ORALITY AND INMEDIACY IN ENGLISH CIVIL PROCEDURE*

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SUMMARY

I. *Introduction*

The topic of orality is one which has given rise to a substantial literature and has been the subject of much discussion on the part of proceduralists in many of the countries sharing the traditions of the civil law. The same is not true for the countries of the common law and, as Professor Cappelletti has percipiently observed,[1] the English and American reporters on "Oral and Written Procedure in Civil Litigation" to the VIII International Congress of Comparative Law in 1970,[2] experienced some discomfort when invited to write upon the topic: in effect they preferred to deal only with "written and oral proof-taking" rather than with civil procedure as a whole.

So far as England, with which country alone this paper deals, is concerned, there are at least two factors which have led to this apparent lack of interest in a matter so extensively dealt with elsewhere, the first general and related to the nature of the academic study of the law in England, and the second more immediately linked with the character of English procedural law.

It may be surprising to persons unfamiliar with the history of legal education in England that in this country, which prides itself upon its history and whose constitutional theory is even to-day so largely based upon historical rather than formal legal sources, the academic study of any branch of English law in the Universities is of comparatively recent origin. The law taught in English Universities was first the canon law and, after the Reformation, Roman law. The man who intended to prac-

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[1] Cappelletti, *Procedure Orale et Procedure Ecrite,* 1971, pp. 6-7.

[2] Pescara, 29th August-5th September, 1970.

tise as a barrister or as what is now known as a solicitor was expected to learn his English law and procedure through a form of apprenticeship. It was not until 1758 that the first lectures on English law were given in an English University by a professor appointed for that purpose, and then no one considered it to be the professor's duty to prepare students for the legal professions.[3]

During the nineteenth century the study of substantive law in the Universities developed rapidly and this development has continued so that at the present time the demand for places in University Law Faculties exceeds the supply and there is actually difficulty in finding sufficient numbers of qualified teachers of law. Nevertheless, until very recently it has not been thought obvious or even desirable that a University student who intends to enter either branch of the legal profession should study law at his University. It is the professional bodies, the Inns of Court and the Law Society, which control entry to the professions; they conduct their own examinations and have accepted responsibility for the training of practitioners, and they continue to require a form of apprenticeship as part of the qualification for practice.[4]

The development of academic study of English law in the Universities has, therefore, concentrated almost exclusively on the substantive law because of the view, still widely held, that it is in the field of substantive law that scholarly work is possible and that it is there that the value of law as a vehicle for a liberal educations is to be found. The business of the Universities is seen to be education, not vocational training, and procedure, it is argued, is merely something which the practitioner must know for purely practical purposes: to teach procedure to University law students would be like teaching the techniques for cleaning old pictures to University students of Art History. It should be left to the stage of practical training upon which the student will enter when he leaves the University.

It is inevitable that this should have led to the existence of only an unsatisfactory and inadequate literature on procedure, and the purpose of such books as there are seems to be no more than that of enabling a student to learn what steps a practitioner must take as litigation proceeds. Indeed, most lawyers still seem to think that this is all there is to be known: as recently as 1967, in a memorandum to a Committee set up to consider and report on education for the legal profession, the Council of Legal Education, which is the teaching organisation of the Bar, wrote

[3] The professor was Sir William Blackstone, the first Vinerian Professor at Oxford. In his famous *Commentaries on the Law of England,* which grew out of his lectures, Blackstone stated his purpose to be that of providing a competent knowledge of the law to "gentlemen of all stations and degrees" and especially to those of "independent estates and fortunes, the most useful as well as considerable body of men in the nation": *Bl. Comm.*, 1, p. 7.

