi. L. Rev. 235 (1953); Jowitt, Legal Aid in England, 24 N.Y.U.L.Q. Rev. 757 (1949); Smith, The English Legal Assistance Plan: Its Significance for American Legal Institutions, 35 A.B.A.J. 453 (1949); Abrahams, The English Legal Assistance Plan: A Description of its Machinery, 36 id. 31 (1950); The British Legal Aid and Advice Bill, 59 Yale L.J. 320 (1950).

<sup>45</sup> Gower, *supra* note 8, at 18-23.

<sup>46</sup> As he points out, Gower, *supra* note 8, at 19 and n.83, retention of present limitations on the scope of appeal from the County Courts is *contra* to the Committee's recommendation. See also note 24 *supra*.

with interchangeable personnel, so that all parts can be kept equally operable; but it is not a court piled in a heap. Indeed for a decentralized court to be at the same time efficient, the control of an administrative director and chief justice is more than ever necessary.

So this proposal is attractive. Its approach to the question of fusion of the profession is at least ingenious. Since barristers are not required in the County Courts, since very likely they, or many of them, may not wish to leave London, a kind of fusion may develop of its own accord where solicitors may perform the duties of trial counsel in these then important courts. Perhaps here is a bit of oversimplification, at least as a matter of hope or prophecy. For the division may not so easily die, and reform somewhat by indirection may not actually occur. If the public still feels that London justice is worth the cost and if solicitors still brief the stylish barrister of the Inns of Court, then County Court justice will inevitably bear a stigma in comparison with what others can pay for. On the other hand, such a reform might well work a reorganization of activity whereby the barrister might become the leading adviser to business and industry in London, the commercial center of the country, while litigation went more and more to others in other places. At any rate it would mark a development of absorbing interest to students both of the law and of social change.

It is not practicable here to go into others of the many interesting suggestions contained in this *Report*. Enough has been said, it is hoped, to show the interest it arouses, as well as the kinds of questions it suggests but does not answer. Perhaps one further thought may be ventured. The Committee uncovers drives for court improvement not only in its own country and in America, but in Canada and Australia, which show a consistent and widespread purpose to achieve better court administration. It is perhaps unfortunate that there is so little interchange of the knowledge thus acquired and of the good will for reform and so little pooling of interests. In the United States the diversity is of course particularly great because of the diverse jurisdictions showing still so many types of procedure and of reform. Perhaps there ought to be a united body of advisory committees and of procedure commissions to serve as a clearing house and common meeting ground for all procedural reformers who should be blood brothers under the skin.<sup>47</sup> Among our many organizations there ought to be room for another which would bring together those in various parts of the world following the English law who are charged with official responsibility of trying to keep the tools of justice always bright.

<sup>47</sup> A suggestion of this kind, although limited to American committees, was presented in an important address by Dean Pirsig of Minnesota, member of the Advisory Committee of the Supreme Court of the United States on Rules of Civil Procedure, before the Section of Judicial Administration of the ABA at Boston in August, 1953.

# Structural Procedural Matrix of Civil Procedure Code of UK, USA, INDIA & PAKISTAN

Civil Procedure Rules, England & Wales : Pre-action Protocol-Discovery-Case Management-ADR-Summary Judgment Centric & Non Trial Bases

Federal Rules of Civil Procedure, USA : Discovery-Case Management-ADR-Summary Judgment Centric & Non Trial Based

Civil Procedure Code, India : Pleadings-ADR-Differential Management Centric & Trial Based

Civil Procedure Code, Pakistan : Pleading Centric & Trial Based

plaintiff is entitled as against the Government to the land or to the possession thereof.

(29 of 1998 s. 105)

**(HK)7A. Construction of references to Registrar (O. 1, r. 7A)**

(HK) Wherever the word "Registrar" appears in these rules and forms there may be substituted the word "Master" when and where appropriate.

**9. Forms (O. 1, r. 9)**

(1) The forms in the Appendices shall be used where applicable with such variations as the circumstances of the particular case require.

**10. Rules not to exclude conduct of business by post (O. 1, r. 10)**

Nothing in these rules shall prejudice any power to regulate the practice of the Court by giving directions enabling any business or class of business to be conducted by post.

(Enacted 1988)

Order:	1A	<b>OBJECTIVES</b>	L.N. 152 of 2008; L.N. 18 of 2009	02/04/2009
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**1. Underlying objectives (O. 1A, r. 1)**

The underlying objectives of these rules are-

- (a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;
- (b) to ensure that a case is dealt with as expeditiously as is reasonably practicable;
- (c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
- (d) to ensure fairness between the parties;
- (e) to facilitate the settlement of disputes; and
- (f) to ensure that the resources of the Court are distributed fairly.

**2. Application by the Court of underlying objectives (O. 1A, r. 2)**

(1) The Court shall seek to give effect to the underlying objectives of these rules when it-

- (a) exercises any of its powers (whether under its inherent jurisdiction or given to it by these rules or otherwise); or
- (b) interprets any of these rules or a practice direction.

(2) In giving effect to the underlying objectives of these rules, the Court shall always recognize that the primary aim in exercising the powers of the Court is to secure the just resolution of disputes in accordance with the substantive rights of the parties.

**3. Duty of the parties and their legal representatives (O. 1A, r. 3)**

The parties to any proceedings and their legal representatives shall assist the Court to further the underlying objectives of these rules.

**4. Court's duty to manage cases (O. 1A, r. 4)**

- (1) The Court shall further the underlying objectives of these rules by actively managing cases.
- (2) Active case management includes-
- (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
  - (b) identifying the issues at an early stage;
  - (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
  - (d) deciding the order in which the issues are to be resolved;
  - (e) encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate, and facilitating the use of such a procedure;
  - (f) helping the parties to settle the whole or part of the case;
  - (g) fixing timetables or otherwise controlling the progress of the case;
  - (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
  - (i) dealing with as many aspects of the case as practicable on the same occasion;
  - (j) dealing with the case without the parties needing to attend at court;
  - (k) making use of technology; and
  - (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

(L.N. 152 of 2008)

Order:	1B	<b>CASE MANAGEMENT POWERS</b>	L.N. 152 of 2008; L.N. 18 of 2009	02/04/2009
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#### 1. Court's general powers of management (O. 1B, r. 1)

- (1) The list of powers in this rule is in addition to and not in substitution for any powers given to the Court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.
- (2) Except where these rules provide otherwise, the Court may by order-
- (a) extend or shorten the time for compliance with any rule, court order or practice direction (even if an application for extension is made after the time for compliance has expired);
  - (b) adjourn or bring forward a hearing;
  - (c) require a party or a party's legal representative to attend the Court;
  - (d) direct that part of any proceedings (such as a counterclaim) be dealt with as separate proceedings;
  - (e) stay the whole or part of any proceedings or judgment either generally or until a specified date or event;
  - (f) consolidate proceedings;
  - (g) try two or more claims on the same occasion;
  - (h) direct a separate trial of any issue;
  - (i) decide the order in which issues are to be tried;
  - (j) exclude an issue from consideration;
  - (k) dismiss or give judgment on a claim after a decision on a preliminary issue;
  - (l) take any other step or make any other order for the purpose of managing the case and furthering the underlying objectives set out in Order 1A.
- (3) When the Court makes an order, it may-
- (a) make it subject to conditions, including a condition to pay a sum of money into court; and
  - (b) specify the consequences of failure to comply with the order or a condition.
- (4) Where a party pays money into court following an order under paragraph (3), the money is security for any sum payable by that party to any other party in the proceedings.

#### 2. Court's power to make order of its own motion (O. 1B, r. 2)

- (1) Except where a rule or some other enactment provides otherwise, the Court may exercise its powers on an application or of its own motion.

- (2) Where the Court proposes to make an order of its own motion-
- it may give any person likely to be affected by the order an opportunity to make representations; and
  - where it does so, it shall specify the time by and the manner in which the representations must be made.
- (3) Where the Court proposes-
- to make an order of its own motion; and
  - to hold a hearing to decide whether to make the order,
- it shall give each party likely to be affected by the order at least 3 days' notice of the hearing.
- (4) The Court may make an order of its own motion, without hearing the parties or giving them an opportunity to make representations.
- (5) Where the Court has made an order under paragraph (4)-
- a party affected by the order may apply to have it set aside, varied or stayed; and
  - the order must contain a statement of the right to make such an application.
- (6) An application under paragraph (5)(a) must be made-
- within such period as may be specified by the Court; or
  - if the Court does not specify a period, not more than 14 days after the date on which notice of the order was sent to the party making the application.

### **3. Court's power to give procedural directions by way of order nisi (O. 1B, r. 3)**

- (1) Where the Court considers that it is necessary or desirable to give a direction on the procedure of the Court and that the direction is unlikely to be objected to by the parties, it may of its own motion and without hearing the parties, give the direction by way of an order nisi.
- (2) The order nisi becomes absolute 14 days after the order is made unless a party has applied to the Court for varying the order.

(L.N. 152 of 2008)

Order:	2	<b>EFFECT OF NON-COMPLIANCE</b>	L.N. 152 of 2008; L.N. 18 of 2009	02/04/2009
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#### **1. Non-compliance with Rules (O. 2, r. 1)**

(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3), the Court may, on the ground that there has been such failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings ought to have begun by an originating process other than the one employed, but shall instead give directions for the continuation of the proceedings in an appropriate manner. (L.N. 152 of 2008)

#### **2. Application to set aside for irregularity (O. 2, r. 2)**

(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

(2) An application under this rule may be made by summons or notice of motion and the grounds of objection must be stated in the summons or notice of motion. (L.N. 152 of 2008)

**3. Non-compliance with rules and court orders (O. 2, r. 3)**

- (1) The Court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule or court order.
- (2) When exercising its power under paragraph (1), the Court shall have regard to-
  - (a) the amount in dispute; and
  - (b) the costs which the parties have incurred or which they may incur.
- (3) Where a party pays money into court following an order under paragraph (1), the money is security for any sum payable by that party to any other party in the proceedings.

(L.N. 152 of 2008)

**4. Sanctions have effect unless defaulting party obtains relief (O. 2, r. 4)**

Where a party has failed to comply with a rule or court order, any sanction for failure to comply imposed by the rule or court order has effect unless the party in default applies to the Court for and obtains relief from the sanction within 14 days of the failure.

(L.N. 152 of 2008)

**5. Relief from sanctions (O. 2, r. 5)**

- (1) On an application for relief from any sanction imposed for a failure to comply with any rule or court order, the Court shall consider all the circumstances including-
  - (a) the interests of the administration of justice;
  - (b) whether the application for relief has been made promptly;
  - (c) whether the failure to comply was intentional;
  - (d) whether there is a good explanation for the failure to comply;
  - (e) the extent to which the party in default has complied with other rules and court orders;
  - (f) whether the failure to comply was caused by the party in default or his legal representative;
  - (g) in the case where the party in default is not legally represented, whether he was unaware of the rule or court order, or if he was aware of it, whether he was able to comply with it without legal assistance;
  - (h) whether the trial date or the likely trial date can still be met if relief is granted;
  - (i) the effect which the failure to comply had on each party; and
  - (j) the effect which the granting of relief would have on each party.
- (2) An application for relief must be supported by evidence.

(L.N. 152 of 2008)  
(Enacted 1988)

Order:	3	TIME	35 of 1998	18/09/1998
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**1. "Month" (月) means calendar month (O. 3, r. 1)**

Without prejudice to section 3 of the Interpretation and General Clauses Ordinance (Cap 1) in its application to these rules, the word "month" (月), where it occurs in any judgment, order, direction or other document forming part of any proceedings in the High Court, means a calendar month unless the context otherwise requires.

(25 of 1998 s. 2)

**2. Reckoning periods of time (O. 3, r. 2)**

- (1) Any period of time fixed by these rules or by any judgment, order or direction for doing any act shall be

- (ii) under a specified enactment; or
- (iii) on some other specified basis;
- (b) where interest is claimed under section 48 of the Ordinance, the rate is no higher than the rate of interest payable on judgment debts at the date when the writ or the originating summons was issued; and
- (c) the plaintiff's request for judgment includes a calculation of the interest claimed for the period from the date up to which interest was stated to be calculated in the statement of claim or the originating summons to the date of the request for judgment.

(2) In any case where judgment is entered under rule 4, 5 or 7 and the conditions specified in paragraph (1) are not satisfied, judgment shall be for an amount of interest to be decided by the Court.

### **13. Form for admission to be served with writ or originating summons**

(O. 13A, r. 13)

- (1) This rule applies where the only remedy that the plaintiff is seeking is the payment of money, whether or not the amount is liquidated.
- (2) Where a writ of summons, an originating summons or any other originating process is served on a defendant, it must be accompanied by-
  - (a) if the amount of money which the plaintiff is seeking is liquidated, a copy of Form No. 16 in Appendix A for admitting the claim; and
  - (b) if the amount of money which the plaintiff is seeking is unliquidated, a copy of Form No. 16C in Appendix A for admitting the claim.

### **14. Application**

(O. 13A, r. 14)

- (1) This Order (other than rule 13) applies in relation to a writ of summons, an originating summons or any other originating process served before the commencement\* of this Order if-
  - (a) in the case of a writ of summons, the plaintiff has not obtained a default judgment under Order 13 or 19;
  - (b) in the case of an originating summons, the admission is filed and served before the date or the period fixed under Order 28, rule 2; and
  - (c) in the case of any other originating process, the period specified in rule 3(1)(c) for filing and serving an admission under rule 4, 5, 6 or 7 has not expired.
- (2) This Order applies in relation to a counterclaim with the necessary modifications as if-
  - (a) a reference to a claim or statement of claim were a reference to a counterclaim;
  - (b) a reference to a plaintiff were a reference to the party making the counterclaim; and
  - (c) a reference to a defendant were a reference to the defendant to the counterclaim.
- (3) Where a defendant has made a claim against a person not already a party to the action under Order 16, rule 1 or 8, this Order applies in relation to that claim and any other claim made under Order 16, rule 9 with the necessary modifications as if-
  - (a) a reference to a plaintiff were a reference to the person who makes the claim; and
  - (b) a reference to a defendant were a reference to the person against whom the claim is made.

(L.N. 152 of 2008)

**Note:**

\* Commencement day: 2 April 2009.

Order:	14	<b>SUMMARY JUDGMENT</b>	L.N. 152 of 2008; L.N. 18 of 2009	02/04/2009
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### **1. Application by plaintiff for summary judgment (O. 14, r. 1)**

- (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.
- (2) Subject to paragraph (3) this rule applies to every action begun by writ other than-
- (a) an action which includes a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment or seduction,
  - (b) an action which includes a claim by the plaintiff based on an allegation of fraud, or
  - (c) an Admiralty action in rem.
- (3) This Order shall not apply to an action to which Order 86 or Order 88 applies.

