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COSTS*

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When Sir Frederick Pollock was the guest of the American Bar Association twenty-five years ago, he wrote,[1] "The interest of our American brethren in English courts and procedure is as inexhaustible as it is flattering." This interest does not seem to have decreased during the intervening years. There is a large and continually growing American literature on procedural questions with special reference to the English practice.[2] The power of the judges, through the Rule Committee, to establish their own rules of court; the system of Masters by which all preliminary points are disposed of without unnecessary delay and expense; the simple form of action which has destroyed all the ingenious, and to some persons delightful, technicalities of pleading; Order 14 which provides for summary judgment in certain cases—all these have been noted and commented on by American legal writers.

It is, therefore, all the more remarkable that virtually no mention has been made by American writers of what is one of the essential features of the English procedural system—the rules by which costs are governed. Costs include all those expenses of litigation which one party has to pay to the other. They must be carefully distinguished from "fees" which have to be paid by a litigant to the officers of the court.[3] Perhaps owing to similarity of name the great difference between costs in England and in America has escaped attention, for it is not infre-

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[1] (1903) 19 L. Q. REV. 356.

[2] See in particular ROSENBAUM, RULE MAKING AUTHORITY (1917); Sunderland, *An Appraisal of English Procedure* (1925) 11 A. B. A. J. 773; Hewes, *English Procedure* (1929) 3 CONN. B. J. 13.

[3] See BOUVIER, LAW DICTIONARY (Baldwin's ed. 1926) 239 under "Costs."

quent to find in comparative law that identity of term conceals fundamental variations in function. Moreover, the whole subject is so technical and so badly arranged in the books that it is difficult for any one who is not a practitioner to understand it. If there were a publication in which the figures as to costs were reported, the American observer would at once realize that here was a matter of vital import. It is only necessary to mention three recent cases. In *Graigola Merthyr Co., Ltd. v. Swansea Corporation,*[4] the costs which the unsuccessful plaintiff had to pay the defendant amounted to more than $350,000. In *Barnato v. Joel,*[5] although the action was ultimately compromised, the defendants had to pay $200,000 costs. Both these cases were in the Chancery Division. In the King's Bench Division, owing to the fact that the cases do not as a rule involve expert evidence or complicated accounts, the record figures are lower, but in *Lek v. Mathews,*[6] the defendant was awarded costs amounting to more than $125,000. In view of these figures it is unnecessary to stress the point that in England a litigant rarely brings or defends an action without realizing that costs are a major consideration and that they may greatly exceed the actual sum in dispute.

The importance of costs in English law is shown by the space this subject occupies in the law reports. In Bannehr and Porter's *Guide to Costs,* published in 1921, a leading practice book, over two thousand cases are listed in the table of cases. Since that date probably a hundred cases have been decided which will have to be included in the next edition. Nor are these cases merely perfunctory judgments of a few lines. In 1927 in *Donald Campbell & Co. v. Pollak,*[7] the House of Lords took ninety-five pages in which to decide a question which concerned costs alone. With a single exception this is the longest reported case in the last ten years.[8] That this interest in costs is not a modern development is shown by Hullock's *The Law of Costs,* published in 1793, for in that early book the table of cases includes over a thousand references.

The relative importance of costs to other procedural questions is illustrated even more strikingly when we turn to practice books. In *The Annual Practice,* commonly known as the White Book, which contains an annotated collection of the statutes,

—"They are distinguished from fees in being an allowance to a party for expenses incurred in conducting his suit; whereas fees are a compensation to an officer for services rendered in the progress of the cause. Musser v. Good, 11 S. & R. 248 [Pa. 1824]."

[4] 45 T. L. R. 219 (1929).

[5] Reported in the London Times Newspaper, Dec. 21, 1928.

[6] Unreported on this point.

[7] [1927] A. C. 732.

[8] See Note (1928) 44 L. Q. REV. 11.

orders, and rules relating to the general practice and procedure of the Supreme Court, costs is by far the most important subject. Twenty pages of the index are concerned with it alone, although not more than ten pages are needed for any other topic. Order 65 of the Rules of Court,[9] which is the chief, but not the sole, Order dealing with costs, occupies with its annotations over one hundred and forty pages while the average Order requires only seventeen.

There is also a considerable English literature on the subject. Besides a few well-known practitioners' books, there have been published a large number of articles and notes in the legal periodicals.[10] Most of these deal, however, with various special features of the subject rather than with the general principles involved, and are therefore of no particular interest to the foreign reader.

In America, on the other hand, the subject of costs seems to be a minor one. In Volume 7 of *Ruling Case Law*, the chapter dealing with costs is twenty-five pages long, while the next one on co-tenancy occupies one hundred and seven pages. In Volume 9 of the *Cyclopedia of Law and Procedure*, Costs and Counties are given exactly the same number of pages. A search through the index of periodicals shows that not a single article of any importance has been written on this subject, and only five American references are given.

HISTORY OF COSTS

The history of costs in England is a comparatively simple one, although a distinction must be drawn between the costs awarded in the common-law courts and those given by equity.

The common-law rule as to costs is based entirely on statute. As Pollock and Maitland say, in dealing with the law before the time of Edward I:

"What some modern practitioners may think the most interesting topic of the law was as yet much neglected. . . . It is highly probable that in some actions in which damages were claimed a successful plaintiff might often under the name of "damages" obtain a compensation which would cover the costs of litigation as well as all other harm that he had sustained; but we know that this was not so where damages were awarded in an action for land, and in many actions for land no damages, and therefore no costs, could be had. It is only under statute that a

[9] The procedure of the Supreme Court is governed by the Rules of the Supreme Court, 1883, with later amendments and additions. The authority to make rules of procedure is vested in the Rule Committee which includes certain judges, barristers, and solicitors. The Rules are divided into 72 Orders. Each Order is subdivided into a number of rules.

[10] Special reference may be made to numerous articles and notes in the Law Journal, Law Times, and Solicitors' Journal.

victorious defendant can claim costs, and at the time of which we write statutes which allowed him this boon were novelties. *In expensarum causa victus victori condemnandus est*—this is a principle to which English, like Roman, law came but slowly." [11]

If the plaintiff failed in his action, he was amerced *pro falso clamore;* if he succeeded, the defendant was *in misericordia* for his unjust detention of the plaintiff's right, but was not liable to the payment of any costs of suit, at least under that title.[12]

The first statute which gave the plaintiff his costs, and the one on which the whole law on the subject was based until 1875, was the Statute of Gloucester (1275) [13] which provided that in assizes of novel disseisin, writs of entry, mortdauncester, cosinage, aiel, and besaiel, "whereas before time Damages were not taxed, but to the Value of the Issues of the Land; it is provided, that the Demandant may recover against the Tenant the Costs of his Writ purchased, together with the Damages abovesaid. And this Act shall hold Place in all Cases where the Party is to recover Damages." Although this statute referred only to "the costs of his writ purchased," it was liberally interpreted. As Lord Coke said, while indulging his fantasy in etymology:

"Here is expresse mention made but of the costs of his writ, but it extendeth to all the legall cost of the suit, but not to the costs and expences of his travell and losse of time, and therefore costages commeth of the verb conster, and that again of the verb constare, for these costages must constare to the court to be legall costs and expences." [14]

There was also a question whether this statute applied in cases where damages were newly given by a statute subsequent to the Statute of Gloucester where no damages were formerly recoverable, but the later and prevailing view was that it did, even though Coke doubted it.[15]

Apparently the litigious spirit was strong during the reign of Elizabeth, for an attempt was made to limit "the infinite number of small and trifling suits, commenced or prosecuted . . . in her Highness Courts at Westminster . . . to the intolerable vexation and charge of her Highness subjects" by providing in 1601 [16] that in most personal actions if the debt or damages to be recovered did not amount to forty shillings then the plaintiff could not recover more costs than damages and might be awarded less. This principle was extended to actions of slander in

[11] 2 HISTORY OF ENGLISH LAW (2d ed. 1911) 597.