[4] The system of apprenticeship now operating is showing signs of severe strain under modern conditions and there will probably be substantial changes in the future, *Report of the Committee on Legal Education,* 1971, Cmnd., 4595.

of the twin subjects of Evidence and Procedure that "basically these are subjects which a student has to memorize".[5]

To-day, it is true, there is a growing number of University law teachers, of whom the writer of this paper is one, who are aware of the value and importance of the academic study of procedural law, but it should surprise no one that there is little literature on the particular subject of orality —there is little enough on any subject within procedural law. Despite the antiquity of the English legal system and despite the great expansion in the University teaching of English law since it began a little over two hundred years ago, as a subject of systematic study and scholarly enquiry, the law of both civil and criminal procedure is in its infancy.

There is another and less reprehensible explanation for the lack of discussion of orality in England which is derived from the general character of English procedure, and there is reason for the concentration by the English reporter on "written and oral proof-taking".[6] In the common law the central feature of litigation is the trial or "Day in Court" to which all other procedural stages are subsidiary, and at the trial under normal circumstances, everything is conducted *viva voce* and at a single session of the court. Orality and immediacy furnish the norm and there seems little to be said about either concept: such discussion as there is focusses upon the exceptions to the norm, which seem to the English lawyer to be genuinely exceptional, namely the circumstances in which documents may take the place of the spoken word at the trial.[7]

One final prefatory remark is necessary before turning to English civil procedure itself. In England a differentiation is customarily made between the law of Evidence and the law of Procedure. "Evidence" is that which tends to prove a fact's existence —something which may satisfy an enquirer of the fact's existence[8] and the law of evidence controls what the parties may and what they may not place before the court at the trial in the attempt to satisfy the court that the facts which they allege are true. Procedure, on the other hand, is the machinery of litigation —"the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right".[9]

It is doubtful whether the distinction between evidence and procedure would appeal to lawyers accustomed to other systems, and it may be that it will not withstand careful analysis even within the English system. What is important for present purposes, however, is not to produce such an analysis but to explain, if this can be done, English attitudes of mind, and from this point of view the acceptance of the distinction may be seen to have an important consequence.

[5] See the *Report* cited *supra,* note 4, Appendix F., p. 193.

[6] *Ante.*

[7] This subject is dealt within my paper "Written and Oral Proof-Taking" prepared for the Pescara Congress.

[8] Cross, *Evidence,* 3rd ed., p.1.

[9] *"Povser* v. *Minors"* (1881), 7 *Q.B.D.,* 329, 333, per Lush *L.J.*

Outside the common law world the law rarely speaks of "evidence": it speaks of "proof" and provides for various methods of proof which may be specified in a code of procedure.[10] or in a civil code.[11] It also, significantly, provides for the procedural phase of *"instrucción"*, a concept which seems to stem from the perfectly comprehensible idea that no court can reach a decision without first being informed of the factual basis of the parties' dispute. And even if facts which are not in dispute between the parties do not require proof, the comparative lawyer trained in the common law gains the impression that the administration of the proofs has as its main purpose the conveying of information to the court. This, however, does not appear to him to be the main purpose of "evidence" which, it is to be observed, is never presented to the court until the trial wheter it consists of oral testimony or written documents which came into existence before the litigation was begun. The function of evidence is primarly persuasive —it is used to persuade the court that one party's version of controverted facts is to be preferred to that of the other— and if persuasion is not needed on a particular matter of fact because the parties are agreed upon it, then evidence is not required. The difference between the two legal traditions on this point is not stark and each no doubt contains substantial elements of what may be called the informative and the persuasive purposes, but their starting points are different, and it is this rather than matters of detail which produce different attitudes of mind.

In these circumstances it is natural that an English lawyer, invited to give his attention to orality, should think immediately of the trial, the centre piece of his procedure, and of oral and documentary evidence. Nevertheless, in the following pages the attempt will be made to assess the role of orality in English civil procedure from a wider point of view and to consider other stages of the procedure than the trial itself. Three distinct stages will be discussed, namely the "interlocutory proceedings" which precede the trial, the trial itself, and proceeding on appeal.