**2. Manner in which application under rule 1 must be made (O. 14, r. 2)**

- (1) An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed.
- (2) Unless the Court otherwise directs, an affidavit for the purposes of this rule may contain statements of information or belief with the sources and grounds thereof.
- (3) The summons, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant not less than 10 clear days before the return day.

**3. Judgment for plaintiff (O. 14, r. 3)**

- (1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed. (See App. A Form 44)
- (2) The Court may by order, and subject to such conditions, if any, as may be just, stay execution of any judgment given against a defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action.

**4. Leave to defend (O. 14, r. 4)**

- (1) A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court.
- (2) Rule 2(2) applies for the purposes of this rule as it applies for the purposes of that rule.
- (3) The Court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit.
- (4) On the hearing of such an application the Court may order a defendant showing cause or, where that defendant is a body corporate, any director, manager, secretary or other similar officer thereof, or any person purporting to act in any such capacity-
- (a) to produce any document;
  - (b) if it appears to the Court that there are special circumstances which make it desirable that he should do so, to attend and be examined on oath.

**5. Application for summary judgment on counterclaim (O. 14, r. 5)**

- (1) Where a defendant to an action begun by writ has served a counterclaim on the plaintiff, then, subject to paragraph (3), the defendant may, on the ground that the plaintiff has no defence to a claim made in the counterclaim,

or to a particular part of such a claim, apply to the Court for judgment against the plaintiff on that claim or part.

(2) Rules 2, 3 and 4 shall apply in relation to an application under this rule as they apply in relation to an application under rule 1 but with the following modifications, that is to say-

- (a) references to the plaintiff and defendant shall be construed as references to the defendant and plaintiff respectively;
  - (b) the words in rule 3 (2) "any counterclaim made or raised by the defendant in" shall be omitted; and
  - (c) the reference in rule 4(3) to the action shall be construed as a reference to the counterclaim to which the application under this rule relates.
- (3) This rule shall not apply to a counterclaim which includes any such claim as is referred to in rule 1(2).

#### **6. Directions (O. 14, r. 6)**

##### **(1) Where the Court-**

(a) orders that a defendant or a plaintiff have leave (whether conditional or unconditional) to defend an action or counterclaim, as the case may be, with respect to a claim or a part of a claim, or  
 (b) gives judgment for a plaintiff or a defendant on a claim or part of a claim but also orders that execution of the judgment be stayed pending the trial of a counterclaim or of the action, as the case may be, the Court shall give directions as to the further conduct of the action, and Order 25, rules 2 to 7, shall, with the omission of so much of rule 7(1) as requires parties to serve a notice specifying the orders and directions which they require and with any other necessary modifications, apply as if the application under rule 1 of this Order or rule 5 thereof, as the case may be, on which the order was made were a case management summons. (L.N. 152 of 2008)

(2) In particular, and if the parties consent, the Court may direct that the claim in question and any other claim in the action be tried by a master under the provisions of these rules relating to the trial of causes or matters or questions or issues by masters.

#### **7. Costs (O. 14, r. 7)**

(1) If the plaintiff makes an application under rule 1 where the case is not within this Order or if it appears to the Court that the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, then, without prejudice to Order 62 and in particular to rule 4(1) thereof, the Court may dismiss the application with costs and may require the costs to be paid by him forthwith.

(2) The Court shall have the same power to dismiss an application under rule 5 as it has under paragraph (1) to dismiss an application under rule 1, and that paragraph shall apply accordingly with the necessary modifications.

#### **8. Right to proceed with residue of action or counterclaim (O. 14, r. 8)**

(1) Where on an application under rule 1 the plaintiff obtains judgment on a claim or a part of a claim against any defendant, he may proceed with the action as respects any other claim or as respects the remainder of the claim or against any other defendant.

(2) Where on an application under rule 5 a defendant obtains judgment on a claim or part of a claim made in a counterclaim against the plaintiff, he may proceed with the counterclaim as respects any other claim or as respects the remainder of the claim or against any other defendant to the counterclaim.

#### **9. Judgment for delivery up of chattel (O. 14, r. 9)**

Where the claim to which an application under rule 1 or rule 5 relates is for the delivery up of a specific chattel and the Court gives judgment under this Order for the applicant, it shall have the same power to order the party against whom judgment is given to deliver up the chattel without giving him an option to retain it on paying the assessed value thereof as if the judgment had been given after trial.

#### **10. Relief against forfeiture (O. 14, r. 10)**

A tenant shall have the same right to apply for relief after judgment for possession of land on the ground of forfeiture for non-payment of rent has been given under this Order as if the judgment had been given after trial.

## 11. Setting aside judgment (O. 14, r. 11)

Any judgment given against a party who does not appear at the hearing of an application under rule 1 or rule 5 may be set aside or varied by the Court on such terms as it thinks just.

(Enacted 1988)

Order:	14A	<b>DISPOSAL OF CASE ON POINT OF LAW</b>	L.N. 152 of 2008; L.N. 18 of 2009	02/04/2009
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### 1. Determination of questions of law or construction (O. 14A, r. 1)

(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that-

- (a) such question is suitable for determination without a full trial of the action; and
- (b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have either-

- (a) had an opportunity of being heard on the question; or
- (b) consented to an order or judgment on such determination.

(4) The jurisdiction of the Court under this Order may be exercised by a master.

(5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19 or any other provision of these rules.

### 2. Manner in which application under rule 1 may be made (O. 14A, r. 2)

An application under rule 1 may be made by summons or (notwithstanding Order 32, rule 1) may be made orally in the course of any interlocutory application to the Court.

(L.N. 165 of 1992; L.N. 152 of 2008)

Order:	15	<b>CAUSES OF ACTION, COUNTERCLAIMS AND PARTIES</b>	L.N. 362 of 1997; 01/07/1997 25 of 1998
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#### Remarks:

Adaptation amendments retroactively made - see 25 of 1998 s. 2

### 1. Joinder of causes of action (O. 15, r. 1)

(1) Subject to rule 5(1), a plaintiff may in one action claim relief against the same defendant in respect of more than one cause of action-

- (a) if the plaintiff claims, and the defendant is alleged to be liable, in the same capacity in respect of all the causes of action, or
- (b) if the plaintiff claims or the defendant is alleged to be liable in the capacity of executor or administrator of an estate in respect of one or more of the causes of action and in his personal capacity but with reference to the same estate in respect of all the others, or
- (c) with the leave of the Court.

(2) An application for leave under this rule must be made ex parte by affidavit before the issue of the writ or originating summons, as the case may be, and the affidavit must state the grounds of the application.

- the case shall, notwithstanding anything in this Order, be made in the manner specified in the order; and
- (c) an order directing that documents which may be inspected under this Order shall, notwithstanding anything in rule 9 or 10, be inspected at a time or times specified in the order.

(L.N. 152 of 2008)

#### **16. Failure to comply with requirement for discovery, etc. (O. 24, r. 16)**

(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose or to supply copies thereof fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1), the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.

(2) If any party against whom an order for discovery or production of documents is made fails to comply with it, then, without prejudice to paragraph (1), he shall be liable to committal.

(3) Service on a party's solicitor of an order for discovery or production of documents made against that party shall be sufficient service to found an application for committal of the party disobeying the order, but the party may show in answer to the application that he had no notice or knowledge of the order.

(4) A solicitor on whom such an order made against his client is served and who fails without reasonable excuse to give notice thereof to his client shall be liable to committal.

#### **17. Revocation and variation of orders (O. 24, r. 17)**

Any order made under this Order (including an order made on appeal) may, on sufficient cause being shown, be revoked or varied by a subsequent order or direction of the Court made or given at or before the trial of the cause or matter in connection with which the original order was made.

(Enacted 1988)

Order:	25	CASE MANAGEMENT SUMMONS AND CONFERENCE*	L.N. 152 of 2008; L.N. 18 of 2009	02/04/2009
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#### **1. Case management summons and conference (O. 25, r. 1)**

(L.N. 152 of 2008)

(1) For the purpose of facilitating the giving of directions for the management of a case, each party shall, within 28 days after the pleadings in an action to which this rule applies are deemed to be closed-

- (a) complete a questionnaire prescribed in a practice direction issued for that purpose by providing the information requested in the manner specified in the questionnaire; and
- (b) serve it on all other parties and file it with the Court in the manner specified in the practice direction.

(L.N. 152 of 2008)

(1A) Where, upon completion of the questionnaire, the parties are able to reach an agreement on-

- (a) the directions relating to the management of the case that they wish the Court to make; or
- (b) a timetable for the steps to be taken between the date of the giving of those directions and the date of the trial,

they shall procure an order to that effect by way of a consent summons. (L.N. 152 of 2008)

(1B) Where there is no agreement on any of the matters specified in paragraph (1A)(a) and (b)-

- (a) each party shall in the questionnaire make a proposal on the matter; and
- (b) the plaintiff shall, within the time specified in the practice direction, take out a summons (in these rules referred to as a case management summons) returnable in not less than 14 days, so that the Court may give directions relating to the management of the case. (L.N. 152 of 2008)

(2) This rule applies to all actions begun by writ except-

- (a) actions in which the plaintiff or defendant has applied for judgment under Order 14, or in which the plaintiff has applied for judgment under Order 86, and directions have been given under the relevant Order;
- (b) actions in which the plaintiff or defendant has applied under Order 18, rule 21, for trial without pleadings or further pleadings and directions have been given under that rule;
- (c) actions in which an order has been made under Order 24, rule 4, for the trial of an issue or question before discovery;
- (d) actions in which directions have been given under Order 29, rule 7;
- (e) actions in which an order for the taking of an account has been made under Order 43, rule 1;
- (f) actions in which an application for transfer to the commercial list is pending;
- (g) actions for the infringement of a patent; and
- (j) actions for personal injuries for which automatic directions are provided by rule 8.
- (k) (Repealed L.N. 152 of 2008)
- (3) (Repealed L.N. 152 of 2008)
- (4) If the plaintiff does not file the questionnaire in accordance with paragraph (1)(b) or take out a case management summons in accordance with paragraph (1B)(b), the defendant or any defendant may-
  - (a) take out a case management summons; or
  - (b) apply for an order to dismiss the action. (L.N. 152 of 2008)
- (5) On an application by a defendant to dismiss the action under paragraph (4) the Court may either dismiss the action on such terms as may be just or deal with the application as if it were a case management summons.
- (6) In the case of an action which is proceeding only as respects a counterclaim, references in this rule and rule 1A(1)(c) to the plaintiff and defendant shall be construed respectively as references to the party making the counterclaim and the defendant to the counterclaim.
- (7) Notwithstanding anything in paragraph (1B), any party to an action to which this rule applies may take out a case management summons at any time after the defendant has given notice of intention to defend, or, if there are two or more defendants, at least one of them has given such notice.

(L.N. 152 of 2008)

#### **1A. Case management timetable**

(O. 25, r. 1A)

- (1) Subject to paragraph (4), as soon as practicable after the completed questionnaire has been filed with the Court, the Court shall, having regard to the questionnaire and the needs of the case-
  - (a) give directions relating to the management of the case and fix the timetable for the steps to be taken between the date of the giving of those directions and the date of the trial;
  - (b) fix a case management conference if the Court is of the opinion that it is desirable to do so; or
  - (c) direct the plaintiff to take out a case management summons if he has not already done so under rule 1(1B)(b).
- (2) Where the Court has fixed a case management conference, it shall-
  - (a) give directions relating to the management of the case and fix the timetable for the steps to be taken between the date of the giving of those directions and the date of the case management conference; and
  - (b) at the case management conference, fix a timetable for the steps to be taken between the date of the conference and the date of the trial, and the timetable must include-
    - (i) a date for a pre-trial review; or
    - (ii) the trial date or the period in which the trial is to take place.
- (3) Where the Court has not fixed a case management conference, any timetable fixed under paragraph (1)(a) must include-
  - (a) a date for a pre-trial review; or
  - (b) the trial date or the period in which the trial is to take place.
- (4) The Court may, without a hearing of the case management summons and having regard to the completed questionnaire, by an order nisi, give directions relating to the management of the case and fix the timetable for the steps to be taken between the date of the giving of those directions and the date of the trial.
- (5) The order nisi becomes absolute 14 days after the order is made unless a party has applied to the Court for varying the order.
- (6) The Court shall, on an application made under paragraph (5), hear the case management summons.

(L.N. 152 of 2008)

**1B. Variation of case management timetable** (O. 25, r. 1B)

- (1) The Court may, either of its own motion or on the application of a party, give further directions relating to the management of the case or vary any timetable fixed by it under rule 1A.
- (2) A party may apply to the Court if he wishes to vary a milestone date.
- (3) The Court shall not grant an application under paragraph (2) unless there are exceptional circumstances justifying the variation.
- (4) A non-milestone date may be varied by procuring an order to that effect by way of a consent summons.
- (5) A party may apply to the Court if he wishes to vary a non-milestone date without the agreement of the other parties.
- (6) The Court shall not grant an application under paragraph (5) unless sufficient grounds have been shown to it.
- (7) Whether or not sufficient grounds have been shown to it, the Court shall not grant an application under paragraph (5) if the variation would make it necessary to change a trial date or the period in which the trial is to take place.

(8) In this rule-  
**"milestone date"** (進度指標日期) means-

- (a) a date which the Court has fixed for-
  - (i) a case management conference;
  - (ii) a pre-trial review; or
  - (iii) the trial; or
- (b) a period fixed by the Court in which a trial is to take place;

**"non-milestone date"** (非進度指標日期) means a date or period fixed by the Court, other than a date or period specified in the definition of "milestone date".

(L.N. 152 of 2008)

**1C. Failure to appear at case management conference or pre-trial review**  
(O. 25, r. 1C)

- (1) Where the plaintiff does not appear at the case management conference or pre-trial review, the Court shall provisionally strike out the plaintiff's claim.
- (2) Where the defendant has made a counterclaim in the action and he does not appear at the case management conference or pre-trial review, the Court shall provisionally strike out the defendant's counterclaim.
- (3) Where the Court has provisionally struck out a claim or counterclaim under paragraph (1) or (2), the plaintiff or the defendant may, before the expiry of 3 months from the date of the case management conference or pre-trial review, as the case may be, apply to the Court for restoration of the claim or counterclaim.
- (4) The Court may restore the claim or counterclaim subject to such conditions as it thinks fit or refuse to restore it.
- (5) The Court shall not restore the claim or counterclaim unless good reasons have been shown to the satisfaction of the Court.
- (6) If the plaintiff or the defendant does not apply under paragraph (3) or his application under that paragraph is refused, then-
  - (a) the plaintiff's claim or the defendant's counterclaim stands dismissed upon the expiry of 3 months from the date of the case management conference or pre-trial review, as the case may be; and
  - (b) (i) in the case of the plaintiff's claim, the defendant is entitled to his costs of the claim; and  
(ii) in the case of the defendant's counterclaim, the plaintiff is entitled to his costs of the counterclaim.