[12] HULLOCK, LAW OF COSTS (1793) 1.

[13] 6 EDW. I. c. 1 (1275).

[14] COKE, 2d INSTITUTES, 288.

[15] HULLOCK, *op. cit. supra* note 12, at 6; COKE, *op. cit. supra* note 14, at 289.

[16] 43 ELIZ. c. 6, f. 2 (1601).

1623,[17] and in 1670 [18] to trespass where the title to the land was not chiefly in question and to assault and battery. An interesting attempt to use costs as a form of punishment was made in 1672 [19] when a statute provided that a plaintiff could recover his full costs of suit in an action of trespass against any "inferior tradesmen, apprentices and other dissolute persons" who trespassed while hunting or fishing.[20] In 1697 [21] full costs of suit were given to a plaintiff whenever defendant's trespass was wilful and malicious.

The law giving costs to the successful defendant developed more slowly than that which gave costs to the plaintiff. Perhaps this was due to the fact that the amercement of the unsuccessful plaintiff was considered a sufficient punishment, although it could not have been much of a satisfaction to the victorious defendant. The Statute of Marlborough (1267),[22] it is true, provided that if a lord maliciously impleaded a feoffee when the feoffment was made lawfully, the feoffee should be able to recover damages and costs, "and the plaintiffs shall be grievously punished by amerciaments," but this was an isolated instance. It was not until 1531 [23] that a defendant was given costs in certain specified actions such as trespass, case, debt, contract, covenant, detinue and account. In 1607 [24] the final step was taken when it was provided that a defendant might recover costs in all cases in which the plaintiff would have had them if he had recovered.

These statutes only applied to original proceedings. In 1487 [25] a statute provided that if a judgment be affirmed on writ of error, the writ be discontinued, or if the party suing it be nonsuited then the defendant in error was to have his costs. This was followed by a number of statutes on the same subject.[26]

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[17] 21 JAC. I, c. 16, f. 6 (1623).

[18] 22 & 23 CAR. II, c. 9, f. 136 (1670).

[19] 4 & 5 W. & M. c. 23, f. 10 (1672).

[20] A series of cases followed on the question as to what was meant by "inferior tradesmen." In Buxton v. Mingay, 2 Wils. 70 (1757), the defendant was an apothecary. Bathurst, J. remarked: "And I am inclined to think the parliament purposely penned the act in this obscure manner not to disoblige their constituents, many of whom are tradesmen."

[21] 8 & 9 W. III, c. 11, f. 4 (1697).

[22] 52 HEN. III, c. 6 (1267).

[23] 23 HEN. VIII, c. 15 (1531). This statute was followed by 8 ELIZ. c. 2 (1566), which provided that "the defendant shall recover costs and damage, where the plaintiff doth delay or discontinue his suit, or is nonsuit."

[24] 4 JAC. I, c. 3 (1607).

[25] 3 HEN. VII, c. 10 (1487). Apparently appeals for the purpose of delay have a long history for this statute speaks of the defendant who "sueth a writ or writs of error to adnul and reverse the said judgement, to the intent only to delay execution of the said judgement."

[26] 13 CAR. II, c. 2, f. 10 (1661); 8 and 9 W. III, c. 11, f. 2 (1696); 4 ANNE c. 16, f. 25 (1705). The statute of William III contains these pregnant

No alteration of note in the rules as to common-law costs took place until 1875 when an important change in the principle on which costs were awarded was made by the Supreme Court of Judicature Acts, 1873 and 1875.[27] In previous statutes costs had followed the event, but Order 55 of the Rules of Court, attached as the First Schedule to the Act of 1875, provided that, with certain exceptions, "the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court." A victorious litigant might, therefore, be deprived of his costs for good cause. This short nine line order was greatly expanded when the Rules of Court were substantially rewritten in 1883. With certain amendments and additions, these Rules are in force today and will be considered in detail in the body of this article in so far as they affect the question of costs. There are also a great number of other statutes which contain particular provisions as to costs, but the general principles are to be found in the Rules of Court.

The jurisdiction of the Lord Chancellor in costs was essentially different from that at common-law.[28] "The giving of costs in equity," said Lord Hardwicke in *Jones v. Coxeter*,[29] "is entirely discretionary, and is not at all conformable to the rule at law." It has been a long disputed point whether the Chancellor's power to award costs was an inherent one or was based on statute, 17 RICH. II, c. 6 (1394). The better view seems to be that the power was inherent, and it is clear that the courts have acted on this view.[30] The great difference between equity and common-law costs lay in the fact that in equity costs were in the discretion of the court while at common-law they followed the event. Therefore the 1875 Rules of Court, although placing equity costs on a statutory basis, made no change of principle in them as they did in common-law costs.

MACHINERY

Before discussing the present rules concerning costs as laid down in the Rules of Court, 1883, it is necessary to say a few

words: "Foreasmuch as for want of a sufficient provision by law for the payment of costs of suit, divers evil disposed persons are encouraged to bring frivolous and vexatious actions, and others to neglect the due payment of their debts, etc." See HULLOCK, *op. cit. supra* note 12, at 277 *et seq.*

[27] 36 & 37 VICT. c. 66 (1873); 38 & 39 VICT. c. 77 (1875).

[28] See Guardian Trust Co. v. Kansas City Southern Ry., 28 F. (2d) 233 (C. C. A. 8th, 1928).

[29] 2 Atk. 400 (1742).