II. *Interlocutory Proceedings*

Since the trial is at once the focal point and the object of the interlocutory proceedings, it will be apparent that their principal purpose is to provide for its adequate preparation.[12] To this and a number of steps must be taken by the parties beginning, of course, with that of securing the submission of the proposed defendant to the jurisdiction of the court. This is achieved by the issue out of the court of a document —a "writ of

[10] E.g. cod. proc. civ. del D.F., art. 289.

[11] E.g. C.C. français, art. 1315 *et seg.*

[12] Other objectives of the interlocutory proceedings include the elimination of cases which can properly be disposed of without trial, the encouragement of settlements and the prevention of delay. See Jacob, "The English System of Civil Proceedings" (1963-4), 1, *Common Market Law Review,* 294.

summons" or other equivalent originating process— which must be served on the defendant,[13] and to which the defendant must "appear". Appearance is effected by sending to the court and to the plaintiff copies of another document, the "memorandum of appearance" and the procedure for the actual constitution of the action before the court is thus wholly documentary.[14]

Once the action is thus set on foot, the first requirement of the preparation for trial is that the questions or issues in dispute between the parties which will have to be decided at the trial should be defined as accurately and precisely as possible.[15] This is achieved by the process known as "pleading" which, in the early days of the common law was conducted orally before the court.[16] In time, however, the written record of he oral pleadings supplanted the actual oral process as the basis on which the trial subsequently proceeded, and by the sixteenth century the practice had developed whereby the lawyers provided the clerk of the court with a written draft of their pleadings. Finally the process came to be conducted exclusively through an exchange of documents between the parties, and that remain the position at the present time.

Before the reforms of the nineteenth century the rules for written pleadings had become exceedingly technical and many cases were decided rather on points of pleading than on their merits, but since 1875, when the first version of the modern procedural Rules was brought into operation, the process has been much simplified. Either with the writ of summons or within 14 days of the appearance of the defendant, the plaintiff must serve on the defendant a "statement of claim", and this must be answered by a "defence". In straightforward cases nothing else is required.[17] The basic rule of pleading is that each party must allege in his document all the facts upon which he needs to rely for his claim or defence and the defendant must also deny any allegation in the statement of claim which he is not prepared to admit. Comparison of the two documents will then reveal what questions of fact are in issue between the

[13] In principle service must be on the defendant in person, but in practice, where solicitors are already involved on both sides, the defendant's solicitor agrees to accept service of the writ by post.

[14] If the defendant fails to appear and the writ has been properly served, the plaintiff my proceed at once to judgment in default of appearance.

[15] The procedure of the courts of common law (as distinct from those of equity) has always demanded the maximum precision in defining the issues, i.e. the differences in point of fact between the parties. When the normal mode of trial was through submission to the super-natural by way of some kind of ordeal it was essential to know which party bore the burden of proof and of what; and the need for clarity was even greater when trial by jury replaced the ordeal.

[16] The process was extremely formal and, until the midfourteenth century, was conducted in French.

[17] A "reply" to the defence may be delivered by the plaintiff and, if an order of the court is obtained, further pleadings are possible in a case of great complexity. Pleading beyond the reply is, however, extremely rare.

parties,[18] subject to the possibility that the pleadings may be amended at a later date, neither party need bring evidence at the trial to prove facts which are admitted; he may not bring evidence to prove facts which have not been pleaded.

It must be emphasised that the pleadings contain only allegations of fact. They do not contain arguments or submissions of law founded upon those allegations, nor do they contain or even refer to the evidence by which the party pleading intends to prove the truht of his allegations. On the other hand it is the purpose of pleadings not only that the issues between the parties should be clarified but also that each party should know the nature of the case that he will have to meet at the trial. Neither purpose will be adequately served if the pleadings are written in unduly general language, and either party may, therefore, require of the other "further and better particulars" of his pleading. Once again this is achieved by a written procedure. Indeed, the original request for particulars is made by ordinary letter, and if the particulars are voluntarily supplied, again by letter, the correspondence simply becomes part of the pleadings. Only if particulars are refused is an appplication to the court required, and even then, if the court orders that the particulars be given, they will be given in documentary form.