(L.N. 152 of 2008)

**2. Duty to consider all matters** (O. 25, r. 2)

(1) When the case management summons first comes to be determined, the Court shall consider whether-(L.N. 152 of 2008)

- (a) it is possible to deal then with all the matters which, by the rules of this Order, are required to be considered at the case management summons; or
- (b) it is expedient to adjourn the consideration of all or any of those matters until a later stage.

(2) If when the case management summons first comes to be determined the Court considers that it is possible to deal then with all the said matters, it shall deal with them forthwith and shall endeavour to secure that all other matters which must or can be dealt with on interlocutory applications and have not already been dealt with are also then dealt with.

(3) If, when the case management summons first comes to be determined, the Court considers that it is expedient to adjourn the consideration of all or any of the matters which, by the rules of this Order, are required to be considered at the case management summons, the Court shall deal forthwith with such of those matters as it considers can conveniently be dealt with forthwith and adjourn the consideration of the remaining matters and shall endeavour to secure that all other matters which must or can be dealt with on interlocutory applications and have not already been dealt with are dealt with either then or at such time as the Court may specify.

(4) Subject to paragraph (5), and except where the parties agree to the making of an order under Order 33 as to the place or mode of trial before all the matters which, by the rules of this Order, are required to be considered at the case management summons have been dealt with, no such order shall be made until all those matters have been dealt with.

(5) If, at the determination of the case management summons, an action is ordered to be transferred to the District Court or some other court, paragraph (4) shall not apply and nothing in this Order shall be construed as requiring the Court to make any further order at the case management summons.

(7) If the determination of the case management summons is adjourned without a day being fixed for its resumption, any party may restore the summons to the list on 2 days' notice to the other parties.

(L.N. 152 of 2008)

### **3. Particular matters for consideration (O. 25, r. 3)**

At the determination of the case management summons, the Court shall in particular consider, if necessary of its own motion, whether any order should be made or direction given in the exercise of the powers conferred by any of the following provisions, that is to say- (L.N. 152 of 2008)

- (a) any provision of Part IV and Part V of the Evidence Ordinance (Cap 8) (hearsay evidence of fact or opinion in civil proceedings) or of Part III and Part IV of Order 38;
- (b) Order 20, rule 5 and Order 38, rules 2 to 7;
- (c) section 43 of the District Court Ordinance (Cap 336). (L.N. 152 of 2008)

### **4. Admissions and agreements to be made (O. 25, r. 4)**

At the determination of the case management summons, the Court shall endeavour to secure that the parties make all admissions and all agreements as to the conduct of the proceedings which ought reasonably to be made by them and may cause the order on the summons to record any admissions or agreements so made, and (with a view to such special order, if any, as to costs as may be just being made at the trial) any refusal to make any admission or agreement.

(L.N. 152 of 2008)

### **5. Limitation of right of appeal (O. 25, r. 5)**

Nothing in rule 4 shall be construed as requiring the Court to endeavour to secure that the parties shall agree to exclude or limit any right of appeal, but the order made on the case management summons may record any such agreement.

(L.N. 152 of 2008)

### **6. Duty to give all information at determination of case management summons (O. 25, r. 6)**

(L.N. 152 of 2008)

(1) Subject to paragraph (2), no affidavit shall be used at the determination of the case management summons except by the leave or directions of the Court, but, subject to paragraph (4), it shall be the duty of the parties to the action and their advisers to give all such information and produce all such documents as the Court may reasonably require for the purposes of enabling it properly to deal with the summons.

The Court may, if it appears proper so to do in the circumstances, authorize any such information or documents to be given or produced to the Court without being disclosed to the other parties but, in the absence of such authority, any information or document given or produced under this paragraph shall be given or produced to all the parties as well as to the Court. (L.N. 152 of 2008)

(2) No leave shall be required by virtue of paragraph (1) for the use of an affidavit by any party at the determination of the case management summons in connection with any application thereat for any order if, under any of these rules, an application for such an order is required to be supported by an affidavit. (L.N. 152 of 2008)

(3) If the Court at the determination of the case management summons requires a party to the action or his solicitor or counsel to give any information or produce any document and that information or document is not given or produced, then, subject to paragraph (4), the Court may- (L.N. 152 of 2008)

- (a) cause the facts to be recorded in the order with a view to such special order, if any, as to costs as may be just being made at the trial, or
- (b) if it appears to the Court to be just so to do, order the whole or any part of the pleadings of the party concerned to be struck out, or if the party is plaintiff or the claimant under a counterclaim, order the action or counterclaim to be dismissed on such terms as may be just.

(4) Notwithstanding anything in the foregoing provisions of this rule, no information or documents which are privileged from disclosure shall be required to be given or produced under this rule by or by the advisers of any party otherwise than with the consent of that party.

## **7. Duty to make all interlocutory applications at case management summons (O. 25, r. 7)**

(L.N. 152 of 2008)

(1) Any party to whom the case management summons is addressed must so far as practicable apply at the time fixed for determination of the summons for any order or directions which he may desire as to any matter capable of being dealt with on an interlocutory application in the action and must, not less than 7 days before the time fixed for determination of the summons, serve on the other parties a notice specifying those orders and directions in so far as they differ from the orders and directions asked for by the summons.

(2) If the determination of the case management summons is adjourned and any party to the proceedings desires to apply for any order or directions not asked for by the summons or in any notice given under paragraph (1), he must, not less than 7 days before the resumption of the determination of the summons, serve on the other parties a notice specifying those orders and directions in so far as they differ from the orders and directions asked for by the summons or in any such notice as aforesaid.

(3) Any application subsequent to the case management summons and before judgment as to any matter capable of being dealt with on an interlocutory application in the action must be made under the summons by 2 clear days' notice to the other party stating the grounds of the application.

(L.N. 152 of 2008)

## **8. Automatic directions in personal injury actions (O. 25, r. 8)**

(1) When the pleadings in any action to which this rule applies are deemed to be closed the following directions shall take effect automatically-

- (a) there shall be discovery of documents within 14 days in accordance with Order 24, rule 2, and inspection within 7 days thereafter, save that where liability is admitted, or where the action arises out of a road accident, discovery shall be limited to disclosure by the plaintiff of any documents relating to special damages;
- (b)-(c) (Repealed L.N. 152 of 2008)
- (d) photographs, a sketch plan and the contents of any police accident report shall be receivable in

- evidence at the trial and shall be agreed if possible;
- (HK)(dd) the record of any proceedings in any court or tribunal shall be receivable in evidence upon production of a copy thereof certified as a true copy by the clerk or other appropriate officer of the court or tribunal;

(f)-(g) (Repealed L.N. 99 of 1993)

(2) (Repealed L.N. 152 of 2008)

(3) Nothing in paragraph (1) shall prevent any party to an action to which this rule applies from applying to the Court for such further or different directions or orders as may, in the circumstances, be appropriate or prevent the making of an order for the transfer of the proceedings to the District Court. (L.N. 152 of 2008)

(4) For the purpose of this rule-

"a road accident" (道路意外) means an accident on land due to a collision or apprehended collision involving a vehicle; and

"documents relating to special damages" (關於專項損害賠償的文件) include-

- (a) documents relating to any industrial injury, industrial disablement or sickness benefit rights, and
  - (b) where the claim is made under the Fatal Accidents Ordinance (Cap 22), documents relating to any claim for dependency on the deceased.
- (5) This rule applies to any action for personal injuries except-
- (a) any Admiralty action; and
  - (b) any action where the pleadings contain an allegation of a negligent act or omission in the course of medical treatment.

9. (Repealed L.N. 152 of 2008)

#### 10. Application to action in specialist list (O. 25, r. 10)

Notwithstanding anything in this Order, a specialist judge may, by a practice direction, determine the extent to which this Order is to apply to an action in a specialist list.

(L.N. 152 of 2008)

#### 11. Transitional provisions relating to Part 11 of Amendment Rules 2008 (O. 25, r. 11)

(1) A summons for directions taken out before the commencement# of the Amendment Rules 2008 and pending immediately before the commencement is deemed to be-

- (a) if the summons for directions was taken out by the plaintiff, a case management summons taken out under rule 1(1B)(b); or
- (b) if the summons for directions was taken out by a defendant, a case management summons taken out under rule 1(4)(a).

(2) Where the pleadings in an action to which rule 1 applies are deemed to be closed but no summons for directions has been taken out before the commencement of the Amendment Rules 2008, rule 1(1) has effect as if for the words "the pleadings in an action to which this rule applies are deemed to be closed", there were substituted the words "the commencement of the Amendment Rules 2008".

(L.N. 152 of 2008)  
(Enacted 1988)

##### Note:

\* (Amended L.N. 152 of 2008)

# Commencement day: 2 April 2009.

Order:	26	INTERROGATORIES	25 of 1998	01/07/1997
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##### Remarks:

Adaptation amendments retroactively made - see 25 of 1998 s. 2

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ISLAMABAD, TUESDAY, NOVEMBER 8, 2016

## PART II

### Statutory Notifications (S. R. O.)

GOVERNMENT OF PAKISTAN

ISLAMABAD HIGH COURT, ISLAMABAD

### NOTIFICATION

*Islamabad the 7th November, 2016*

S. R. O. 1038 (I)/2016.—In exercise of the powers conferred under Article 202 of the Constitution of Islamic Republic of Pakistan, 1973, read with Section 122 of CPC, the Hon'ble Chief Justice and the Judges of Islamabad High Court, on the recommendations of the Hon'ble Rules Committee of Islamabad High Court, have been pleased to make the following practice and procedure rules in the CPC for information of all persons likely to be affected thereby and notice is hereby given that the draft rules will be taken into consideration after a period of 60 days from the date on which copies of the Gazette of Pakistan in which this notification is published, are made available to the public;

Objections or suggestions, if any, may be addressed to the Additional Registrar (Legislation), Islamabad High Court, G-10/1, Islamabad.

Any objection or suggestion, which may be received from any person in respect of the said draft rules before the expiry of the period specified above, will be considered by the Authority.

(3229)

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**CONCEPTUAL BASIS OF AMENDMENT IN ORDER IX-A CPC**

*(Concept Note: Without disturbing the main scheme of Civil Procedure Code, 1908, or bringing any procedural novation, this amendment aspires to employ the techniques of Case Management derived from Rule 16 Federal Rules of Civil Procedure, USA, and Civil Procedure Rules, England and Wales. Woolf Reforms in UK and Civil Justice Reform Act 1991 of USA influenced changes in Civil Procedures of UK and USA by developing certain Case Management techniques, resulting in shifting the control of civil litigation from the litigants to the courts, extending a proactive managerial role of the Presiding Officers. In this context, this amendment aspires to create a procedural "work station" wherein all the proceedings are regulated by the Presiding Officers in a*

*consultative discourse, designed to curb delay and defeat adversarial tactics of the parties. This work station, as an instrument of Case Management, has the ability to deal with many aspects of the case on the same occasion. To keep the conceptual foundation of this instrument intact, all the provisions and concepts taken from Civil Procedure of U.K and U.S.A are kept in their original legislative language).*

#### Order IX-A CPC. Case Management and Scheduling Conference(s)<sup>I</sup>

- (1) The court at any time during the proceedings of a civil suit may call for a Case Management & Scheduling Conference, and in so doing, the court shall order the parties and the attorneys of the parties and the unrepresented party(ies) to appear in the court for one or more Case Management and Scheduling Conference(s) for the following purposes:—
  - (i) Expedited disposal of the cases.<sup>II</sup>
  - (ii) Establishing an early and continuing control of the court over the case, so that it cannot be protracted because of lack of management.<sup>III</sup>
  - (iii) Discouraging wasteful pre-trial activities.<sup>IV</sup>
  - (iv) Improving the quality of trial through more thorough preparation of the case by the parties and their attorneys.<sup>V</sup>
  - (v) Encouraging the parties to cooperate with each other in conducting the court proceedings.<sup>VI</sup>
  - (vi) Fixing time tables or otherwise controlling progress of the case.<sup>VII</sup>
  - (vii) Facilitating settlements and encouraging parties to use ADR procedures.<sup>VIII</sup>
  - (viii) Giving directions to ensure that the trial of a case proceeds quickly and efficiently.<sup>IX</sup>
  - (ix) Dealing with as many aspects of the case as is possible on the same occasion.<sup>X</sup>
  - (x) For facilitation of the parties, if so required, seeking consultation of the parties or their attorneys in the Case Management and Scheduling Conference(s) through telephone, mail or other technologies.<sup>XI</sup>

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- (2) At any conference under this rule, the court may take appropriate action(s) and pass a scheduling order with respect to:
- (i) The formulation and simplification of issues, including elimination of frivolous claims and defenses<sup>XII</sup>
  - (ii) The necessity or desirability of amendments in the pleadings.<sup>XIII</sup>
  - (iii) The necessity or desirability of joining other parties.
  - (iv) The necessity or desirability of any local inspection through commission.
  - (v) Obtaining proposed exhibits from the parties and scrutinizing them within the mandate of Order XIII, and identifying witnesses.
  - (vi) Determining the appropriateness and timing of Summary Judgment under Order XV.
  - (vii) Control of Discovery through **Discovery Management**
  - (viii) Disposition of pending motions through **Motion Management**.
  - (ix) Conducting **Trial Management** for a speedy trial.
  - (x) Facilitating the just, speedy and inexpensive disposal of cases.
- (3) Seven days prior to conducting any Case Management Conference for scheduling motions, discovery, settlement or trial, the court shall serve the agenda items of the conference to the parties or their counsels through prescribed proformas-A, B, C & D.
- (4) ***Motion Management and Scheduling Order(s).***<sup>XIV</sup>
- (A) The court after consultation with the attorneys of the parties and unrepresented parties shall fix the following three dates:—
- (i) A date by which the parties shall file any of the applications (*i.e.* under order 6 rule 17 CPC, Order 1 rule 10 CPC, order 7 rule 11 CPC, order 26 rule 9 CPC, or any other applications) required for completion of pleadings, and shall provide copies of such application(s) to the other party(ies).
  - (ii) Another date by which the parties shall file written replies to such application(s), and shall give copies of written reply(ies) to the opposite parties.
  - (iii) A third date by which unless the hearing is adjourned, the application(s) shall be disposed of.