[30] Andrews v. Barnes, 39 Ch. D. 133 (1888); Corporation of Burford v. Lenthall, 2 Atk. 551 (1743). In the latter case Lord Hardwicke said: "It is said the court ought to resort back to the original jurisdiction, in point of costs, upon arguments chiefly drawn from cases of costs at common law. . . . But courts of equity have in all cases done it, not from any authority, but from conscience, and *arbitrio boni viri*, as to the satisfaction on one side or the other, on account of vexation."

words about the machinery by means of which they are applied. Costs in the Supreme Court are taxed by the six taxing Masters.[31] The importance of their position is shown by the fact that the senior taxing Master receives a salary of £1600 a year, while the other five receive £1500. After a case is concluded, the solicitor for the successful party prepares his bill of costs in which every taxable item of expense incurred is included. This bill may run into hundreds of pages. The other side may agree to the bill, especially if there are few or no discretionary items. An agreement saves the taxing fee payable to the court which amounts to 2½ per cent on the bill as taxed. In a great many cases, however, there is no prospect of agreeing the bill. This may happen for different reasons, a frequent one being that the losing party's solicitor will not take the responsibility of agreeing a heavy bill against his client. If there is no agreement, the parties proceed to taxation. The Master provides a hearing at which the solicitor for the opposing party may object to any of the items. Each disputed item is discussed, and allowed or disallowed by the Master. In exercising his discretion the Master has before him all the relevant papers in the case so that he may judge of the difficulty and importance of the point or points involved, the character of the evidence required, the length of the trial, etc. There is an appeal from the Master's decision to the judge at chambers both on questions of law and of fact,[32] but where the Master has exercised his discretion his judgment will not, as a rule, be interfered with.[33] A wide discretion is given to him, and his decision as to the quantum, in the absence of particular circumstances, is final.[34] No appeal lies from the order of the judge to the Court of Appeal without his leave "as to costs only, which by law are left to the discretion of the court." [35] An appeal can be taken without leave, however, on all points of law, and on the question whether the judge had before him materials upon which he could exercise his discretion.

[31] The taxing Master, whose duties are concerned with questions of costs, must be distinguished from the Master, who deals with preliminary questions of practice and procedure.

[32] Order 65, r. 27, reg. 41 provides: "Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may within fourteen days . . . apply to a judge at chambers for an order to review the taxation as to the same item or part of an item, and the judge may thereupon make such order as the judge may think just."

[33] See 2 HALSBURY, LAWS OF ENGLAND (1908) 418; Re Maddock [1899] 2 Ch. 588; Spalding v. Gamage [1914] 2 Ch. 405.

[34] In Estate of Ogilvie, Ogilvie v. Massey [1910] P. 243, Cozens-Hardy M. R. said: "The taxing Master is the person whose duty it is to decide questions of quantum, and it is not right for the judge to interfere in such a matter." *Cf.* Smith v. Buller, L. R. 19 Eq. 473, 474 (1875).

[35] The Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16

WHAT ITEMS MAY BE RECOVERED AS COSTS

It is common understanding in America that the difference between the American and the English rules as to costs lies in the fact that under the English system the successful party may recover the charges he has to pay his own lawyer. This is both an over and an understatement, for English costs rarely include the whole payment made to the barrister and solicitor while they also cover many other items not allowed in America.

In laying down the principles on which taxing Masters shall allow costs, Order 65, r. 27, reg. 29 [36] provides that all necessary expenses shall be included, but that all costs "incurred or increased through over-caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses" shall be disallowed. How this rule works in practice can be best seen by considering the various items usually found in a bill of costs.

(a) *Fees paid to court.* The fees which have been paid to the court, including fees for summons, on appearance, commencement of cause, entering and setting down case for trial, interlocutory applications, on entering a judgment, etc., can be recovered from the losing party in full unless they have been unnecessarily incurred. If, however, the plaintiff could have achieved the same end by adopting a less expensive form of procedure then he will not be allowed the additional amount.[37]

(b) *Fees paid to the solicitor.*[38] For the purposes of taxation the solicitor must deliver an itemized bill for his services which

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GEO. V, c. 49, § 31 (1) h (1927), replacing Judicature Act, 1873, 36 & 37 VICT. c. 66, § 49 (1873), enacts that, "No appeal shall lie without the leave of the court or judge making the order from an order of the High Court or any judge thereof made . . . as to costs only, which by law are left to the discretion of the court."

[36] Rosenbaum, *op. cit. supra* note 2, at 146: "This is now the kernel of the whole rule. It is the touchstone which the taxing master can apply to every item in a bill of costs."

[37] Johnson v. Evans, 60 L. T. 29 (1888). Thus a person applying for a special jury shall not have on taxation any further allowance than he would be entitled to if the case had been tried by a common jury, unless the judge certifies immediately after the verdict that the case was proper to be tried by a special jury.

[38] In explaining to American lawyers the difference between barristers or counsel, these terms being practically interchangeable, on the one hand, and solicitors, on the other, it is the practice to say that the barrister is the trial lawyer while the solicitor is the office lawyer. This is far from accurate. The solicitor deals directly with the client while the barrister is retained by the solicitor. In non-litigious matters the solicitor may himself draft all necessary papers, but if the matter is difficult or important he will retain a barrister who is a specialist in the practice of conveyancing, probate, company law, etc. He may also ask for a barrister's opinion on any doubtful point of law on which a client consults him. In litigious matters, the solicitor interviews the witnesses and obtains all other neces-

has been derisively compared to an apothecary's bill. He does not charge a lump sum, as does the American lawyer, which is figured on the amount at issue, the difficulty of the case, etc., but he must charge separately for every thing he or his clerks do.[39] What is even more remarkable from the American standpoint is that the charges for most items are fixed by statute. Thus the solicitor receives a fixed sum for each letter he may write, a routine letter being 3s. 4d. and a special letter 5s. The only item which is discretionary is the "Instructions for Brief." This varies with the difficulty and laboriousness of the case and with its importance. The principles underlying this odd system of remuneration were settled when a solicitor was in fact little more than a person skilled in the details and clerical work of lawsuits and payment was made for services mainly of a clerical nature. It is now out of date and is the most criticized part of the English system.[40] As the amount for these various items is fixed by statute, the taxing Master is only concerned with the various steps taken by the solicitor, and not with his charges for them. Thus, for example, if the solicitor's bill includes an item for ten letters written by the solicitor, the Master's sole duty is to determine whether it was necessary to write this number. With the exception of the "Instructions for Brief," the difficulty or importance of the case is only relevant in determining what steps were necessary; it does not affect the amount to be charged for each step.

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sary evidence. He summarises this in a document known as the brief, which is sent to the barrister with the fee for appearing in the case marked on the outside. Where there are difficult questions of law involved, the barrister settles the pleadings. As barristers have an exclusive right of audience as advocates in the House of Lords, Privy Council, Supreme Court of Judicature, Central Criminal Court and Assizes, it is necessary for them to be briefed in all trials in these courts. In other courts, such as the County Courts, a solicitor may himself appear for his client, but if the case is an important one he may brief a barrister. It is the practice to brief two, or even three, barristers in all important cases, the senior of whom is known as the leader.

Barristers are either "utter" barristers, more frequently called "junior" barristers, or King's Counsel. King's Counsel are barristers who have been "called within the bar," occupying the front benches in the auditorium of the court. Technically they are Crown officials, appointed, on the advice of the Lord Chancellor, by Letters-Patent of the King, and, until quite recently, they could not appear for any client against the Crown without a special license. A King's Counsel, or K.C. for short, is called a "silk" as he wears a silk gown, while the junior barrister wears one made of stuff. See JENKS, THE BOOK OF ENGLISH LAW (1928) 83.