The pleadings form an essential and obligatory step in all actions begun by writ of summons,[19] which constitute the majority of actions in the High Court.[20] So also does "Discovery of Documents", a process whereby each side is required to disclose to the other the documents which he has in his possession and which bear upon the subject matter of the litigation. The procedure for discovery consists of an exchange of lists of documents, and each side must allow the other an opportunity to inspect and copy any of the listed documents other than those which are privileged from production on some specific ground such as that they tend to incriminate the party having them, or that they are communications between him and his legal advisers brought into existence in connection with the litigation. Formerly an order of the court was necessary for discovery of documentos, but now in most cases it is a matter of routine.[21]

[18] Certain presumptions assist. In effect, the defendant is taken to admit any allegation in the statement of claim which he does not expressly deny while the plaintiff is taken to deny any allegation in the defence which he does not expressly admit.

[19] Various attempts have been made in the interest of saving costs to reduce the number of cases in which pleadings are required, but these have been uniformly unsuccessful in cases where serious issues of fact are raised. See Jacob, "The Present Importance of Pleadings" (1960) 13, *Current Legal Problems*, 171.

[20] Matrimonial proceedings such as divorce are begun by "petition". This document and the "answer" are similar to the statement of claim and the defence. If an "originating summons" is used there are no pleadings, but this procedure may only be employed where no issues of fact are raised but only some such question as the interpretation of a document.

[21] "Interrogatories", whereby one party calls for written and sworn answers to

It is important to observe that, except so far as concerns the writ of summons and appearance, where its role is for all practical purposes purely administrative, in none of the procedural activities so far mentioned is any action normally required of the court. In the preparation of even the simplest of cases, however, there are bound to be certain matters which must be setled by the court such as the place and mode of trial, and, of course in more complex litigation many questions may arise which only the court can resolve. An order of the court is needed, for example if one of the parties wishes to amend his pleading after a certain lapse of time or if particulars asked for by one party are refused by the other; there are also specialised procedures which may be invoked such as those by which one of the parties seeks to dispose of the action in whole or in part without the necessity for a trial, and these inevitably demand a judicial decision.

To handle questions arising at the interlocutory stages of an action there are special judicial officers known as "Masters of the Supreme Court". Originally no more than administrative officials of the court, the Masters came during the ninettenth century to be full, albeit junior, judicial officers whose principal function it is to resolve interlocutory disputes.[22] Matters are brought before them by "summons", a document similar to a writ, calling upon the parties to appear before the Master, and the Master's decision will be given after an oral hearing on the summons. Any necessary evidence will be presented in documentary form,[23] exceptional cases apart, but, subject to this, the hearing of a summons is much like a miniature trial: all the arguments and submission of law will be preented *viva voce* to the Master who will then announce his decision orally.

III. *The Trial*

The concentration of the English system of civil procedure upon the trial has already been emphasised. The historical explanation of this probably lies mainly in the institution of the jury, which provided for so long the only mode of trial available in the courts of common law. It is true that the Court of Chancery, the most important and the longest surviving

certain specific questions put by him in writing, which is a form of discovery, though not of documents, may be administered, but only with the leave of the court.

[22] Under modern conditions the Masters may perform other judicial duties also including the actual trial of certain types of action if both parties consent. See Diamond, "The Queen's Bench Master" (1960), 76, *L.Q.R.* 504; Ball, "The Chancery Master" (1961), 77, *L.Q.R.*, 331. Appeal lies as of right from a Master's decision to a full Judge of the court, but the enormous majority of interlocutory questions are settled once and for all by the Masters.