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- (B) No opportunity shall be provided to any party for making any such application(s) if he/she opts not to file such application(s) or reply thereto after exhausting the opportunity provided under rule 4(A).
  - (C) If it is not convenient to decide all the applications collectively, the court may decide them separately by making a fixed schedule for their disposal.
- (5) ***Discovery Management and Scheduling Order(s)*** After the completion of pleadings, in accordance with the nature of the litigation, the court shall fix a timetable(Schedule) for:
- (A) Developing with the consultation of the attorneys of the parties and unrepresented parties a factual and legal statement of controversy.<sup>xv</sup>
  - (B) Employing all or any modes of “litigant conducted investigation” provided in Order 10, 11 and 12 CPC.
  - (C) Requiring parties and their counsels to submit their proposed exhibits along with Proforma-E, and conducting their scrutiny in accordance with the mandate of Order 13 CPC.
- (6) ***Trial Management and Scheduling Order(s)***<sup>xvi</sup> After framing of the issues, if the case is fixed for trial, then the court with the consultation of attorneys of the parties and any unrepresented party(ies), shall within seven days, establish a time table (Schedule)for:
- A. Presenting and exchanging the list of witnesses, which the parties intend to produce in the court either to give evidence or produce documents, on the prescribed Proformas-F1 & F2.
  - B. Procuring the certificates of readiness from the parties to produce their witnesses and documentary evidence in the court on the prescribed Proforma-G.
  - C. Proceeding with the trial in accordance with the schedule, within which, the parties shall be bound to present their evidence and cross examine each other's witnesses
- (7) ***Settlement Conference & Scheduling Order*** At any stage during the proceedings of a case, the court with the consent of the parties, may employ any of the modes of Alternate Dispute Resolution for expeditious disposal of the case.
- (8) ***Imposing fee and cost***<sup>xvii</sup> If a party or his attorney fails to appear at a Case Management and Scheduling Conference, or is substantially unprepared to participate, or does not participate in good faith in the conference, or fails to obey a case management and scheduling order, the

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court in addition to any other sanction, must order the party to pay reasonable expenses, unless such non compliance was substantially justified or other circumstances made an award of expenses unjust.

- (9) ***Modifying a Schedule***<sup>XVIII</sup> A court, with the consultation of the attorneys of the parties and any unrepresented party, may modify a schedule, only if a good cause is shown. After such modification in the schedule/time table, the court shall issue a fresh schedule/time table in consultation with the attorneys of the parties and any unrepresented party. Issuing schedules/time tables with the consultation of the attorneys is a mandatory feature, and no party or his attorney can opt to exclude itself from such consultation.
- (10) ***Piloting Clause*** This amendment in the Order 9-A CPC is a pilot legislation, which will be applicable in pilot courts notified by the Hon'ble Chief Justice, Islamabad High Court, Islamabad for a stipulated period. After promulgation of these amendments, working of the pilot courts and pilot procedures will be over sighted by the Rule Committee of the Hon'ble High Court for the stipulated period, following which, the Rule Committee of the Hon'ble Islamabad High Court shall decide about the applicability of these rules to all the courts of Islamabad, and may also consider further necessary amendments in the rules. On the expiry of piloting period, this pilot clause shall cease to exist.<sup>XIX</sup>

<sup>I</sup>Rule 16 of Federal Rule of Civil Procedure USA provides the concept of "Pre-Trial Case Management and Scheduling Conference". In Federal Courts of USA, Rule-16 has served as the most affective instrument of Case Management, and has resulted in expeditious disposal of cases. Even in United Kingdom (UK), the Woolf Report on "Access to Justice" recommended for active "Case Management", and in this regard, 1.4(1) of *Civil Procedure Code 1998 of England and Wales*, assigns duty to the courts to actively manage cases. Accordingly, on the basis of such recommendations of the Woolf Report, the entire *CPR, 1998* was moduled to actively employ the concepts of Case Management broadly enumerated in 1 4(1) of CPR to establish a "Managed System of Dispute Resolution"

<sup>II</sup>Rule 16(a)(1) *Federal Rules of Civil Procedure, USA*.

<sup>III</sup>Rule 16(a)(2) *Federal Rules of Civil Procedure, USA*

<sup>IV</sup>Rule 16(a)(3) *Federal Rules of Civil Procedure, USA*.

<sup>V</sup> Rule 16(a)(4) *Federal Rules of Civil Procedure, USA*.

<sup>VI</sup> Rule 1 4(2)(a)*Civil Procedure Rules, England and Wales, 1998* Active case management includes encouraging the parties to cooperate with each other in the conduct of proceedings.

<sup>VII</sup> Rule 1.4(2)(g) *Civil Procedure Rules, England and Wales 1998* One of the most important finding of the Woolf Report was that the Civil Justice System failed to deliver because the progress of the cases was left largely to the parties. He required introduction of Case Management Procedures to change this traditional position, and opted for such a procedural module, where the progress of case was not left in the hands of the parties. In this sense, Case Management means the exercise by the court of the power given to it to enable it, and not the parties, to dictate the progress of the cases Through this process, the court controls the progress of the case by fixing time tables. Under this "Court Controlled Approach" to Case Management, the court is able to monitor the progress of the case from an early stage

<sup>VIII</sup> Rule 2(e) *Civil Procedure Rules, England and Wales 1998* Further see Rule 16(a)(5) *Federal Rules of Civil Procedures, USA*.

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<sup>ix</sup>Rule 2(l) *Civil Procedure Rules, England and Wales 1998*. Active Case Management includes the court giving directions to ensure that the trial of a case proceeds quickly and efficiently.

<sup>x</sup>Rule 2(i) *Civil Procedure Rules, England and Wales, 1998* According to this module, the parties to a case and the judges should not be encouraged to deal with several aspects of a case on "successive occasions", rather, it would be practicable to deal with them on one "occasion". In this context, the "Case Management and Scheduling Conference" operates as a "work station" which has the agility to manage many proceedings collectively.

<sup>xI</sup>This concept is taken from Rule 16(b) *Federal rules of Civil Procedure USA*, and 1.4(j)(k) of *Civil Procedure Rules England and Wales 1998*.

<sup>xII</sup> Rule 16 (c)(1) *Federal Rules of Civil Procedure USA*

<sup>xIII</sup>Ibid., Rule 16(c)(2)

<sup>xIV</sup>This concept is derived from Rule 16(b) (c) (3) of *Federal Rules of Civil Procedure USA*, wherein, the scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions. Based on this concept, section 9-A was introduced in Civil Procedure Code 1908 on 02-10-2001 in the following manner:—

**9-A. Intermediate Dates**

1. *Fixation of Intermediate dates. After the close of the pleadings, the court shall fix;*

(a) *a day by which parties shall apply for orders of the court with regard to any of the following matters, namely—*

*Pleadings, further and better particulars, admission, discoveries, inspection of documents or of movable property and the mode by which particular facts may be proved;*

(b) *another day by which parties may reply such applications; and*

(c) *a third day of which, unless the hearing is adjourned, the applications shall be disposed of.*

Although, 9-A CPC was introduced in the *Civil Procedure Code 1908* as a module of Case Management, yet on account of its weak conceptual understanding and poor legislative drafting, this provision was barely exercised in the courts since its birth. Even, the 60<sup>th</sup> report of Law Commission of Pakistan at page-149 acknowledges the importance of this provision in the following words:-

"4. By addition of Order IX-A in the code a new and very important concept of case management has been introduced which is generally followed in developed countries to check belated complication of suits and to rectify faults at initial stage of hearing"

<sup>xV</sup>Empirical evidence suggests that our civil courts usually proceed with the civil cases without having a deep understanding into the legal and factual aspect of the controversy. Therefore, it is imperative that in order to grasp the controversy in a civil suit, a civil court after filing of the written statement of the defendant(s), should formulate a legal and factual statement of the controversy with the consultation of the parties. This exercise will not only prune the frivolous and un-required aspects of the pleadings, but will improve the control of the judicial officer over the real contours of the controversy.

<sup>xVI</sup>This concept is taken from Rule-16(c)(7) and(d) of *Federal Rule of Civil Procedure, USA*, whereby, Case Management and Scheduling Conference is used for identifying witnesses and documents, scheduling the filing and exchange of any pre-trial brief, and setting dates for further conferences and for trial. In *Civil Procedure Code, 1908*, parties present their list of witnesses under Order 16 Rule 1 and the list of documentary evidence which they intend to rely upon under Order 13 Rule 1 of Civil Procedure Code.

<sup>xVII</sup>This concept is taken from Rule-16(f) of *Federal Rules of Civil Procedure, USA*

<sup>xVIII</sup>This concept is taken from Rule-16(b) of *Federal Rules of Civil Procedure, USA*.

<sup>xIX</sup>To oversee the efficacy of procedural legislative instruments, in many international jurisdictions, piloting is done through Pilot Project Rules (PPRs). These PPRs are practiced in Pilot Courts for a designated period of time, and after over sight and review of working of these rules in Pilot Courts, they are given permanence. For reference see "Superior Court PAD Pilot Rules-Proportional Discovery/Automatic Disclosure Pilot Project for Carroll and Stafford County Superior Courts".

**Order XV-A****Summary Judgment**

1. **Application for summary judgment.**—A party may move an application for summary judgment identifying the whole claim or defense, or each claim or defense on which summary judgment is sought, or the court may grant such summary judgment on its own initiative, if:—

- (a) it is satisfied that (i) the respondent has no real prospect of succeeding on such claim or claims or successfully defending such claim or claims, as the case may be, and (ii) there is no genuine dispute as to any material fact requiring a trial and a party is entitled to judgment as a matter of law; or
- (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

2. **Time to file an application.**—Unless the court otherwise directs to prevent injustice, a party may file an application for summary judgment or the court may consider the grant of summary judgment on its own initiative at any time after the close of period allowed to the parties for filing list of documents under Order XIII Rule 1, until 15 days after the development of factual and legal statement of controversy by the court under Order [IX-A Rule 2].

3. **Evidence for purposes of summary judgment hearing.**—An applicant asserting that a fact cannot be or is genuinely disputed must support the assertion by:—

- (a) citing particular parts of any documentary evidence filed with the court along with the pleadings, or
- (b) showing that the documentary evidence cited does not establish the absence or presence of a genuine dispute or that the respondent cannot produce admissible evidence to support the fact:

Provided, that documentary evidence will be construed in a manner most favorable to the respondent and any doubts regarding the existence of a genuine issue of material fact will be resolved against the applicant.

4. **Procedure.**—(1) When an application for summary judgment is filed, the respondent shall be given at least 14 days notice of the date fixed for the hearing along with a copy of the application.

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(2) The respondent may file a response to the application for summary judgment, and serve copies on every other party to the application at least 7 days before the summary judgment hearing and the applicant may file a rejoinder to the response, and serve copies on every other party to the application at least 3 days before the summary judgment hearing.

(3) Where the summary judgment hearing is fixed by the court on its own initiative, any party to the proceedings may file an affidavit citing particular parts of the documentary evidence filed with the court to support or oppose the notice issued by the court to consider grant of summary judgment and serve copies of such affidavit on every other party to the proceedings at least 7 days before the summary judgment hearing, and any party may file a response to such affidavit and serve copies on every other party to the proceedings at least 3 days before the summary judgment hearing.

**5. Orders the court may pass.**—After giving notice and allowing the stipulated time to respond, the court may:—

- (a) grant summary judgment along with costs;
- (b) dismiss the application along with costs;
- (c) grant partial relief in relation to one or more claims or defenses identified in the application that shall be deemed to be established, unless the trial judge orders otherwise to prevent injustice; or
- (d) issue any other appropriate order with directions about the management of the case.

**6. Piloting Clause.**—This amendment in the Order XV-A CPC is a pilot legislation, which will be applicable in pilot courts notified by the Hon'ble Chief Justice, Islamabad High Court, Islamabad for a stipulated period. After promulgation of these amendments, working of the pilot courts and pilot procedures will be over sighted by the Rule Committee of the Hon'ble High Court for the stipulated period, following which, the Rule Committee of the Hon'ble Islamabad High Court shall decide about the applicability of these rules to all the courts of Islamabad, and may also consider further necessary amendments in the rules. On the expiry of piloting period, this pilot clause shall cease to exist.

**PROFORMA 'A'**

**IN THE COURT OF CIVIL JUDGE ISLAMABAD WEST**

Civil Suit No. \_\_\_\_\_ /2016

Plaintiff(S)

VS

Defendant(S)

**(NOTICE FOR MOTION MANAGEMENT AND SCHEDULING CONFERENCE)**

It is ordered that the court shall hold a Motion Management and Scheduling Conference on (Date) at (Time). The Conference shall be attended by either the parties in person, or through their counsels fully authorized on their behalf and acquainted with the nature and basis of their claims. The Conference shall be conducted on the following agenda items:

- (a) Both the parties will be required to inform the court that they have gone through each other pleadings, and are aware of the nature and basis of each other claims.
- (b) Both the parties will be required to inform the court about different applications which they intend to file in the court such as application under Order VII Rule 11, Order I Rule 10, Order VI Rule 17, Order XXXIX Rule 1 & 2, Order XXVI Rule 9 or any other application(s).
- (c) Setting three dates: (1) For filling various applications by either party(ies); (2) For filling of reply(ies) to such applications; and (3) For hearing arguments on such applications collectively.
- (d) Both the parties will be required to discover the chance of settlement, and inform the court about the intended mode of Alternate Dispute Resolution.

(CIVIL JUDGE-WEST)  
ISLAMABAD.

**PROFORMA 'B'**  
**IN THE COURT OF CIVIL JUDGE ISLAMABAD WEST**

Civil Suit No. \_\_\_\_\_ /2016

Plaintiff(S)  
*VS*  
DEFENDANT(S)

*(Notice for Discovery Management and Scheduling Conference)*

It is ordered that the court shall hold a Discovery Management and Scheduling Conference on (Date) at (Time). The Conference shall be attended by either the parties in person, or through their counsels fully authorized on their behalf and acquainted with the nature and basis of their claims. The Conference shall be conducted on the following agenda items:

- (a) Both the parties will be required to inform the court that they have gone through each other pleadings and are aware of the nature and basis of each other claims.
- (b) Both the parties will be required to develop a factual and legal statement of controversy through a consultative discourse.
- (c) Both the parties will be required to show their preparedness for their examination under Order X CPC, for admitting or denying allegations of facts laid in the plaint, or written statement (if any) of the opposite party.
- (d) Both the parties will be required to acquaint the court, if they like to deliver interrogatories in writing for the examination of the opposite party. If yes, number of interrogatories.
- (e) Both the parties will be required to acquaint the court, if they intend to file application for discovery of documents, which are in possession of the opposite party.
- (f) Both the parties will be required to acquaint the court, if they intend to inspect the document referred in the pleadings of either party, and which are in possession of the other party.
- (g) Both the parties will be required to acquaint the court if they intend to send notice to the other party to admits some documents or facts.
- (h) Both the parties will be required to submit their proposed exhibits alongwith duly filled Proforma 'E' for the scrutiny of those exhibits within the mandate of Order XIII CPC.
- (i) Both the parties will be required to discover the chance of settlement, and inform the court about the intended mode of Alternate Dispute Resolution.