[39] The bill which the solicitor sends to his own client, where there is no question of taxation, is a lump sum bill. However, this, unless there is a special agreement to the contrary, can be objected to by the client. He can insist on an itemized bill, and then tax it against his solicitor.

[40] The Earl of Birkenhead, *Costs* (1925) 60 LAW JOURNAL 89.

(c) *Fees paid to counsel.* Where counsel's fees are concerned an entirely different principle has to be applied, for a barrister receives payment for his work more in accordance with the American system. When he is retained by the solicitor, a sum is marked on the brief he receives which is determined by the eminence of his position, the difficulty of the case, etc. This fee will not necessarily be allowed in whole when the Master taxes costs against the other party. He will consider whether it was necessary under the circumstances for the party to have one, two, or in rare cases, three counsel;[41] whether it was necessary to retain a King's Counsel at a fee of one hundred guineas in addition to junior counsel, rather than a junior counsel alone at a fee of twenty guineas. Perhaps a medical comparison may make this clearer. A patient, suffering from an ordinary cold, instead of calling in a family doctor who charges an ordinary fee for each visit, employs a specialist who charges a much higher one. The specialist's fee may be a perfectly fair and reasonable one although, under the circumstances, it was not necessary for the patient to incur the expense. Thus a taxing Master may disallow a large part of the fee paid to eminent counsel on the ground that it was unnecessary for the party to incur it, without holding that the fee itself was unreasonable. Recently the Court of Appeal, of its own motion, in dismissing an interlocutory appeal with costs, ordered that the fees of leading counsel were not to be allowed. Lord Justice Scrutton remarked that he regarded Mr. Jowitt, K.C., who was briefed for the respondent, as a "super luxury," and said that if his client took the unnecessary step of briefing him he must pay for the luxury.[42]

(d) *Necessary expenses paid to witnesses.* These include both traveling and living expenses, and a sum representing compensation for loss of time. In fixing the amount to be allowed on taxation, the Master will take into consideration the social standing of the witness; whether, for example, it was reasonable for him to travel first or third class, to take a taxicab or a tram.[43] In cases where expert witnesses are called, the item for witnesses may prove a formidable one, for the winning party may recover the necessary fees he has paid to his experts. These may include not only payment for the time spent in court but also for the time spent in qualifying to give evidence.[44] So the fees of a

[41] Peel v. London & North Western Ry., [1907] 1 Ch. 607; Easton v. London Joint Stock Bank, 38 Ch. D. 25 (1888); Kirkwood v. Webster, 9 Ch. D. 239 (1878).

[42] See Comment (1928) 67 LAW JOURNAL 174.

[43] Re Working Men's Mutual Society, 21 Ch. D. 831 (1882); Parkinson v. Atkinson, 31 L. J. C. P. 199 (1862); East Stonehouse Local Board v. Victoria Brewery Co., [1895] 2 Ch. 514.

[44] See BANNEHR & PORTER, GUIDE TO COSTS (12th ed. 1921) 837.

chemist, which amounted to £330, for time occupied in making experiments preparatory to trial, were allowed to the party who called him.[45] In chancery cases, especially where scientific questions are involved, expert evidence frequently constitutes the largest part of the bill of costs. In a recent case this item ran into thousands of pounds.[46] It is in the discretion of the taxing Master to decide whether he will allow the fees of all or only some of the expert witnesses; if a party calls more witnesses than are absolutely necessary he cannot recover their fees from his opponent.

(e) *All other necessary expenses.* The Master will allow all items which were necessarily incurred in the preparation as well as in the presentation of the case. Thus the cost of employing an agent to obtain evidence[47] can be charged. Similarly plans, models, photographs, copies of documents, translations, etc. may constitute items in the bill.[48] There is only one item on which the rules seem to be illiberal, and that is on the question of shorthand notes. Perhaps this is due to the English prejudice against typewriting. It is only in exceptional cases that the expense of taking shorthand notes of evidence can be recovered by a party.[49]

It will be apparent from the above list that the English rules are very liberal in their conception of what constitutes costs. They will include not only all expenses necessarily incurred at the trial, but also those which the plaintiff or the defendant had to meet in preparing his case. Therefore a plaintiff who only discontinues his action immediately before trial, or a defendant who pays at the last moment may nevertheless have incurred costs of many thousand pounds.[50]

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[45] Leonhardt v. Kalle, 39 SOL. J. 524 (1895).

[46] Graicola Merthyr Co., Ltd. v. Swansea Corporation, *supra* note 4.

[47] Slingsby v. Attorney General, [1918] P. 236.

[48] Batley v. Kynock, L. R. 20 Eq. 632 (1875); Mackley v. Chillingworth, 2 C. P. D. 273 (1877); Re Bowes, Strathmore (Earl of) v. Vane, [1900] 2 Ch. 251.

[49] Earl de la Warr v. Miles, 19 Ch. D. 80 (1878); Hebert v. Royal Society of Medicine, 56 SOL. J. 107 (1911); Pilling v. Joint Stock Institute, Ltd., 73 L. T. 570 (1895).

[50] The amount to be allowed for each of the above items depends upon whether the costs are "party and party" or "solicitor and client" costs. As a rule only "party and party" costs are allowed. They comprise only those expenses which are strictly necessary in the action, while "solicitor and client" costs include, in addition, many things, which although not essential, are, nevertheless, advisable under the circumstances. As Parker J. said in Peel v. London & North Western Ry., [1907] 1 Ch. 607, 613: "One is the question of doing the litigation, if I may use the expression, as cheaply as a reasonable man can do it, because possibly someone else may have to pay the expense, and the other is a question what a man spending his own money would reasonably be expected to do in the particular circumstances of the case." So agents entitled to an indemnity from their

WHEN COSTS WILL BE ALLOWED

It has been comparatively easy to state what items will be allowed in a bill of costs. It is a far more difficult problem to state in any logical form under what circumstances costs will be allowed, for the simple rule that costs follow the judgment as of course, which is the practice in some American states, does not exist in England. The Rules of the Supreme Court, like most English institutions, are more remarkable for their practical efficiency than for their symmetry. Although Order 65 is entitled "Costs," this gives only a part of the provisions as to costs, some of the more important being scattered more or less haphazard among the other orders. As a result an attempt to give a picture of the English practice as to costs is like fitting a jigsaw puzzle together. Such an attempt to deal with the question as a whole must be made, however, so that the full significance and fundamental importance of costs in English procedure can be realized.

COSTS OF THE ACTION AS A WHOLE

The most important single provision on costs is found in Order 65, r. 1:

"Subject to the provisions of the Act and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge; Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division; Provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the court shall, for good cause, otherwise order."