[23] I.e. by "affidavits" which are sworn statements made and reduced to writing by the deponent in advance of the hearing.

court of equity,[24] never made use of the jury, and also that its procedure, derived substantially from that of the canon law, placed far less emphasis upon the oral hearing, but it was the common law, not the equity, procedure which formed the bassis of the new Rules of Procedure introduced when the unified Supreme Court was created and which, in their essentials, are still in force to-day.[25] And, although it is now rare to find a jury used in the trial of a civil case, the jury is still always "morally present".[26] It follows that immediacy, in the sense that all the evidence is displayed at one and the same session of the court, is inevitable and is taken for granted by almost every English lawyer. The jury, supposing there to be one, can only be called together on a single occasion,[27] and on that occasion it must be given all the material upon which its decisions on questions of fact are to be reached. As will appear, evidence may be presented in documentary form, but whatever its form it must be presented to the court at, and not before, the trial: there are no judicial enquiries, no reports of court appointed experts and, indeed, nothing other than the preparatory activities of the interlocutory proceedings in which the court is involved until the day of the trial.

It is fundamental to such a system that, when the Day in Court arrives, each side must establish by evidence everyfact which forms an essential ingredient in his claim or defence, apart from facts which are already admitted in the pleadings, and there are rules of the substantive law which govern the burden of proof. Traditionally and in principle this evidence must be given orally by witnesses present in court who are called by one or other of the parties[28] and, although a witness is likely to have given to the party calling him a written statement of his relevant knowledge, this "proof of evidence" as it is called cannot be used as evidence in its own right save in exceptional circumstances. Indeed, theoretically, even if a party wishes to use a pre-existing document as evidence, the document should be produced to the court by a witness who can speak as to its authenticity and source.

Apart from the historical fact that in the past juries may have included illiterates amongst their members, the underlying reason for the English insistence on oral evidence lies in the great importance that was and still is attached to the process of cross-examination. The English conception

[24] It did not finally disappear until the creation of the unified Supreme Court of Judicature in 1875.

[25] Certain equitable institutions, including that of discovery of documents, have found their place in modern procedure.

[26] Hamson, "Civil Procedure in France and England" (1950), 10, *C.L.J.*, 411, 416.

[27] Of course, in a long case lasting, several days the trial will have to be adjourned over night, but the days of the hearing will follow directly upon one another.

[28] In the event that a witness refuses to give evidence voluntarily, the party wishing to call him may, with the assitance of the court, compel him to atend under "subpoena".

of the adversary procedure is that the witnesses are the witnesses of the parties, not of the court, and the questioning of the witnesses is for their advocates, not for the judge; the judge should only ask a question of a witness if he needs some clarification of the meanning of what the witness has said. But it is central to this approach that a witness called by one party must be subject to cross-examination by the other, the principal object of cros-examination being to test the completeness and truth of what the witness said "in chief". And, as is particularly well shown by the attitudes of appellate judges,[29] where the credibility of a witness is in question, very great value is attached to the fact that the judge is able to observe how the witnesses conduct themselves under cross-examination. A judge is far more likely to find the true answer to a controverted question of fact if he is able to see and hear the witnesses than if all he can do is to read their answers in a *procés verbal.*

Nevertheless, there has developed in recent years an increasing awareness of the fact that oral testimony need not in all circumstances be required. In the first place it has always been possible for the parties to agree that certain documents should be put before the court without oral evidence being available to prove their authenticity: an "agreed bundle" of correspondence is a standard feature of many actions to-day and it is common for photographs, plans, and even some experts' reports to be accepted as accurate by both sides without proof. Moreoever, under the rules of procedure now in force, each party is assumed to admit the authenticity of the documents included in the other's list of documents as given on discovery unless he gives express notice to the contrary. Until recently, however, there has existed a major obstacle to the general use of documentary evidence which lay not so much in the fact that the evidence was documentary as that the use of documents as evidence offended againts the rule forbidding hearsay evidence. A party tendering a document as evidence of the truth of its contents is seeking to put in evidence statements concerning facts of which he does not have first hand knowledge (unless he happens himself to be the maker of the document) and on which he can not be cross-examined.