(CIVIL JUDGE-WEST)  
ISLAMABAD.

THE GAZETTE OF PAKISTAN, EXTRA., NOVEMBER 8, 2016 [PART II]

**PROFORMA 'C'**

**IN THE COURT OF CIVIL JUDGE ISLAMABAD WEST**

Civil Suit No. \_\_\_\_\_ /2016

Plaintiff(S)  
VS  
Defendant(S)

***(Notice for Trial Management and Scheduling Conference)***

It is ordered that the court shall hold a Trial Management and Scheduling Conference on (Date) at (Time). The Conference shall be attended by either the parties in person, or through their counsels fully authorized on their behalf and acquainted with the nature and basis of their claims. The Conference shall be conducted on the following agenda items:

- (a) Both the parties will be required to inform the court that they have gone through each other pleadings, and are aware of the nature and basis of each other claims.
- (b) Both the parties will be required to present and exchange the list of witnesses, which they intend to produce in the court, either to give evidence or to produce documents, on the prescribed Proformas 'F1' & 'F2'.
- (c) Both the parties will be required to tender certificate of readiness, to produce their witnesses and documents in the court, through Proforma 'G'.
- (d) Both the parties will be required to give a schedule/time table, within which, they would be bound to present their evidence and cross examine each other witnesses.
- (e) Both the parties will be required to discover the chance of settlement, and inform the court about the intended mode of Alternate Dispute Resolution.

**(CIVIL JUDGE-WEST)  
ISLAMABAD.**

**PROFORMA 'D'**

**IN THE COURT OF CIVIL JUDGE ISLAMABAD WEST**

Civil Suit No. \_\_\_\_\_ /2016

Plaintiff(S).

VS

Defendant(S)

*(Notice for Settlement Conference)*

It is ordered that the court shall hold a Settlement Conference on (Date) at (Time). The Conference shall be attended by either the parties in person, or through their counsels fully authorized on their behalf and acquainted with the nature and basis of their claims. The Conference shall be conducted on the following agenda items:

- (a) Both the parties will be required to inform the court that they have gone through each other pleadings, and are aware of the nature and basis of each other claims.
- (b) Both the parties will be required to discover the chance of settlement, and inform the court about the intended mode of Alternate Dispute Resolution.

**(CIVIL JUDGE-WEST)  
ISLAMABAD.**

THE GAZETTE OF PAKISTAN, EXTRA., NOVEMBER 8, 2016 [PART II]

**PROFORMA 'E'**

**IN THE COURT OF CIVIL JUDGE ISLAMABAD WEST**

Civil Suit No. \_\_\_\_\_ /2016

Plaintiff(S) VS Defendant(S)

**(LIST OF PROPOSED EXHIBITS SUBMITTED BY THE PARTIES AT  
THE FIRST HEARING OF THE SUIT UNDER ORDER XIII)**

<b>EXHIBIT LIST</b>		
<input type="checkbox"/> PLAINTIFF	<input type="checkbox"/> DEFENDANT	
SERIAL NO.	DESCRIPTION OF DOCUMENT(S)	EVIDENCE OF WHICH FACT(S)

Name(s) of the plaintiff(s)/defendant(s) and their counsel(s) \_\_\_\_\_

Signature(s) of the Plaintiff(s)/Defendant(s) and their counsel(s) \_\_\_\_\_.

**PART II] THE GAZETTE OF PAKISTAN, EXTRA., NOVEMBER 8, 2016**

**PROFORMA 'F-1'**

**IN THE COURT OF CIVIL JUDGE ISLAMABAD WEST**

Civil Suit No.       /2016

Plaintiff(S)      VS      Defendant(S)

**(LIST OF WITNESSES AND DOCUMENTS TENDERED BY THE PARTIES UNDER ORDER XVI CPC)**

<input type="checkbox"/> PLAINTIFF		LIST OF WITNESSES AND DOCUMENTS		
SERIAL NO.	DESCRIPTION OF DOCUMENT(S)	<input type="checkbox"/> DEFENDANT	CORRESPONDING WITNESS (S) NAME, ADDRESS, MOBILE NUMBER	EVIDENCE OF WHICH FACT (S)

Name(s) of the plaintiff(s)/defendant(s) and their counsel(s) \_\_\_\_\_

Signature(s) of the Plaintiff(s)/Defendant(s) and their counsel(s) \_\_\_\_\_

**THE GAZETTE OF PAKISTAN, EXTRA., NOVEMBER 8, 2016 [PART II]**

**PROFORMA 'F-2'**

**IN THE COURT OF CIVIL JUDGE ISLAMABAD WEST**

Civil Suit No. \_\_\_\_\_ /2016

Plaintiff(S)      VS      Defendant(S)

***(LIST OF WITNESSES AND DOCUMENTS REQUIRED TO BE  
TENDERED BY THE PARTIES UNDER ORDER XVI CPC THROUGH  
THE PROCESS OF THE COURT)***

LIST OF WITNESSES AND DOCUMENTS				
<input type="checkbox"/> PLAINTIFF		<input type="checkbox"/> DEFENDANT		
SERIAL NO.	DESCRIPTION OF DOCUMENT(S)	CORRESPONDING WITNESS (S) NAME, ADDRESS, MOBILE NUMBER	EVIDENCE OF WHICH FACT (S)	DATE & NUMBER OF ENDORSEMENT BY THE COURT AS PROPOSED EXHIBITS

Name(s) of the plaintiff(s)/defendant(s) and their counsel(s) \_\_\_\_\_

Signature(s) of the Plaintiff(s)/Defendant(s) and their counsel(s) \_\_\_\_\_.

**PROFORMA 'G'****IN THE COURT OF CIVIL JUDGE ISLAMABAD WEST**

Civil Suit No. \_\_\_\_\_ /2016

Plaintiff(S)      VS.      Defendant(S)

**(CERTIFICATE OF READINESS OF EVIDENCE UNDER ORDER XVI  
RULE I CPC)** PLAINTIFF DEFENDANT

It is certified by the Plaintiff(s)/Defendant(s) that:

- (a) The witnesses and documents which Plaintiff(s)/ Defendant(s) aspires to produce as evidence in the court, are ready to be produced at the date and time given by the court.
- (b) There are no other witnesses and documents required to be produced in the court, other than those mentioned in Proformas 'E', 'F1' & 'F2'.

Name(s) of the plaintiff(s)/defendant(s) and their counsel(s) \_\_\_\_\_

Signature(s) of the Plaintiff(s)/Defendant(s) and their counsel(s) \_\_\_\_\_.

[No. 252/Legislation/IHC.]

**SALAMAT ULLAH,**  
*Additional Registrar (Legis).*



*The*  
**PESHAWAR HIGH COURT**  
*Peshawar*

All communications should be addressed to the Registrar Peshawar High Court, Peshawar and not to any official by name.

Exch: 9210149-58  
Off: 9210135  
Fax: 9210170

www.peshawarhighcourt.gov.pk  
Info@peshawarhighcourt.gov.pk  
phcpsh@gmail.com

1523-1622  
No. \_\_\_\_\_ /Admn:

Dated Pesh the 7/2/2018

To:

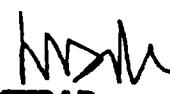
1. The Chief Secretary, Government of Khyber Pakhtunkhwa, Peshawar.
2. The Secretary to Government of KPK, Law Department, Peshawar.
3. The Secretary to Government of KPK, Home Department, Peshawar.
4. The Secretary to Government of KPK, Establishment Department, Peshawar.
5. All the District & Sessions Judges/ZQs in the Khyber Pakhtunkhwa.
6. All the Judicial/Principal Officers in Peshawar High Court, Peshawar.
7. All the Additional Registrars of the Peshawar High Court Benches.
8. All the PS to Hon'ble Judges in the Peshawar High Court, Peshawar.
9. The Librarian, Peshawar High Court, Peshawar.

Subject: **AMENDMENTS IN FIRST SCHEDULE OF THE CODE OF CIVIL PROCEDURE, 1908.**

Dear Sir,

Attached please find herewith gazette copy of notification No.15-J/2018 dated 23.01.2018, for information and further appropriate action.

Sincerely yours,

  
**REGISTRAR**

4



## KHYBER PAKHTUNKHWA

Published by Authority

PESHAWAR, MONDAY, 29TH JANUARY, 2018

### THE PESHAWAR HIGH COURT, PESHAWAR

#### NOTIFICATION

Peshawar, dated: 23.01.2018.

**NO. 15-J/2018.—**In exercise of the powers conferred by section 122 of the Civil Procedure Code, 1908 (Act No. V of 1908), the Peshawar High Court, Peshawar, is pleased to direct that in the First Schedule of the Code of Civil Procedure, 1908, the following further amendments shall be made, namely:

#### AMENDMENTS

- (1) In Order-V, in rule 20, in sub-rule (1).-
  - (a) in clause (b), after the word "television", the words "short message service, electronic mail etc." shall be added; and
  - (b) in clause (e), after the word "press", the words "or publication on the official website of the Court" shall be added.
- (2) In Order-VI, in rule 17, for the words "The Court may at any stage of the proceedings", the words "Subject to the provisions of Order-IX-A, the Court may, before framing of issues," shall be substituted.
- (3) In Order-VII, for rule 21, the following shall be substituted, namely:

"21. Consequences for filing incorrect address or failure to file address.—Where a plaintiff or petitioner files incorrect address or fails to file an address, in order to mislead the Court, for service, he shall be liable to have his suit dismissed or his petition rejected by the Court suo moto or any party may apply for an order to that effect, and the Court may make such order as it thinks just."

- (4) After Order-IX, the following new Order-IX-A shall be inserted, namely:

"Order IX-A  
Case Management and Scheduling Conference

1. **Case management and scheduling conference.**---(1) The Court shall, under its own supervision, in each and every case, after receiving a plaint, petition or appeal, as the case may be, and having regard to the provisions of the Code and these rules, start case management and scheduling conference. For the purpose of these rules case management and scheduling conference means and includes:

- (i) expeditious disposal of the cases;
- (ii) establishing an early and continuing control of the Court over the case, so that it cannot be protracted because of lack of management; (3)
- (iii) discouraging wasteful pre-trial activities;
- (iv) improving the quality of trial through more thorough preparation of the case by the parties and their counsel;
- (v) encouraging the parties to cooperate with each other in conducting the Court proceedings;
- (vi) fixing time tables or otherwise controlling progress of the case;
- (vii) giving directions to ensure that the trial of a case proceeds quickly and efficiently; and
- (viii) for facilitation of the parties, if so required, seeking consultation of the parties or their counsel in the case management and scheduling conference through telephone, mail or other modern technologies;

Provided that in case the Court does not call for such conference, it shall be bound to record reasons for not doing so.

(2) At any conference under this rule, the Court may take appropriate action and pass a scheduling order with respect to-

- (i) the formulation and simplification of issues, including elimination of frivolous claims and defenses;
- (ii) the necessity or desirability of amendments in the pleadings;
- (iii) the necessity or desirability of joining other parties;
- (iv) the necessity or desirability of any local inspection through commission;
- (v) obtaining proposed exhibits from the parties and scrutinizing them within the mandate of Order-XIII, and identifying witnesses;

- (vi) determining the appropriateness and timing of summary judgment under Order-XV;
  - (vii) control of discovery through discovery management;
  - (viii) disposal of pending miscellaneous applications;
  - (ix) conducting trial management for a speedy trial; and
  - (x) facilitating the just, speedy and inexpensive disposal of cases.
- (3) Seven days prior to conducting any case management and scheduling conference for hearing of the applications, discovery, settlement or trial, the Court shall serve the agenda items of the conference to the parties or their counsel through proformas-A, B, C and D, as specified in the Fifth Schedule.
2. **Management and disposal of miscellaneous applications.**—(1) The Court shall manage the miscellaneous applications, arising out of the suits or proceedings, in the following manner:
- (a) the Court, after consultation with the parties and or their counsel, shall fix the following three dates:
    - (i) a date by which the parties shall file any of the applications under this Court, required for completion of pleadings, or any other equity based applications, and shall provide copies of such applications to the other party or parties, as the case may be;
    - (ii) another date by which the parties shall file written replies to such applications, and shall give copies of written replies to the opposite parties; and
    - (iii) a third date by which unless the hearing is adjourned, the applications shall be disposed of;

Provided that the whole proceedings, under this clause, shall be completed within a maximum period of sixty (60) days, commencing from the date of attendance of the parties;

- (b) no opportunity shall be provided to any party for making any such applications, if he opts not to file such applications or reply thereto, after exhausting the opportunity provided under clause (a);

- (c) any order made under this rule shall not be appealable or revisable except in an appeal or revision, as the case may be, in the main case; and
  - (d) if it is not convenient to decide all the applications collectively, the Court may decide them separately by making a fixed schedule for their disposal, subject to the provisions of clause (a).
- (2) **Discovery management and scheduling orders.**—After completion of pleadings, in accordance with the nature of the litigation, the Court shall fix a time schedule, which shall not exceed thirty (30) days, in any case, for:
- (a) developing consultation with the parties or their counsel, as the case may be, a factual and legal statement of controversy;
  - (b) employing all or any modes of litigant conducted investigation, as specified in Orders-X, XI and XII of the Code; and
  - (c) requiring parties or their counsel, as the case may be, to submit their proposed exhibits along with proforma-E, as specified in Fifth Schedule, and conducting their scrutiny in accordance with the mandate of Order-XIII of the Code.
- (4) **Trial management and scheduling orders.**—Before or after framing of the issues, if the case is not summarily decided and is fixed for trial, then the Court in consultation with the parties or their counsel, as the case may be, shall, within seven days, establish a time schedule for:
- (a) presenting and exchanging the list of witnesses, which the parties intend to produce in the Court either to give evidence or produce documents, on the proformas-F1 and F2, as specified in the Fifth Schedule;
  - (b) procuring the certificates of readiness from the parties to produce their witnesses and documentary evidence in the Court on proforma-G, as specified in the Fifth Schedule; and
  - (c) proceeding with the trial in accordance within the time schedule, within which, the parties shall be bound to present their evidence and cross examine each other's witnesses. All efforts shall be made by the Court to hold *de die in diem* trials:

Provided that the Court shall conduct the trial within a period of one (01) year.