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principals are entitled to be indemnified against their solicitor and client costs (Williams v. Lister, (1913) W. N. 295), but they only get party and party costs of compelling the indemnity (Simpson v. British Industries Trust Ltd., 39 T. L. R. 286 (1923)). It is doubtful whether the power to allow solicitor and client costs exists in matters of common-law jurisdiction (see ANNUAL PRACTICE (1929) 1436), but in equity they are frequently allowed, *e. g.*, to trustees and executors. Solicitor and client costs do not necessarily include all the charges which a solicitor is entitled to make against his client, for the client may have instructed the solicitor to incur unusual expenses.

Costs may also be allowed on a higher scale for special grounds, such as the peculiar difficulty of the case. See Order 65, r. 9. The court also has power to order one party to pay to the other a fixed sum in lieu of taxed costs. Willmott v. Barber, Ch. D. 774 (1881). This is often applied in smaller actions of the running-down type, and in actions entered in the Short Cause list where with the court's approval settlements are often effected before trial.

This Order gives full discretion to the judge as to costs where the case is tried without a jury, but where the case is tried with a jury the costs must follow the event[51] unless there is good cause for refusing them. In practice there seems to be little distinction between "discretion" and "good cause," except that the judge cannot refuse to give costs merely because he disagrees with the verdict of the jury.[52] He may, however, refuse costs to a successful plaintiff in a libel action if the plaintiff "brought the whole thing on himself" by actions which excited "very just suspicion on the part of the neighbours." [53] Similarly a plaintiff, in a personal injury case, who makes an exorbitant claim which he knows is partly based on false evidence, may be deprived of costs even though he recovers substantial damages.[54] A successful defendant may also be deprived of his costs if his conduct has made the action reasonable.[55] On the other hand the judge need not refuse costs because the plaintiff has recovered only nominal damages,[56] and cannot refuse them solely on the ground that the defendant has set up a technical defence.[57]

In using his discretion where the case is tried without a jury, the judge must use it judicially; thus he cannot determine the question merely on grounds of benevolence or sympathy,[58] nor because the unsuccessful party's case has great moral, although no legal, merits.[59] Where a party successfully enforces a legal right and in no way misconducts himself, he is entitled to costs. On the other hand a party who brings a vexatious or unnecessary action, even if he succeeds to some extent, may be ordered to

[51] The headnote to Reid, Hewitt & Co. v. Joseph, [1918] A. C. 717 reads: "The expression 'the costs shall follow the event' . . . means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it.

"An issue, in this sense, need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment in whole or in part."

[52] Wight v. Shaw, 19 Q. B. D. 396 (1888). Lord Esher, M. R.: "He could have no jurisdiction to interfere with the costs on the ground that the verdict was wrong. For this purpose the verdict must be assumed to be right."

[53] Harnett v. Vise, 5 Ex. D. 307 (1879).

[54] Pearman v. Burdett-Coutts, 3 T. L. R. 719 (1887).

[55] Myers v. Financial News, 5 T. L. R. 42 (1889); Ritter v. Godfrey [1920] 2 K. B. 47; Bostock v. Ramsey Urban Council, [1900] 2 K. B. 625.

[56] Moore v. Gill, 4 T. L. R. 738 (1888).

[57] Granville v. Firth, 72 L. J. K. B. 152 (1903); Civil Service Cooperative Society v. General Steam Navigation Co., [1903] 2 K. B. 756; Elm v. Hedges, 95 L. T. 148 (1906).

[58] Kierson v. Joseph L. Thompson & Sons, Ltd., [1913] 1 K. B. 587; Bevington v. Perks, [1925] 2 K. B. 229.

[59] Re Birkbeck Building Soc., 108 L. T. 211 (1913).

pay the whole costs of the other side.[60] In exercising his discretion, the judge may take into consideration the fact that the claim is grossly exorbitant, that the plaintiff has unfairly charged a trustee with fraud, that some of the evidence offered is clearly false, that the plaintiff by his improper actions has caused the defendant to act as he did, that the action is brought out of spite or purely for political motives; or, on the other hand, that a successful defendant has by his conduct made the action reasonable.[61] Although the improper conduct may have taken place before the actual commencement of the action, it must be conduct relative to the question between the parties.[62]

Thus the trial judge has wide discretion as to costs, and may by this means punish a party who has unfairly brought or defended an action. It is not infrequent that the plaintiff, although successful in the action, has to pay the defendant's costs in whole or in part. In such a case he will realize that his victory is indeed a Pyhrric one, for the bill of costs may greatly exceed the actual sum in dispute. This is a power which, if wisely exercised, enables a judge to prevent the use of the courts as machinery for extortion or chicanery.

COSTS AND THE CONDUCT OF LITIGATION

It is not only as a means of discouraging unfair and unnecessary litigation that costs have proved so efficacious in England. They may be of even greater use in controlling each step of the case from summons to final appeal—in preventing prolixity, delay, misjoinder of parties, the demand for the production of undisputed evidence, and the taking of appeals as a matter of course. To make this clear it is necessary to classify as far as possible the various orders which contain references to costs.

(a) *Prolixity.* One of the major sins of the ancient forms of action was their immoderate prolixity. The pleader, for fear that he might have forgotten a necessary allegation, repeated everything at interminable length. The Rules of the Supreme Court provide means for stamping out this nuisance. Therefore Order 2, r. 2 provides that a party using any forms of writs and indorsements more prolix than the prescribed forms shall bear the cost thereof himself, and Order 19, r. 2 makes the same provision in the case of statement of claim, defense, set-off, counter-

[60] Harris v. Petherick, 4 Q. B. D. 611 (1879); Fane v. Fane, 13 Ch. D. 228 (1879). But a successful defendant cannot, under any circumstances, be made liable to pay the whole costs of the action if the plaintiff was not entitled to bring the action. Dicks v. Yates, 18 Ch. D. 76 (1881).

[61] See cases cited ANNUAL PRACTICE (1929) 1320.

[62] Edmund v. Martell, 24 T. L. R. 25 (1907); Harnett v. Vise, *supra* note 53.

claim or reply.[63] "Such statements shall be as brief as the nature of the case will admit," and where there is unnecessary prolixity the taxing Master may, either at the instance of any party, or—a remarkable provision—on his own motion without any request, charge the loquacious party. In practice the court rarely acts except on the application of a party, and the party does not as a rule care about the prolixity of his opponent's pleadings if he has no other objection to them. It is, however, a convenient rule *in terrorem* to prevent outrageous cases of loose pleading.