The historical reasons for the development of the rule against hearsay evidence are numerous, but one of the most effective in ensuring its retention in the law has been the fear that a jury will be unable to appreciate the difference in weight which should be given to hearsay and to first-hand evidence. To-day, however, not only is it the fact that juries are rarely used in civil cases, but where they are used they are likely to be far better educated than their predecessors. So far as civil cases are concerned, therefore, there has in recent years been a progressive relaxation of the rule, culminating in the important Civil Evidence Act 1968, by virtue of which it has become possible for a party to use as evidence

[29] *Post.*

documents such as transcripts of other legal proceedings, police reports of accidents and statements made by witnesses to the police, statements contained in correspondence from third parties and books of account and the like, to name only a few classes of document likely to prove useful in civil litigation. It should not be thought, however, that as a result of this recent legislation hearsay evidence oral testimony. On the contrary, the Act and the elaborate Rules of Court governing its operation contain numerous safeguards to ensure that hearsay evidence, whether documentary or not, is not admitted in a particular case over the objection of the other party unless the court has itself considered the matter and concluded that the objection to it ought not to be sustained. Subject to the court's over-riding power a party is still entitled to insist that the maker of a document which is put forward as evidence should himself be called before the court and cross-examined.

In one particular respect, however, the Act of 1968 has made a major inroad into the common law principles of evidence which is of interest in assessing the relative parts played by oral and documentary evidence. As is general known, English law makes no provision for the combined trial of the criminal and the civil aspects of one and the same sequence of events and, indeed, until the Act of 1968 the fact that a person had been convicted of a criminal offence could not be used as evidence in a civil action. In an action for damages for injury caused by the negligent driving of a motor car, for example, the injured plaintiff could not even use as evidence the fact that the defendant driver had been convicted of the offence of dangerous driving in respect of the same accident. Now, however, not only may the fact of the conviction be proved by documentary evidence —the record of the criminal court concerned— but it provides *prima facie* proof that the person convicted did in fact commit the offence in question. The normal result of this in a simple action for negligent driving is, therefore, that instead of having to produce evidence in the usual way to establish the defendant's negligence, the plaintiff will discharge the burden of proof placed upon him by producing documentary proof of the defendant's conviction, if such exists, of the offence. The defendant may attempt to rebut the *prima facie* proof resulting from the conviction, but the value as evidence of documentary proof of conviction is now substantial whereas formerly it was non-existent.

So far as the presentation of evidence at the trial is concerned, therefore, the position may be summarised by saying that the general overriding principle of orality remains, but that the use of documentary evidence without supporting oral testimony has increased and probably will increase a good deal further as the opportunities created by the Act of 1968 come to be realised by the members of the legal profession. For the rest, however, the proceedings are oral and nothing but oral. No written arguments are presented to the court —the pleadings, it is to be recalled, contain only allegations of fact— and the whole process of the presentation

of the evidence —oral and written— as well as that of factual and legal reasoning, is done by word of mouth in open court. Counsel for the plaintiff "opens" the case by outlining its nature and then presents his evidence. Counsel for the defendant then calls his witnesses and presents his evidence, at the conclusion of which he makes a "speech" dealing with both the facts and the applicable principles of law, and counsel for the plaintiff then normally has a right of reply. Both counsel may expect, especially when they are dealing with the law, that the judge will engage in a dialogue with them in order both to test the validity of the propositions of law for which they are contending and to clarify his own thoughts upon the matter. Finally, and perhaps most surprisingly to those who are unfamiliar with the ways of the common law, immediatly after the last speech of counsel, the Judge will deliver his judgment. Save in some cases of especial difficulty when the judge wishes to reserve his judgment in order to have time for reflection and, perhaps, to reduce his thoughts to writing, he will there and then deliver an oral judgment, possibly of considerable length, in which he will deal with the facts of the case, state his findings on any factual matters in controversy and also explain how, on his findings of fact, the applicable legal principles lead him to his conclusion. A formal written judgment which states only the judges conclusion, not his reasons for it, will then be drawn up and that, subject to the possibility of appeal, is the end. The oral expository judgment delivered in open court will have been recorded by a short-hand writer and is available in written form for the purposes of any appeal; if regarded as of suficient legal interest it will also be published in one or more of the published series of "law reports", but it forms no part of the official written record of the action.