- (5) **Settlement conference and scheduling order.**---At any stage during the proceedings of a case, the Court with the consent of the parties, may employ any of the modes of settlement of dispute for expeditious disposal of the case.
- (6) **Penalty for default in case management.**---If a party or his counsel fails to appear at a case management and scheduling conference, or is substantially unprepared to participate, or does not participate in good faith in the conference, or fails to obey a case management and scheduling order, the Court, in addition to any other penalty under this Code, shall order the party to pay reasonable expenses, unless such non-compliance was substantially justified or other circumstances made an award of expenses unjust or impose a fine. All orders under this rule shall be made justly and fairly, notwithstanding anything contained in any rule or order for the time being in force. When the non-attendance of a party or his counsel is justified, the Court may adjourn the matter and fix a final date for that matter.
- (7) The provisions of this Order shall mutatis mutandis apply to all the pending cases before any Court.”.
- (5) In Order-XIV, in rule 1, for sub-rule (5), the following shall be substituted, namely:
- “(5) Subject to the provisions of Order-IX-A, if the case is not summarily decided, the Court shall, after examining the plaint and the written statement, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law, the parties are at variance, and shall thereupon proceed to frame and record the issues, within seven days, on which the right decision of the case appears to depend.”.
- (6) After Order-XV, the following new Order XV-A shall be inserted, namely:

**Order XV-A**  
**Summary Judgment**

**I. Application for summary judgment.**---Either party may move an application for summary judgment, identifying the whole claim or defense, or each claim or defense, as the case may be, on which summary judgment is sought, or the Court may grant such summary judgment on its own initiative, if-

- (a) it is satisfied that-

- (i) the respondent has no real prospect of succeeding on such claim or claims or successfully defending such claim or claims, as the case may be; and
- (ii) there is no genuine dispute as to any material fact requiring a trial and a party is entitled to judgment as a matter of law; or
- (b) the parties agree to have all or part of the claim determined by a summary judgment and the Court is satisfied that it is appropriate to grant summary judgment.

**2. Time to file an application.**---Subject to the provisions of Order-IX-A, unless the Court otherwise directs to prevent injustice, a party may file an application for summary judgment or the Court may consider the grant of summary judgment on its own initiative at any time after the close of period allowed to the parties for filing list of documents under rule 1 of Order-XIII.

**3. Evidence for purposes of summary judgment hearing.**---An applicant asserting that a fact cannot be or is genuinely disputed must support the assertion by:

- (a) citing particular parts of any documentary evidence filed with the Court along with the pleadings; or
- (b) showing that the documentary evidence cited does not establish the absence or presence of a genuine dispute or that the respondent cannot produce admissible evidence to support the fact:

Provided, that documentary evidence shall be construed in a manner most favorable to the respondent and any doubts regarding the existence of a genuine issue of material fact shall be resolved against the applicant.

**4. Procedure.**---(1) When an application for summary judgment is filed, the respondent shall be given at least fourteen (14) days notice of the date fixed for the hearing along with a copy of the application.

(2) The respondent may file a reply to the application for summary judgment, and serve copies on every other party to the application at least seven (07) days before the summary judgment hearing and the applicant may file a rejoinder to the response, and serve copies on every other party to the application at least three (03) days before the summary judgment hearing.

(3) Where the summary judgment hearing is fixed by the Court on its own initiative, any party to the proceedings may file an affidavit citing particular parts of the documentary evidence filed with the Court to support or oppose the notice, issued by the Court to consider grant of summary judgment and serve copies of such affidavit on every other party to the proceedings at least seven (07) days before the summary judgment hearing, and any party may file a response to such affidavit and serve copies on every other party to the proceedings at least three (03) days before the summary judgment hearing.

**5. Orders the Court may pass.**---After giving notice and allowing the above specified time to respond, the Court may:

- (a) grant summary judgment along with costs;
- (b) dismiss the application along with costs;
- (c) grant partial relief in relation to one or more claims or defenses identified in the application that shall be deemed to be established, unless the trial judge orders otherwise to prevent injustice; or
- (d) issue any other appropriate order with directions about the management of the case.”.

(7) In Order-XX, in rule 1, in sub-rule (2), for the word “thirty”, the word “fifteen” shall be substituted.

(8) In Order-XXI, after rule 103, the following rules shall be added:

**“104. On the submission of the execution application, and after a notice has been issued and compliance made with Rule 22 and 23 of Order-XXI, the court shall fix a date for a management conference for disposal of the execution petition.**

**105. In the management conference the court shall determine the validity of objections, if any, and where possible proceed to decide the same summarily.**

**106. Where the court is of the opinion that there is substance in the objections or the same are prima-facie valid, it shall determine the issue to be resolved.**

**107. Where the resolution of the issue needs evidence, investigation or inquiry, the court shall determine a schedule for the disposal of the above. The schedule so determined shall in no case be of more than thirty (30) days. Failure to comply with this provision shall be reported to the High Court through proper channel alongwith reasons thereof.**

108. The court shall determine the days required for fulfilling Rule 107 and fix the dates on which each party to the objection petition shall be liable to fulfill their responsibilities fixed in the schedule. Failure of the parties or a party to comply with the schedule shall entail costs or penalties as the case may be which may also include dismissal of the stance of the erring party.

109. While determining the costs or monetary penalties, the court shall take into consideration the facts and circumstances of the lapse(s) and the costs shall be compensatory or deterrent and in no case the cost or penalties shall be token.

110. Where stay / injunction has been issued by the appellate/revisional court, the executing court shall forthwith communicate the schedule of the execution to the court issuing the injunction.

111. When the proceedings of Rule 107 are being conducted, the court may appoint a commission to visit the spot to aid the court in determining the controversy.

112. The objections regarding demarcation, if not raised in the suit by the judgment debtor, cannot be raised at the subsequent stage of execution through an objection petition.

113. At any stage of the execution proceedings the court can seek directly from any Government Department or bank or institution or agency, whether or not within the territorial jurisdiction of the court, the details of the assets of the judgment debtor.

114. The court shall seek details of the assets of the judgment debtor from him on the first instance. In case of any concealment, proceedings of perjury and or criminal action shall be initiated against the judgment debtor. Any concealment of assets of judgment debtor by any Government Department, bank or institution or agency shall also entail similar action against them.

115. All objections shall be raised at the first instance and no objection will be entertained afterward.

116. If any objection raised by a person other than a judgment debtor, provisions of pre-execution management conference and scheduling shall be followed mutatis mutandis.

117. The modes of compelling the judgment debtor for his attendance or for completing the execution proceedings may include blockage of his Computerized National Identity Card.

118. Where the decretal amount or a part thereof has been deposited in court, the same shall be deposited in a profitable account in the name of the decree holder or holders or their legal representative(s), as the case may be in accordance with their shares. The profits so accrued shall also be paid to the decree holder or decree holders or their legal representative(s), as the case may be, at the time of payment of the decretal amount.”.

- (9) In Order-XI.I. in rule 1, in sub-rule (2), after the words "arguments or narrative". the words and comma "and the time schedule of the case, prepared under Order-IX-A" shall be inserted.
- (10) In Order-XI.I. in rule 27, in sub-rule (2), after the words "admission", the words "and the Court shall preferably record the additional evidence itself" shall be inserted.
- (11) In Order-XI.I. in rule 30, after the words "some future day", the words "not exceeding fifteen (15) days" shall be inserted.
- (12) After Fourth Schedule, the following new Schedule shall be added, namely:

"Fifth Schedule

PROFORMA 'A'

IN THE COURT OF CIVIL JUDGE -----

Civil Suit No. /2018

Plaintiff(S)

vs

Defendant(S)

*(NOTICE FOR CASE MANAGEMENT AND SCHEDULING CONFERENCE)*

WHEREAS the above mentioned suit is pending disposal in this court. Take notice that the undersigned shall hold a Case Management and Scheduling Conference on *(Date)* at *(time)*. The Conference shall be attended by either the parties in person, or through their counsel fully authorised on their behalf and acquainted with the nature and basis of their claims. The Conference shall be conducted on the following agenda items:

- (a) Both the parties will be required to inform the court that they have gone through each other's pleadings, and are aware of the nature and basis of each other's claims.
- (b) Both the parties will be required to inform the court about different applications which they intend to file in the court such as application under Order VII Rule II, Order I Rule 10, Order VI Rule 17, Order XXXIX Rule 1 & 2, Order XXVI Rule 9 or any other application(s).
- (c) Setting dates, if required: (1) For filling various applications by either party(ies); (2) For filling of reply(ies) to such applications; and (3) For hearing arguments on such applications collectively.
- (d) Both the parties will be required to discover the chance of settlement, and inform the court about the intended mode of settlement.

(CIVIL JUDGE)

PROFORMA 'D'

IN THE COURT OF CIVIL JUDGE -----  
Civil Suit No. /2018  
Plaintiff(S)  
vs  
Defendant(S)

(Notice for Settlement Conference)

WHEREAS the above mentioned suit is pending disposal in this court. Take notice that the undersigned shall hold a Settlement Conference on (Date) at (time). The Conference shall be attended by either the parties in person, or through their counsel fully authorized on their behalf and acquainted with the nature and basis of their claims. The Conference shall be conducted on the following agenda items:

- (a) Both the parties will be required to inform the court that they have gone through each others' pleadings, and are aware of the nature and basis of each others' claim.
- (b) Both the parties will be required to discover the chance of settlement, and inform the court about the intended mode of settlement.

(CIVIL JUDGE) -----

PROFORMA 'E'

IN THE COURT OF CIVIL JUDGE -----

Civil Suit No. /2018

Plaintiff(S) VS Defendant(S)

(LIST OF PROPOSED EXHIBITS SUBMITTED BY THE PARTIES AT THE  
FIRST HEARING OF THE SUIT UNDER ORDER XIII)

EXHIBIT LIST		
0	PLAINTIFF DEFENDANTS	
SERIAL NO.	DESCRIPTION OF DOCUMENT(S)	EVIDENCE OF WHICH FACT(S)

Name(s) of the plaintiff(s)/defendant(s) and their counsel(s) \_\_\_\_\_ Signature(s) of the

Plaintiff(s)/Defendant(s) and their counsel(s), \_\_\_\_\_

PROFORMA 'B'

IN THE COURT OF CIVIL JUDGE -----

Civil Suit No. /2018

Plaintiff(S)

vs

DEFENDANT(S)

(Notice for Discovery Management and Scheduling Conference)

WHEREAS the above mentioned suit is pending disposal in this court. Take notice that the undersigned shall hold a Discovery Management and Scheduling Conference on *(Date)* at *(Time)*. The Conference shall be attended by either the parties in person, or through their counsel fully authorised on their behalf and acquainted with the nature and basis of their claims. The Conference shall be conducted on the following agenda items:

- (a) Both the parties will be required to inform the court that they have gone through each others' pleadings and are aware of the nature and basis of -each others' claim.
- (b) Both the parties will be required to develop a factual and legal statement of controversy through a consultative discourse.
- (c) Both the parties will be required to show their preparedness for their examination under Order X CPC, for admitting or denying allegations of facts laid in the plaint, or written statement (if any) of the opposite party.
- (d) Both the parties will be required to appraise the court, if they like to deliver interrogatories in writing for the examination of the opposite party. If yes, number of interrogatories.
- (e) Both the parties will be required to appraise the court, if they intend to file application for discovery of documents, which are in possession of the opposite party.
- (f) Both the parties will be required to appraise the court, if they intend to inspect the document referred to in the pleadings of either party, and which are in possession of the other party.
- (g) Both the parties will be required to appraise the court if they intend to send notice to the other party to admit some documents or facts.
- (h) Both the parties will be required to submit their proposed exhibits alongwith duly filled Proforma 'I' for the scrutiny of those exhibits within the mandate of Order XIII CPC.
- (i) Both the parties will be required to discover the chance of settlement, and inform the court about the intended mode of settlement.

(CIVIL JUDGE) -----

PROFORMA 'C'

IN THE COURT OF CIVIL JUDGE -----  
Civil Suit No. /2018

Plaintiff(S)  
VS  
Defendant(S)

(Notice for Trial Management and Scheduling Conference)

WHEREAS the above mentioned suit is pending disposal in this court. Take notice that the undersigned shall hold Trial Management and Scheduling Conference on (*Date*) at (*Time*). The Conference shall be attended by either the parties in person, or through their counsel fully authorized on their behalf and acquainted with the nature and basis of their claims. The Conference shall be conducted on the following agenda items:

- (a) Both the parties will be required to inform the court that they have gone through each others' pleadings, and are aware of the nature and basis of each others' claims.
- (b) Both the parties will be required to present and exchange the list of witnesses, which they intend to produce in the court, either to give evidence or to produce documents, on the prescribed Proformas 'F1' & 'F2'.
- (c) Both the parties will be required to tender certificate of readiness, to produce their witnesses and documents in the court, through Proforma 'G'.
- (d) Both the parties will be required to give a schedule/time table, within which, they would be bound to present their evidence and cross examine each others' witnesses.
- (e) Both the parties will be required to discover the chance of settlement, and inform the court about the intended mode of settlement.

(CIVIL JUDGE)

PROFORMA 'B'

IN THE COURT OF CIVIL JUDGE -----  
Civil Suit No. /2018  
Plaintiff(S)  
vs  
DEFENDANT(S)

(Notice for Discovery Management and Scheduling Conference)

WHEREAS the above mentioned suit is pending disposal in this court. Take notice that the undersigned shall hold a Discovery Management and Scheduling Conference on (Date) at (Time). The Conference shall be attended by either the parties in person, or through their counsel fully authorised on their behalf and acquainted with the nature and basis of their claims. The Conference shall be conducted on the following agenda items:

- (a) Both the parties will be required to inform the court that they have gone through each others' pleadings and are aware of the nature and basis of -each others' claim.
- (b) Both the parties will be required to develop a factual and legal statement of controversy through a consultative discourse.
- (c) Both the parties will be required to show their preparedness for their examination under Order X CPC, for admitting or denying allegations of facts laid in the plaint, or written statement (if any) of the opposite party.
- (d) Both the parties will be required to appraise the court, if they like to deliver interrogatories in writing for the examination of the opposite party. If yes, number of interrogatories.
- (e) Both the parties will be required to appraise the court, if they intend to file application for discovery of documents, which are in possession of the opposite party.
- (f) Both the parties will be required to appraise the court, if they intend to inspect the document referred to in the pleadings of either party, and which are in possession of the other party.
- (g) Both the parties will be required to appraise the court if they intend to send notice to the other party to admit some documents or facts.
- (h) Both the parties will be required to submit their proposed exhibits alongwith duly filled Proforma 'I' for the scrutiny of those exhibits within the mandate of Order XIII CPC.
- (i) Both the parties will be required to discover the chance of settlement, and inform the court about the intended mode of settlement.