(b) *Scandalous matter.* It usually proves expensive to plead or otherwise allege scandalous matter for under Order 19, r. 27 the judge may order it struck out in a pleading and also order the offending party to pay the full costs of the application,[64] and under Order 38, r. 11 a similar provision applies to affidavits.[65]

(c) *Delay.* In England it is impossible to delay a trial indefinitely by getting adjournments, for if there is not good ground for the application it will be refused. If the application is made a reasonable time in advance, and the judge finds that there is good cause, it will usually be allowed without an order as to costs, but if a party only asks for an adjournment when the case is called, then under Order 36, r. 34 he will generally get it only at the price of paying for the costs thrown away.[66] As these costs may include additional fees to counsel, solicitors' charges for attending court, etc., and all the added expenses of witnesses, it is clear that such an application will not be made lightly. A further provision as to delay is found in Order 65, r. 5 which provides that a solicitor may be made personally to pay all costs due to the delay of a trial caused by him in certain specified ways, such as failing to attend the trial or omitting to deliver necessary papers.[67]

(d) *Joinder of parties and actions, and interpleader.* The English rules as to joinder of parties and causes of action are more liberal than are those in the United States, and by means of this liberality justice is done where the stricter technical rules may delay or hinder the action. The English rules, however, are carefully guarded by provisions as to costs so that a party shall not suffer because of an improper joinder. So under Order 16, r. 1 [68] a defendant, although unsuccessful, shall be entitled to

[63] Stephen v. Laurie, 12 L. J. Ch. 71 (1843); Hanslip v. Kitton, 3 Jur. (N. S.) 835 (1862).

[64] Blake v. Albion Life Assurance Society, 45 L. J. C. P. 663 (1876); Brooking v. Maudslay, 55 L. T. 343 (1886).

[65] Re Jessopp, (1910) W. N. 128.

[66] Lydall v Martinson, 5 Ch. D. 780 (1877).

[67] Shorter v. Tod Heatly, (1894) W. N. 21; Lewis v. Cory, (1906) W. N. 95.

[68] For general principle see Searle v. Matthews, 19 Q. B. D. 77 (1887); Goodman v. Blake, 19 Q. B. D. 77 (1887).

his costs occasioned by the joining of any person as plaintiff who shall not be found entitled to relief. Under Order 16, r. 4 all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, and under Order 16, r. 7 where the plaintiff is in doubt as to the person from whom he is entitled to redress he may join two or more defendants in the alternative. In commenting on these rules a learned writer has said: [69] "This right is, of course, subject to an obligation of a plaintiff to pay the costs of any person who is cleared of liability. Costs, it should be remembered, are a real compensation in England, as they include counsel fees." To prevent multiplicity of actions Order 16, r. 48 establishes what is known as third party procedure. A defendant who claims to be entitled to contribution or indemnity over against any person not a party to the action may by leave of the court serve a third-party notice. In these cases the question of costs may be a peculiarly difficult one, so by Order 16, r. 54 the judge "may order any one or more to pay the costs of any other, or others, or give such direction as to costs as the justice of the case may require." [70] Order 57, r. 1 provides for relief by way of interpleader with careful provisions as to costs in Order 57, r. 15 and Order 57, r. 17. To prevent multiplicity of actions and to enable parties to finish their disputes as soon as possible Order 18, r. 1 provides that a plaintiff may unite in the same action several causes of action, but if the judge finds that such causes of action cannot conveniently be tried together he may order separate trials. The plaintiff must be careful in his joinder for if such an order is made he will, as a rule, under Order 18, r. 9 have to pay the costs of the order and the consequential amendments.

(e) *Summary procedure.* Order 14 which provides for summary judgments by means of specially indorsed writs has been the subject of favorable comment in America, and has been adopted in substance by a number of the states.[71] But here again, any possible abuse is met by a provision in Order 14, r. 9 (b) as to costs. In order to discourage plaintiffs from making unnecessary application for summary judgment, it is provided that if a plaintiff makes an application where the case is not within the Order or when he knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, "the application may be dismissed with costs, to be paid

[69] ROSENBAUM, *op. cit. supra* note 2, at 52.

[70] Bates v. Burchell, (1884) W. N. 108; Morgan v. Hardy, 17 Q. B. D. 770 (1886); Blore v. Ashby, 42 Ch. D. 682 (1889).

[71] See Clark and Samenow, *The Summary Judgment* (1929) 38 YALE L. J. 423.

forthwith by the plaintiff." [72] The Master, instead of dismissing the application, may, however, treat it as a summons for directions, and give directions as though the summons were taken out under Order 30. It is interesting to note that in Connecticut, where the judges of the Superior Court have recently adopted new rules of practice relating to summary judgments, the Judicial Council has recommended that the General Statutes be amended so that "double costs, including a reasonable counsel fee to be taxed by the court" may be allowed to the plaintiff when the defendant files an affidavit without just cause, or for the purpose of delay.[73]

(f) *Interrogatories.* As has been frequently noted, the English rules of procedure are based on the theory that a party coming to trial should not be taken by surprise. The purpose of the courts is to administer justice and not to referee a game between two players. Therefore, an attempt is made to prevent either party from gaining an unfair advantage over the other, and, as far as possible, the contestants are not allowed to keep cards up their sleeves. As Professor Sunderland has said: "Our [the American] bar has always been inclined to fear and distrust disclosure before trial. They have thought it would tend to produce framed-up cases and perjured testimony. . . . The spirit of the times calls for disclosure, not concealment, in every field—in business dealings, in governmental activities, in international relations, and the experience of England makes it clear that the courts need no longer permit litigating parties to raid one another from ambush." [74]

The English Rules by Order 31, r. 1 provide that in any cause the plaintiff or defendant may, by leave of the court, deliver interrogatories in writing to the opposite party. The practice is to issue a summons to which are attached a number of interrogatories and to ask the Master to allow them. The other side makes his objections and in the end a certain number of interrogatories are left, eight or ten being a fair number to get allowed. These the party interrogated has to answer. If a party should set out a tremendous list of interrogatories the Master would make him bear the costs under Order 31, r. 3 which provides that if "such interrogatories have been exhibited unreasonably, vexatiously, or at improper length" the costs occasioned thereby "shall be paid in any event by the party in fault." Order 31, r. 26 provides that any party seeking discovery by interrogatories or otherwise may be required to give security for the costs of the discovery.

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[72] Symon & Co. v. Palmer's Stores, [1912] 1 K. B. 259; Lagos v. Grunwaldt, [1910] 1 K. B. 41.

[73] FIRST REPORT OF THE JUDICIAL COUNCIL OF CONNECTICUT (1928) 31.

[74] Sunderland, *op. cit. supra* note 2, at 775.