IV. *Proceedings on Appeal*

From a judgment of the High Court or the County Court two appeals are possible, first to the Court of Appeal and from there, but only with the leave of the Court of Appeal itself or the House of Lords, to the House of Lords.[30]

An appeal to the Court of Appeal is initiated by a document produced by the appellant and to be served on the respondent, known as a "Notice of Appeal", in which the appelant must set out briefly his grounds of appeal; the respondent, if he wishes to support the decision appealed from on grounds other than those relied on by the trial judge, must reply to this with a "Respondent's Notice". These documents do indicate the points of law which are to be argued on the appeal, but their purpose is to do no more than that, and they play a role similar to that of the pleadings in the court of trial. Certainly they must not be confused or equated with the "brief on appeal" which is a familiar element of North

[30] In a limited number of cases appeal is possible directly from the High Court to the House of Lords.

American practice; that is a closely reasoned document, possibly of considerable length, which deals fully with the facts and presents the arguments of law on one side or the other. The English notices are quite different.

Appeals to both the Court of Appeal and to the House of Lords are technically by way of "re-hearing", but this does not mean that the witnesses are called to give their evidence over again at the hearing of the appeal. The significance of the phrase lies, principally, in the fact that the appellate court does more than just review the judgment appealed from in order to decide whether or not it should be quashed; the court can substitute any decision which it considers the judge should have made.

So far as providing the court with the factual background to the case is concerned, the procedure in the appellate courts relies heavily on documents. The Court will be supplied with the notice of appeal and the respondent's notice, and it will also have a copy of the judgment appealed from, copies of any documents used in evidence at the trial and a transcript of the short-hand record of the oral testimony. Since it will not have the opportunity enjoyed by the trial judge of observing the witnesses while they are giving evidence, an appellate court will rarely, if ever, reverse or vary a decision of fact if it turned upon the credibility of a witness, but a decision of fact which consists essentially of an inference or deduction which is drawn from other established facts is as much open to challenge as a decision of law.

Despite the existence of the documents referred to, the hearing of the appeal retains to the full the principle of orality. The presentation of the case by the advocates is oral, the time allowed for oral argument is unlimited and the hearing of an appeal may last for several days. What is more, the judges of the court will rarely have read the transcript of evidence or the other documents in advance of the hearing. The normal practice is for counsel to read out and draw attention to those parts of the document to which he attaches importance. His opponent can, of course, be relied on the ensure that the passages which are important to his case are also read.

Following meetings between appellate judges of the English and American courts in 1961, and also in accordance with certain recommendations made some years earlier by a Committee appointed to look into the law of civil procedure, the experiment was tried of having the judges of the Court of Appeal read the documents in advance of the hearing. The experiment was not regarded as successful, however, except in cases where the documents were especially voluminous, and for normal cases the fully oral approach even to the presentation of documentary material has been restored. The main reason for this is not difficult to understand by anyone with experience of the way in which the English Court of Appeal is accustomed to work. It is true that a good deal of time is taken up by reading aloud, both from the documents and from the judgments in cases used by

counsel to support his arguments on points of law, but the reading is selective and is interspersed with comment by counsel as he reads. More important is the character of the hearing itself which was well-described by a distinguished American commentator when he said that "an appeal sometime has the appearance of a committee meeting with five members present, only three of whom have a vote".[31] In short a dialogue takes place between counsel and the judges, and the latter reach their conclusion only after they have tested by discussion as well as listened to the arguments of counsel.