(CIVIL JUDGE) -----

PROFORMA 'C'

IN THE COURT OF CIVIL JUDGE -----  
Civil Suit No. /2018

Plaintiff(S)  
VS  
Defendant(S)

(Notice for Trial Management and Scheduling Conference)

WHEREAS the above mentioned suit is pending disposal in this court. Take notice that the undersigned shall hold Trial Management and Scheduling Conference on (*Date*) at (*Time*). The Conference shall be attended by either the parties in person, or through their counsel fully authorized on their behalf and acquainted with the nature and basis of their claims. The Conference shall be conducted on the following agenda items:

- (a) Both the parties will be required to inform the court that they have gone through each others' pleadings, and are aware of the nature and basis of each others' claims.
- (b) Both the parties will be required to present and exchange the list of witnesses, which they intend to produce in the court, either to give evidence or to produce documents, on the prescribed Proformas 'F1' & 'F2'.
- (c) Both the parties will be required to tender certificate of readiness, to produce their witnesses and documents in the court, through Proforma 'G'.
- (d) Both the parties will be required to give a schedule/time table, within which, they would be bound to present their evidence and cross examine each others witnesses.
- (e) Both the parties will be required to discover the chance of settlement, and inform the court about the intended mode of settlement.

(CIVIL JUDGE)

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PROFORMA 'E-1'

IN THE COURT OF CIVIL JUDGE -----

Civil Suit No. /2018

Plaintiff(S) vs Defendant(S)

(LIST OF WITNESSES AND DOCUMENTS TENDERED BY THE PARTIES  
UNDER ORDER XVI CPC)

LIST OF WITNESSES AND DOCUMENTS				
PLAINTIFF		DEFENDANT		
SERIAL NO.	DESCRIPTION OF DOCUMENT(S)	CORRESPONDING WITNESS (S) NAME, ADDRESS, MOBILE NUMBER	EVIDENCE OF WHICH FACT (S)	DATE & NUMBER OF ENDORSEMENT BY THE COURT AS PROPOSED EXHIBITS

Name(s) of the plaintiff(s)/defendant(s) and their counsel(s) \_\_\_\_\_

Signature(s) of the Plaintiff(s)/Defendant(s) and their counsel(s) \_\_\_\_\_

## PROFORMA 'F-2'

IN THE COURT OF CIVIL JUDGE -----

Civil Suit No. /2018

Plaintiff(S)

vs

Defendant(S)

(LIST OF WITNESSES AND DOCUMENTS REQUIRED TO BE TENDERED BY  
THE PARTIES UNDER ORDER XVI CPC THROUGH THE  
PROCESS OF THE COURT)

LIST OF WITNESSES AND DOCUMENTS				
PLAINTIFF		DEFENDANT		
Serial No.	DESCRIPTION OF DOCUMENT(S)	CORRESPONDING WITNESS (S) NAME, ADDRESS, MOBILE NUMBER	EVIDENCE OF WHICH FACT (S)	DATE & NUMBER OF ENDORSEMENT BY THE COURT

Name(s) of the plaintiff(s)/defendant(s) and their counsel(s) \_\_\_\_\_ Signature(s) of \_\_\_\_\_

the Plaintiff(s)/Defendant(s) and their counsel(s) \_\_\_\_\_

PROFORMA 'G'

IN THE COURT OF CIVIL JUDGE -----

Civil Suit No. /2018

Plaintiff(S) vs. Defendant(S)

(CERTIFICATE OF READINESS OF EVIDENCE UNDER  
ORDER XVI RULE 1 CPC)

PLAINTIFF

DEFENDANT

It is certified by the Plaintiff(s)/Defendant(s) that:

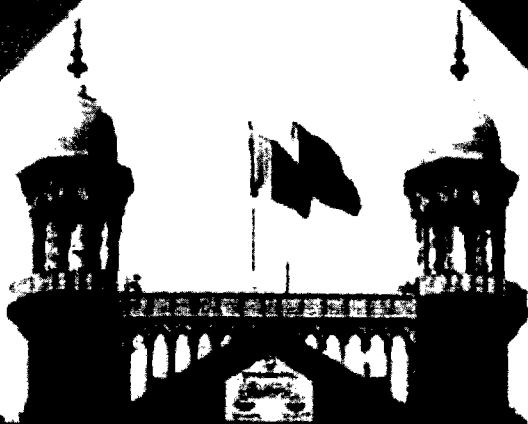
- (a) The witnesses and documents which Plaintiff(s)/Defendant(s) aspires to produce as evidence in the court, are ready to be produced at the date and time given by the court.
- (b) There are no other witnesses and documents required to be produced in the court, other than those mentioned in Proformas 'E','F1' & 'F2'.

Name(s) of the plaintiff(s)/defendant(s) and their counsel(s) \_\_\_\_\_ Signature(s) of the

Plaintiff(s)/Defendant(s) and their counsel(s) \_\_\_\_\_ .

329  
AND THE MUSLIMS  
IN THE FIRST SECTION OF THE CODE OF

THE MUSLIM CHIEF



LAW AND THE MUSLIM CHIEF

**LAHORE HIGH COURT, LAHORE****MEMBERS OF RULE COMMITTEE (CPC):**

<b>Hon'ble Mr. Justice Aminud-Din Khan</b>	<b>President</b>
<b>Hon'ble Mr. Justice Muhammad Tariq Abbasi</b>	<b>Member</b>
<b>Hon'ble Mr. Justice Shams Mehmood Mirza</b>	<b>Member</b>
<b>Hon'ble Mr. Justice Shahid Karim</b>	<b>Member</b>
<b>Mr. Shakib Imran, Senior Civil Judge, Lahore</b>	<b>Member</b>
<b>Mr. Muhammad Shahzad Shaukat, Advocate</b>	<b>Member</b>
<b>Mr. Zafar Iqbal Kalanauri, Advocate</b>	<b>Member</b>
<b>Mr. Muhammad Rafique, Additional Registrar (L&amp;R)</b>	<b>Secretary</b>

***Compiled by:***

**Muhammad Rafique**  
Secretary Rules Committee (CPC)  
Lahore High Court, Lahore

WEEKLY ISSUE

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# The Punjab Gazette

PUBLISHED BY AUTHORITY

No. 08

LAHORE WEDNESDAY AUGUST 22, 2018

LAHORE HIGH COURT, LAHORE.NOTIFICATION.

No. 237/Legis/XI-Y-26

Dated 15-08-2018

The following amendments in Rules and Orders of the First Schedule to the Code of Civil Procedure, (Act of 1908), made under section 122 of the Code, by Lahore High Court, Lahore, after previous approval of the Govt. of the Punjab are hereby published in the official Gazette under section 127 of the Code.

2. These shall come into force, within the local limits of jurisdiction of Lahore High Court, Lahore on such dates and in such District or Districts of the Punjab as Lahore High Court, Lahore may determine by Notification.

**AMENDMENTS**

1. This Notification may be cited as the Civil Procedure Code (Amendment of First Schedule) 2018.

2. It shall come into force in such district or districts of the Punjab as Lahore High Court Lahore may, by notification, determine and different dates may be so determined for different districts.

**"In the Code of Civil Procedure, 1908, in the First Schedule:**

1. In Order I, for rule 11, the following shall be substituted:

**"11. Conduct of suit.-** The Court shall, at the time of framing of the issues, give the conduct of the suit to such party as it deems proper for expeditious adjudication of the suit.”.

2. In Order II, after rule 6, the following new rule 6-A shall be inserted:

**"6-A. Consolidation of suits.-** Where two or more suits or proceedings of the same nature requiring determination of similar issues between the same parties are pending in relation to the same subject matter, the Court may, if considers it expedient for avoiding multiplicity of litigation or conflict in judgments, direct the consolidation of

such suits or proceedings as one trial, whereupon all such suits or proceedings shall be decided on the basis of the consolidated trial.”.

3. For Order IV, the following shall be substituted:

**1. Courts to be numbered.**— For the purposes of this Code, the Courts shall be numbered, identified and addressed with reference to the numbers allocated to them.

**2. Commencement of proceedings in suit.**—  
(1) Every suit shall be instituted, by presenting a plaint to a Court or such officer as it appoints in this behalf, and assigned to an Administrative Judge and a Trial Judge under the Code.

(2) Every plaint shall comply with the rules contained in Order VI and Order VII, so far as they are applicable.

**3. Register of suits.**— The Administrative Judge shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entry shall be numbered in every year according to the order in which the plaints are admitted.”

4. After Order IV, the following new Order IV-A shall be inserted.

#### **"ORDER IV-A ADMINISTRATIVE JUDGES**

**1. Administrative Judges.**— The District Judge shall designate as many Civil Judges in the District as Administrative Judges as are necessary to the disposal of load of work with dispatch.

**2.** The Administrative Judge shall take and complete pre-trial proceedings in a suit, after it has been registered, when he is satisfied that the plaint and the written statement complies with the provisions of Orders VI and VII.

**3.** The pre-trial proceedings include the proceedings under Orders V, VIII, IX, IX-A, IX-B, X, XI, XII, XIII and XIV.

**4.** Upon taking and completing his pre-trial proceedings, the Administrative Judge shall cause the suit along with the entire record, placed on a specific date, before the Trial Judge for its trial under the Code:

Provided that the Administrative Judge, before sending the suit, shall satisfy himself that witnesses of the parties to the suit enter their appearance before the Trial Judge on the date when the suit is to be placed before him.

5. The Trial Judge, before commencement of trial, shall cause registration of the suit in the register of civil suits in the manner provided in Order IV."

5. In Order V:

- (1) for rule 2, the following shall be substituted:

**"2. Copy or statement annexed to the summons.**- Every summons shall be accompanied by a copy of the plaint, or if so permitted by a concise statement, and copies of the documents annexed with the plaint and a copy of the list under sub-rule (2) of Rule 14 in Order VII.";

- (2) In rule 5, the existing rule shall be numbered as sub-rule (1) and thereafter, the following new sub-rule (2) shall be inserted:

"(2) When the summons are for the settlement of issues, the summons shall state that the defendant may present written statement of his defence before the day fixed for his appearance".

- (3) for rule 10-A, the following shall be substituted:

**"10-A. Service by post.**- (1) Simultaneously with the issue of summons under rule 9, there shall be sent, unless otherwise ordered by the Court, to the defendant, by registered post acknowledgement due and another copy of the summons signed and sealed in the manner provided in rule 10 by courier service, or as the court may determine, by urgent mail service of Pakistan Post, at the cost of the plaintiff.

(2) The acknowledgment, purported to be signed by the defendant, of the receipt of the registered communication or an endorsement by a courier messenger or postal employee that the defendant refused to take delivery of the summons shall be deemed by the Court issuing the summons to be *prima facie* proof of the service of the summons.".

6. In Order VII:

- (1) in rule 9, in sub-rule (1-A), for clause (a), the following shall be substituted:

"(a) copies of the plaint and documents under rule 14 for each defendant and two extra copies;"

- (2) in rule 11, for clause (d), the following shall be substituted:

- "(d) where the suit appears, from the record available with the court, to be bared by any law.";
- (3) after rule 11, the following new rule 11-A shall be inserted:

**"11-A. Separate application barred.-** A plea for rejection of plaint under rule 11 may be raised by the defendant in his written statement and not by a separate application.";

- (4) for rule 13, the following shall be substituted:

**"13. Where rejection of plaint does not preclude presentation of fresh plaint.-** The rejection of the plaint, on any of the grounds mentioned in clause (a), clause (b) or clause (c) of rule 11, shall not, of its own force, preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action."; and

- (5) after rule 21, the following new rule 21-A shall be inserted:

**"21-A. Consequence of failure to annex copy etc. with the plaint.-** When the plaintiff fails to annex a copy of the plaint or concise statement or copies of documents mentioned in rule 2, the Court may make such order as it thinks just and fit."

- (6) in rule 26, after sub-rule (3), the following sub-rule (4), shall be inserted:

"(4) Failure of the plaintiff to file the list of legal representatives, as aforesaid, shall render the suit liable to be dismissed."

#### 7. In Order VIII:

- (1) after rule 1, the following new rule 1-A and rule 1-B shall be inserted:

**"1-A. Presumption of admission of contents of plaint.-** When the defendant fails to present written statement of his defence before the day fixed for his hearing, the Court shall presume that he admits the contents of the plaint as true:

Provided that nothing shall preclude the Court from permitting the defendant to present written statement, upon showing a just and sufficient cause in an application in writing supported by an affidavit:

Provided further that the permission to present written statement shall not extend beyond the period fixed in rule 1.

**1-B. Additional copies of written statement and documents.**- The defendant shall furnish additional copies of written statement and of the documents annexed therewith for their supply to the plaintiff."

(2) in rule 13, after sub-rule (3), the following new sub-rule (4) and sub-rule (5) shall be inserted:

"(4) Failure of the defendant to file the list of legal representatives, as aforesaid, shall render his defence liable to be struck out."

(5) The Court may, on an application made by the defendant when accompanied with the list of legal representatives and disclosing a sufficient cause for non-filing of the list, recall the order passed under sub-rule (4) and allow him to continue with his defence of the suit."

**8. For Order IX-A, the following shall be substituted:**

**"1. Fixation of intermediate date.**- (1) After the close of the pleadings, the Court shall fix-

- (a) a day for examination of parties under Order X;
- (b) a day for discovery and inspection under Order XI; and
- (c) a day for its proceedings under Order XII.

(2) The Court may grant a maximum adjournment of three days for completion of each proceedings mentioned in sub-rule (1) and shall keep a full and complete record of these proceedings in Form 13 in Appendix C.

(3) It shall be the duty of the Court to take proceedings under Orders X, XI and XII and to satisfy itself that the parties go to trial for precise and exact issues of law and facts they are at variance with each other.

(4) While taking proceedings under Orders X, XI and XII, the Court, having regard to the facts and circumstances of the case, shall carefully determine the possibility of the alternate dispute resolution method and when so warranted adopt such a method in accordance with section 89-A.

(5) The Court shall stay the proceedings of the suit for a period which is not more than thirty days when it requires the parties to adopt any of the alternate dispute resolution method.

**2. Case management questionnaire.**— (1) The plaintiff shall file along with the plaint a duly filled in case management questionnaire in Form 14 in Appendix C.

(2) The defendant shall, at the time of presenting his written statement, file a duly filled in case management questionnaire in Form 15 in Appendix C.”

**9.** After **Order IX-A**, the following new Order IX-B shall be inserted:

**“ORDER IX-B**

**ALTERNATE DISPUTE RESOLUTION**

**1. Reference to mediation.**— (1) Except where the Court is satisfied that there is no possibility of mediation or an intricate question of law or facts is involved, the Court shall refer the case for mediation.

(2) While referring the matter for mediation, the Court may indicate the material issues for determination through mediation.