Compare with these rules the statement as to interrogatories in the First Report, 1925, of the Judicial Council of Massachusetts:

"It is the practice today of some members of the Bar to file an unconscionable number of interrogatories in the first instance, in order to forestall evasive answers, and to avoid having to go to the court for leave to file supplementary interrogatories. As many as 200 to 300 interrogatories are not uncommon, and in one instance 2,258 interrogatories have been filed in the first instance. Of course, as a rule defendants object to answering so great a number of interrogatories, and the result is that in such instance the court has to hear a motion to compel answers and to wade through the unconscionable number of interrogatories that have been filed." [75]

(g) *Evidence.* Closely related to the rules as to interrogatories, but quite distinct in purpose, are the rules which require a party to admit documents offered and specific facts alleged by the opposing party. The purpose is to save the time of the court and reduce the expenses of the party offering the evidence by obtaining these admissions. There has been continued and bitter complaint in America that under the rules of evidence at present established, a party may be forced to prove a fact not really in dispute, at great expense of time and money. It is difficult to imagine a more gloomy picture than that drawn by Professor Morgan's Committee on Evidence:

"But what is the generally current American practice? In his pleadings each party attempts to keep the other as much in the dark as possible. The plaintiff often alleges much more than he expects to be able to prove in order to cover every possible contingency of the discovery of additional evidence before trial, and thus makes it necessary for the defendant to prepare to meet entirely unfounded claims which will never be pressed. The defendant, when he can do so without perjury, puts the plaintiff to the proof of every allegation regardless of whether he really denies or doubts its existence. And at the trial each counsel constantly interrupts the story of opposing witnesses by objections, most of them devoid of either technical validity or substantial merit. And each party insists upon a strict observance of the rules of evidence and procedure in the proof of formal matters and of evidentiary facts as to the truth of which there is really no question." [76]

To remedy this evil the Committee recommended the enactment of the following statute:

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[75] At 42.

[76] THE LAW OF EVIDENCE, SOME PROPOSALS FOR ITS REFORM, p. 2. By Professor Edmund M. Morgan and a committee appointed by The Legal Research Committee of The Commonwealth Fund.

"Any rule of evidence need not be enforced if the trial judge, on inquiry made of counsel or otherwise, finds that there is no *bona fide* dispute between the parties as to the existence or non-existence of the facts which the offered evidence tends to prove, even though such fact may be in issue under the pleadings. . . ." [77]

It is no part of this article to criticize this proposed statute but two points may be made; first, that under this rule a party will not know until the last moment whether or not he will have to prove a fact, and will therefore have to prepare his evidence in any case, and secondly, the whole plan will break down under "a spineless judge." [78] It is strange that the committee made no reference to the English rules, for the law of evidence is substantially the same in both countries. Nevertheless in England trials are not held up for days while facts not in dispute are being laboriously proved nor are plaintiffs forced to abandon just claims because the cost of proving the facts is prohibitive. It is in the word "cost" that the answer can be found.

Order 21, r. 9 provides that where any allegations of fact are denied or not admitted by the defence, when in the opinion of the judge they should have been admitted, the defendant may be charged with the extra costs occasioned thereby. This rule may at times prove of value, for as Fletcher Moulton, L. J. said,[79] "by rashly traversing statements which are obviously true, much unnecessary expense may be caused." Under this rule a party may still put his opponent to the full proof of all material facts, but if he does so unnecessarily he will have to pay for his fun.[80]

Of even greater practical value in preventing unnecessary evidence is Order 32, r. 2 and r. 4. Rule 2 permits either party to call upon the other to admit any document. In case of unreasonable refusal to do so, the party refusing will have to pay the costs of proving the document, whatever the result of the cause may be.[81] On the other hand, no costs of proving any document shall be allowed unless such notice is given. Rule 4 has a similar

[77] *Ibid.* 6.

[78] *Ibid.* 7: "It must be conceded that with a spineless judge, it may work little good; but its possibilities of harm are nil."

[79] Lever Brothers v. Associated Newspapers, [1907] 2 K. B. 626, 628. Fletcher Moulton L. J.: "Either party to an action has full power to put in issue any matters alleged by his opponent. He does so at the peril of having to pay costs."

[80] The Connecticut Judicial Council in its First Report, at 71, recommends the enactment of the following act:

"Allegations or denials made without reasonable cause and found untrue shall subject the party pleading the same to the payment of such reasonable expenses, including a reasonable counsel fee, to be taxed by the court, as may have been necessarily incurred by the other party by reason of such untrue pleading."

[81] Dudley, etc. Co. v. Dudley Corp., (1906) W. N. 67.

provision which enables a party to call on the other to admit "any specific fact or facts mentioned in such notice." [82] Thus, for example, a party who calls on his opponent to prove a business account which is not really in dispute may be required to pay the cost of the proof. Compare with this rule the statement by Professor Morgan's committee: "The law, then, if properly presented and understood, furnishes a method by which most business accounts can be proved; by a slight extension all could be proved. But at what an exorbitant cost!" [83] The English rules place this exorbitant cost on the party who unreasonably puts his opponent to the proof.

It is interesting to read the comment of the Massachusetts Judicial Council on rules 2 and 4:

"These two English rules are set forth below. This practice is provided for in Massachusetts by G. L., c. 231, s. 69, and Common Law Rule 37 of the Superior Court. But as no penalty is provided in either the statute or the rule, in case the admission is not made when there are no real grounds for contesting the facts or the documents, the statute and the rule are not as helpful as they should be." [84]

(h) *Estate and probate actions.* In common-law actions costs as a rule follow the event, but in equity and probate actions concerning estates, etc., the more usual order is that the costs be paid out of such estate. In these cases the court may be faced with a number of difficult and apparently conflicting problems—it must protect the estate; it must not, on the one hand, unduly penalize the bona fide but unsuccessful claimant while on the other hand giving the successful one more than his share; it must control the trustee and executor. The Rules of Court have certain provisions which serve as guides in these difficult situations. It is only possible here to mention some of the more important ones.

Order 65, r. 14-A warns trustees and executors against needless litigation by providing that "the costs occasioned by any unsuccessful claim or unsuccessful resistance to any claim to any property shall not be paid out of the estate unless the judge shall otherwise direct." [85] The practice is that if the claim or resistance was reasonable the judge will otherwise direct.

Order 65, r. 14-B is self-explanatory: "The costs of inquiries to ascertain the person entitled to any legacy, money, or share, or otherwise incurred in relation thereto, shall be paid out of such legacy, money or share, unless the judge shall otherwise direct."

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[82] Crawford v. Chorley, (1883) W. N. 198.

[83] *Supra* note 76, at 57.

[84] FIRST REPORT (1925) 43.

[85] If the parties are *sui juris* they can enter into an agreement to the contrary. Prince v. Haworth, [1905] 2 K. B. 768.

Order 21, r. 18, as amended in 1898, is an interesting one. Before the amendment, a party opposing a will had the right to insist that the will be proved "in solemn form of law," without having to pay the costs of the proceeding. Since the amendment the judge may order him to pay the costs if there were no reasonable grounds for opposing the will.[86]

Further provisions as to probate costs are found in Order 65, r. 14-C and 14-D, etc.