We have spoken mainly, so far, of proceedings in the Court of Appeal, but in principle matters are not very different in the House of Lords. The preliminary documentation is more elaborate than in the Court of Appeal and the "Case on Appeal" which takes the place of the notice of appeal deals more fully with the arguments, but even so is is neither comparable to the American "brief", nor is it a substitute for oral argument. Indeed the only significant difference for present purposes is that whereas in the Court of Appeal judgments are frequently delivered extempore and immediately the argument is concluded, it is the invariable practice in the House of Lords for the judges to reserve their opinions.[32]

V. *Conclusion*

This brief outline of some of the main features of English civil procedure reveals that substantial use is made of the written as well as of the spoken word. It reveals also that, in assessing the role of orality, a distinction must be taken between evidence on the one lot and advocacy or argument on the other.

It can be said that the process of presenting and deciding a case involves three stages, not necessarily clearly separated from one another chronologically or even analytically. First, the basic facts must be established; secondly the necessarely inferences must be drawn from those facts and, to the extent that the substantive law requires, the quality of the conduct of a party as thus established —as being negligent, malicious, fraudulent or as the case may be— must be determined; thirdly the law must be ascertained and applied. It is, of course, to the first of these stages, and to the first only, that evidence is directed, and here the traditional emphasis on orality, has been somewhat reduced. The second and third, on the other hand, demand advocacy, that is reasoned argument from the parties or their lawyers, and here English law continues to insist on orality to the fullest extent. Whenever a judicial decision is required, whether on all the matters at issue or only upon some comparatively insignificant question arising in the course of the interlocutory proceedings, the arguments are

[31] Karlen, *Appellate Courts in the United States and England*, p. 94.

[32] As the final appellate court for all the jurisdictions of the United Kingdom, it is of especial importance for case-law that the opinions of the House of Lords should be formulated with particular care.

invariably presented orally to the court, never in writing. Moreover, even where, as is almost always the position in the appellate courts, the factual background to the case has been reduced to documentary form, it is only rarely that the judges will read the documents in advance of the hearing. Normally they will rely upon counsel to read the documents in open court.

No doubt a number of factors have combined to lead to this position, but two considerations may be suggested as having especial significance to English methods. In the first place, whether or not extensive use is made of documents to inform the court of the background of the dispute, it is thought to be essential that all the material shall be presented to the court at one and the same session for by this "immediacy" of presentation the court is best enabled to assess the overall impact of the material. This immediacy is not achieved if the court is provided with documents, including documents containing counsel's submissions on the facts and on the law, which it is expected to read privately. Secondly, by preserving full orality the judge is given the opportunity to engage in a dialogue with counsel, and this serves two purposes; it enables the judge to clarify his own thoughts through the process of question and answer concerning the significance of the material placed before him, and it enables him to test the legal submissions of counsel and to formulate his own opinion on the law and its application through a process of discussion.

The value of orality in the presentation of the evidence itself is, of course, not the same. It is true that a judge can question a witness who is present in court but not one whose statement has been reduced to writing, but the chief purpose served by the insistence on oral testimony lies in the fact that the judge's assessment of the reliability of evidence is more likely to be accurate if the witness has not only been cross-examined, but has given the whole of his evidence in the presence and under the scrutiny of the judge. It is now increasingly appreciated that oral testimony is expensive, time consuming and, sometimes, very difficult to produce, so that the use of documentary evidence is increasingly allowed, but whenever the credibility of a witness is contested the truth is most likely to be discovered by the judge before whom the witness gave his evidence *viva voce*. It is for this reason, as has been indicated, that the Court of Appeal will seldom if ever interfere with the judge's decision on such a question.

It may be that justice would be more speedily and more cheaply administered in England if greater use were made of written procedures. On the other hand, there is no tendency in England to-day to move towards the written submmission of arguments at any stage of the proceedings and it seems clear that written evidence whether in the form of a statement of a witness or of a report of his examination before another judge, will not be allowed to take the place of oral testimony in open court whenever the basic facts of a case are in dispute and can only be settled by deciding the credibility of the witnesses.