**2. Appearance of parties.**— Where a case is referred for mediation, the Court shall stay the proceedings for a period not exceeding thirty days and direct the parties to appear before the Mediation Centre, set up by Lahore High Court, on such date and time as the Court may specify.

**3. Settlement.**— (1) Where the mediation proceedings are successful and the parties have arrived at an agreement, the Mediator shall cause the same to be recorded in writing, signed by the parties or their recognized agents or their pleaders and attested by two independent witnesses.

(2) The agreement shall be certified by the Mediator and transmitted forthwith, through the Administrator of the Mediation Center, to the Court.

(3) The Court shall, on receipt of the agreement, pass a decree in terms thereof unless the Court, for reasons to be recorded in writing, finds that the agreement between the parties is not enforceable at law.

(4) Where the settlement relates only to a part of the dispute, the Court shall pass decree or an order in terms of such settlement and proceed to adjudicate the remaining issues.

**4. Failure of mediation.**— Where the mediation fails and no settlement is made between the parties, the Mediator shall submit a report to the Court and the Court shall proceed with the case from the stage it was referred to Mediation.”.

**10. In Order XI:**

(1) for the existing rules 1 and 2, the following shall be substituted:

**"1. Discoveries by interrogatories.-** The Court shall direct the parties to deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties stating clearly which of such interrogatories each of such person is required to answer, provided that the Court may reject an interrogatory or part thereof which, in its opinion, is not relevant to the case.

**2. Communication of interrogatories.-** On receipt of the interrogatories under rule 1, the Court shall deliver the interrogatories to the concerned person for submitting the answer within such time as the Court may specify.

- (2) for rule 8, the following shall be substituted:

**"8. Affidavit.-** The interrogatories shall be answered by an affidavit to be filed within the time specified by the Court.";

- (3) for rule 11, the following shall be substituted:

**"11. Order to answer or answer further.-** Where any person interrogated submits an insufficient or an evasive answer, the Court may require him to submit the proper answer within the time specified by the Court.";

- (4) for rule 12, the following shall be substituted:

**"12. Application for discovery of documents.-** (1) Any party may apply to the Court for an order directing any other party to a suit to make discovery on oath of the documents which are or have been in his possession or power, relating to a matter in issue in the suit.

(2) On hearing such application, the Court may either refuse or adjourn the same, if it is satisfied that such discovery is not necessary or not necessary at that stage of the suit, or may, after being satisfied as to the validity of the prayer made, direct the other party to make the discovery:

Provided that the discovery shall not be ordered when and so far as the Court is of opinion that it is not necessary either for disposing the suit or for saving costs".

**11. In Order XII:**

- (1) for rule 1, the following shall be substituted:

**"1. Admission of case.-** The Court shall enquire from a party whether or not it admits the

truth of the whole or part of the case set up by the other party in the pleadings.”;

(2) for rule 2, the following shall be substituted:

**“2. Admission of documents.**- (1) The Court shall also require the parties to admit or deny the documents annexed with the plaint or, as the case may be, the written statement.

(2) If a party fails to comply with the direction under sub-rule (2), the Court may proceed against such party under rule 21 of Order XI.

(3) If a party denies a document which is proved at the trial, the Court shall burden such party with such heavy costs as it may deem fit.”.

**12. In Order XIV,** in rule 1, for sub-rule (5), the following shall be substituted:

“(5) At the first hearing of the suit after the proceedings under Orders X, XI and XII, the Court shall, after reading the plaint, the written statement and such examination of the parties as may be necessary, determine the material propositions of facts or of law in dispute between the parties and shall proceed to frame and record the issues on which the decision is likely to depend.”.

**13. In Order XVI,** in rule 1:

(1) for sub-rule (1), the following shall be substituted:

“(1) The Court shall, immediately after framing of the issues, require the parties to file a list of witnesses in the Court within such period, not later than seven days, as the Court may fix.”; and

(2) for sub-rule (2), the following shall be substituted:

“(2) A party shall not be permitted to call witnesses other than those contained in the list, except with the permission of the Court and after showing good cause for the omission of the said witnesses from the list and the Court shall record reasons for granting permission.”.

**14. In Order XX:**

(1) for rule 1, the following shall be substituted:

**“1. Judgment when pronounced.**- (1) On completion of evidence, the Court shall fix a date, not exceeding fifteen days, for submission of the precise written arguments along with the relevant case-law by the parties.

(2) The Court, after submission of the written arguments under sub-rule (1) and after hearing the oral submissions, if so required, pronounce judgment in open court either at once or on some future date, not exceeding fifteen days, for which due notice shall be given to the parties or their advocates."; and

- (2) for rule 20, the following shall be substituted:

**"20. Certified copies of judgment and decree.-** The Court shall, at the time of pronouncement of the judgment, provide to the parties, at their expense, certified copies of the judgment and the decree.".

**15. In Order XXI:**

- (1) for rule 10, the following shall be substituted:

**"10. Execution of a decree.-** On passing of an executable decree by a Court, the suit shall stand converted into execution proceedings and no separate application for the purpose and no fresh notice to the judgment debtor shall be necessary.";

- (2) for rule 11, the following shall be substituted:

**"11. Attachment.-** At the time of the initiation of execution proceedings, the Court shall order the attachment of the property of the judgment debtor, if it has not already been attached under Order XXXVIII.";

- (3) rule 17 shall be omitted;

- (4) rule 23 shall be omitted;

- (5) for rule 23-A, the following shall be substituted:

**"23-A. Deposit of decretal amount, etc.-** An objection by the judgment-debtor to the execution of a decree shall not be considered by the Court unless:

(a) in case of a decree for the payment of money, he either deposits the decretal amount in the Court or furnishes security to the satisfaction of the Court for its payment; and

(b) in case of any other decree, he furnishes security to the satisfaction of the Court for the due performance of the decree.";

- (6) rule 29 shall be omitted;

- (7) in rule 32, in sub-rule (1), the expression "or for restitution of conjugal rights," and the expression "in the

case of a decree for restitution of conjugal rights by the attachment of his property or," shall be omitted;

- (8) rule 33 shall be omitted;
- (9) in rule 36, for the full stop at the end, a colon shall be substituted and thereafter, the following proviso shall be added:

"Provided that no such right of a tenant or other person shall be protected in a case where the tenant or the other person entered into possession of the immovable property during the pendency of the suit wherein the decree has been passed.";

- (10) for rule 37, the following shall be substituted:

**"37. Discretionary power to allow judgment-debtor an opportunity to show good cause against detention in prison.-** (1) Notwithstanding anything in the rules, where a decree for the payment of money is sought to be executed through arrest and detention in prison of the judgment-debtor, the Court may, before issuing a warrant of arrest, provide one opportunity to the judgment-debtor to show good cause as to why he should not be detained in prison:

Provided that such opportunity shall not be necessary if the Court is satisfied, by affidavit or otherwise, that, with the object of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.

(2) Where the judgment-debtor fails to avail himself the opportunity or is unable to show a good cause, the Court shall, if the decree holder so requires, issue a warrant for the arrest of the judgment-debtor.";

- (11) in rule 40:

- (a) for sub-rule (1), the following shall be substituted:

"(1) Where a judgment-debtor avails himself the opportunity provided under rule 37 or is brought before the Court after being arrested in execution of the decree for the payment of money, the Court shall give the judgment-debtor an opportunity of showing good cause why he should not be detained in prison.";

- (b) sub-rule (2) shall be omitted;

- (c) for sub-rule (3), the following shall be substituted:

"(3) Where the judgment-debtor fails to show any good cause under sub-rule (1),

the Court may, subject to the provisions of section 51 and to the other provisions of the Code, make an order for the detention of the judgment-debtor in prison and shall, in that event, cause him to be arrested if he is not already under arrest.”.

- (12) for rule 54, the following shall be substituted:

**“54. Attachment of immovable property.-** (1) Where the property is immovable property, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all other persons from taking any benefit from such transfer or charge and any such transfer, charge, alienation, encumbrance or other disposition in violation of this rule shall be void and of no legal effect.

(2) A copy of the order under sub-rule (1) shall be conveyed to the concerned authority maintaining the record of the property under attachment, in addition to a proclamation of the order at some place adjacent to such property by beat of drum or any other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and the Court-house, and also, where the property is subject to land revenue to the Government, in the office of the Collector of the district in which the land is situate.”;

- (13) in rule 58, in sub-rule (1), in the proviso, for the words “one year”, the words “thirty days” shall be substituted:

- (14) in rule 66:

- (1) for sub-rule (2), the following shall be substituted:

“(2) (i) such proclamation shall be drawn up by the Court Auctioneer and shall state the time and place of sale and specify as fairly and accurately as possible:

- (a) the property to be sold;
- (b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;
- (c) any encumbrance to which the property is liable;

(d) the amount for the recovery of which the sale is ordered; and

(e) every other thing which the Court Auctioneer considers material for a purchaser to know in order to judge of the nature and value of the property.

(ii) the Court Auctioneer shall submit the proclamation drawn up by him to the Court for its approval which shall add to it the reserve price of the property under sale, based upon the evaluation report submitted by any evaluator appointed by the Court from amongst the evaluators approved by the Pakistan Banker's Association."

(2) sub-rule (3) shall be omitted.

(15) in rule 67, for sub-rule (2), the following shall be substituted:

"(2) (i) Where the reserve price determined by the Court exceeds rupees two million, the proclamation shall also be published in at least one widely circulated national daily newspaper and the costs of such publication shall be deemed to be costs of the sale; and

(ii) The Court Auctioneer shall cause video recording of the auction proceedings while ensuring transparent and fair bidding process of the public auction and the costs of such video recording shall be deemed to be costs of the sale.".

(16) rule 70 shall be omitted;

(17) in rule 72:

(a) for sub-rule (1) and sub-rule (2), the following shall be substituted:

"(1) The holder of a decree in execution of which the property is sold may participate in the auction of the property and for that purpose make a bid for the purchase of the property.

(2) Where a decree-holder purchases the property, the purchase-money and the amount due on the decree

may, subject to the provisions of section 73, be set-off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.”;

(b) sub-rule (3) shall be omitted;

(18) rule 78 shall be omitted;

(19) in rule 83, after sub-rule (3), the following new sub-rule (4) shall be inserted:

“(4) A notice of the sale of the property shall be given to the judgment-debtor with an option to match the highest bid within fifteen days of the auction of the property and the judgment debtor, in that case, shall have the first right of refusal to purchase the property at the highest bid offered by a bidder.”;

(20) in rule 84, for sub-rule (1), the following shall be substituted:

“(1) On every sale of immovable property, the person declared to be the purchaser shall pay to the officer or other person conducting the sale the amount equal to the reserve price of the property through pay order or bank draft or banker’s cheque immediately after such declaration and in case such payment is not so made, the property shall forthwith be resold in the manner provided under this Order.”;

(21) in rule 89:

(a) for the full stop at the end, a colon shall be substituted and thereafter the following proviso shall be inserted:

“Provided that no application under this rule shall be entertained unless the applicant deposits in the Court the amount specified in the proclamation of sale along with a sum equal to five per cent of the purchase money.”; and

(b) after sub-rule (3), the following new sub-rule (4) shall be inserted:

“(4) The Court shall decide the application under this rule within thirty days of the filing of the application.”; and

(22) in rule 90, in the second proviso, for the words “twenty five”, the word “fifty” shall be substituted.

**16.** In **Order XXIII**, in rule 1, in sub-rule (2), after the words “the Court is satisfied”, the words “after recording reasons” shall be inserted.

17. In **Order XXXII**, for rule 2, the following shall be substituted:

**"2. Where suit is instituted without next friend.**- (1) Where a suit is instituted by or on behalf of a minor without a next friend, the Court may on such fact coming to its notice allow an opportunity to remedy the defect.

(2) Where the defect is not removed, the Court may, on an application of the defendant, or of its own motion, order that the plaint should be taken off the file with costs to be paid by the pleader or other person by whom it was presented.

(3) Notice of the application submitted under sub-rule (2) shall be given to the pleader or such other person, and the Court may, after hearing his objections, if any, make appropriate order.".

18. **Order XXXIII** shall be omitted.

19. In **Order XXXVIII**, for the existing rule 1, rule 2 and rule 3, the following shall be substituted:

**"1. Defendant to be called upon to furnish security.**- (1) The Court, on the first date of hearing, after examination of the plaint and on being satisfied as to the existence of a *prima facie* case, direct the defendant to furnish adequate security for the due satisfaction of the decree, if passed against him.

(2) Where the defendant fails to furnish security within the time fixed by the Court, the Court may, after considering the available record and for reasons to be recorded, prohibit the defendant from transferring or charging his property in any way, except with the prior permission of the Court.

**2. Procedure on application.**- (1) Where an order under rule 1 is made, the defendant may apply, along with an affidavit, to the Court for permission to transfer or charge his property.

(2) On receipt of such application, the Court, if satisfied, that the intended disposal by the defendant is not likely to affect the due satisfaction of the decree, may proceed to grant such permission.

**3. Furnishing of security.**- The defendant may apply to the Court for the vacation of the order issued under rule 1, by furnishing independent security to the satisfaction of the Court for the due satisfaction of the decree, if passed against him.".

20. In **Order XXXIX**, rule 2B shall be omitted.

21. In **Order XLI**:

(1) rule 23-A shall be omitted;

(2) for rule 27, the following shall be substituted:

**"27. Production of additional evidence in Appellate Court.-** The Appellate Court, after recording reasons, allow the parties to an appeal to produce additional evidence, whether oral or documentary:

- (a) if the Court from whose decree the appeal has been preferred, has refused to admit evidence which ought to have been admitted;
- (b) the Appellate Court, on being satisfied that the additional evidence has been available but could not be produced before the trial Court for reasons beyond the control of the party seeking its production; or
- (c) the Appellate Court itself requires any such evidence so as to enable it to pronounce a judgment.”.

**22. In Order XLIII:**

(1) in rule 1:

- (i) clauses (a), (c), (e), (f), (g), (h), (i), (k), (l), (m), (n), (o) and (v) shall be omitted;
- (ii) in clause (j), the expression “rule 72 or” shall be deleted;
- (iii) in clause (w), for the full stop at the end, a colon shall be substituted and thereafter the following proviso shall be inserted:

“Provided that the appellant, while filing an appeal under this Order shall along with the memorandum of appeal, furnish copies of the pleadings, order sheet of the subordinate Court and all necessary documents.”;

(2) for rule 2, the following shall be substituted:

**“2. Record of the trial Court.-** It shall not be necessary for the Appellate Court to call for the record of the trial Court, unless it, for reasons to be recorded, requires the record for decision of the appeal.”; and

(3) rule 3 and rule 4 shall be omitted.

**23. Order XLIV shall be omitted.**

**By order of the Chief Justice and Judges**

(Rao Abdul Jabbar Khan)  
Registrar

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