(i) *Appeals.* In an article entitled "The Problem of Appellate Review" [87] Professor Sunderland emphasizes the well-known fact that in England there are many less appeals than in the United States. He suggests that this is due largely to the superior quality of the English trial judges as contrasted with the American ones: "It may be that the immense volume of appeals which we suffer from is an indication of a want of confidence in our courts of first instance." [88] Undoubtedly the point which Professor Sunderland makes is a material and important one, but it is doubtful whether even in England a defeated litigant has any particular confidence in the judge who has decided against him. May it not be suggested that one of the reasons why an Englishman does not appeal, unless he thinks that he has a good chance of winning, is based on the fact that if he loses his appeal he will, as a general rule, have to pay his opponent's costs of appeal? These will include not only the expense of preparing the record, but also, as in the trial court, all the necessary expenses incurred by the successful party, including counsel fees and solicitors' charges. As the costs in even a simple appeal may easily amount to £100 or £200 it is obvious that a litigant will hesitate before taking this step. Of course, where the amount in dispute is large or the point at issue is an important one, costs will not prove a serious deterrent, even if the chances of reversal are slight, but in the average case they are an element to be considered. To appeal from the Court of Appeal to the House of Lords may prove to be an even more expensive luxury, especially if there are many documents in a case, for all of these have to be printed and the bill may run into thousands of pounds. It is only necessary to give the rules as to security for costs to show the amount that may be involved in an average case:

"Within one week after the presentation of the petition security must be given for costs. The security consists of the appellant's own recognizance to the amount of £500, and either a payment into the Security Fund Account of the House of Lords at the Bank of England of £200, or, instead of that pay-

[86] Spicer v. Spicer, [1899] P. 38.

[87] (1927) 5 TEX. L. REV. 126.

[88] *Ibid.* 128.

ment, the giving of a bond with two sufficient sureties for £200 . . . ." [89]

In determining the costs of appeal the Court of Appeal has wide discretion, for under Order 58, r. 4 it has power to make such order as to the whole or any part of the costs of the appeal as may be just. As a general rule a successful appellant gets both his costs of appeal and his costs in the court below,[90] but this does not follow where the appellant succeeds on a point not taken below, or on evidence not before the court below.[91] When an appeal is unsuccessful, it is generally dismissed with costs, but under special circumstances the dismissal may be without costs.[92]

(j) *Discontinuance.* The English rules as to costs not only control actions which are seriously prosecuted, but they also prevent persons from commencing or defending a suit without any real intention of bringing it to trial. Under Order 26, r. 1 a plaintiff may, under certain circumstances, discontinue an action, but he must pay the defendant's costs. These will include all the expenses which the defendant has reasonably incurred in preparing his case up to the time of the discontinuance, such as money spent in collecting evidence, solicitor and counsel fees, etc.[93] Under the same Order the court may allow a defendant to withdraw his defence, but the usual terms are that he must pay the plaintiff's costs. As a result, an English calendar is not cluttered with suits that were never intended to be brought to trial. With this can be compared the following statement in the 1926 Report of the Massachusetts Judicial Council:

"In their First Report the Judicial Council called attention to the fact that there is too much litigation in the Courts of the Commonwealth and suggested that if justice were done by requiring substantial costs between party and party the amount of it would be decreased.

"The truth of this statement has received a striking confirmation since then by the number of cases in the Superior Court which were dismissed for want of prosecution under Rule or General Order in the year ending June 30, 1926.

"The number thus dismissed was 9,257." [94]

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[89] INDERMAUR, MANUAL OF PRACTICE (10th ed. 1919) 355.

[90] Olivant v. Wright, 45 L. J. Ch. 1 (1876); *cf.* North London and General Property Co. v. Moy, Ltd., [1918] 2 K. B. 439.

[91] Hussey v. Horne-Payne, 8 Ch. D. 670 (1878); Chard v. Jervis, 9 Q. B. D. 178 (1881); Arnot's Case, 36 Ch. D. 702 (1887); Ex parte Hauxwell, 23 Ch. D. 626 (1883).

[92] Jones v. Merionethshire Benefit Building Society, [1892] 1 Ch. 173; Simpson v. Crowle, [1921] 3 K. B. 243; Ex parte Walton, 17 Ch. D. 746 (1887); Farquharson v. Morgan, [1894] 1 K. B. 557.

[93] See ANNUAL PRACTICE (1929) 1342.

[94] At 47.

(k) *Payment into court.* The English rules favor as far as possible the settlement of actions before trial so that the time of the court shall not be unnecessarily occupied and expense to the parties may be avoided. Order 22, r. 6 is an ingenious, and frequently successful, means of attaining this result. "The object of this innovation is to provide a medium of compromise for cases where the defendant is willing to pay something for the sake of peace, rather than incur the expense and risk of proving he is not at fault." [95] A defendant before trial may, in satisfaction of the claim or without admitting liability, pay a sum of money into court which the plaintiff is free to accept or refuse. If he refuses it and proceeds to trial, and does not recover more than the sum paid into court, he will, as a rule, be deprived of his costs of the issues as to liability. If he accepts the payment, he receives, under Order 22, r. 7, the general costs of the action down to the time of payment in.[96]

(l) *Liability of solicitors.* A rule which fortunately does not have to be frequently applied is Order 65, r. 11 which provides that a solicitor may be ordered to pay or bear personally any costs which have been incurred on account of his delay or misconduct. Thus a solicitor may have to bear the costs of litigation unreasonably commenced.[97] It is interesting in this connection to read the following recommendation in the Final Report to the Appellate Division, Second Department, New York, by the Committee on "Ambulance Chasing."

"In certain instances it seems deplorable that costs cannot be assessed personally against the lawyer who flagrantly prosecutes baseless suits. Some measure of responsibility should be placed upon him. He should be *driven* to consider the merits of a claim before he institutes an action. If his own professional honor and common sense will not supply the motive to scrutinize claims carefully, and if money is the only object in his mind, then it is a great pity that he himself cannot be reached and cannot be subjected to a money penalty when he goes counter to the most basic canon of his profession."

(m) Since the County Courts have been established, it has been the aim of the law to have all cases involving sums of less than £100 tried there rather than in the High Court. This has the advantage of saving the time of the High Court while also enabling the litigants to settle their disputes in a less expensive manner. A plaintiff may, however, in many cases defeat this provision by making a claim for more than £100 even though he

[95] ROSENBAUM, *op. cit. supra* note 2, at 96.

[96] Powell v. Vickers' Sons & Maxim, Ltd., [1907] 1 K. B. 71; Fitzgerald v. Thos. Tilling, Ltd., 96 L. T. 718 (1907); Langridge v. Campbell, 2 Ex. D. 281 (1877).

[97] Re Dartnall, [1895] 1 Ch. 474; Batten v. Wedgwood & Co., 31 Ch. D. 346 (1875); Shorter v. Tod-Heatly, *supra* note 67.

knows that he will not be able to recover that amount. To prevent this the County Courts Act, 1919,[98] provides that if an action is brought in the High Court which could have been commenced in a County Court, then, if the plaintiff recovers less than forty pounds in an action founded on contract or less than ten pounds in an action founded on tort, he shall not be entitled to any costs of the action.

CONCLUSION

The above list of instances in which costs are used as a means of controlling litigation is not intended to be an exhaustive one. It would be possible to refer to other Orders in the Rules of the Supreme Court, and to other statutes, as for example the Public Authorities Protection Act, 1893,[99] in which there are important provisions on this matter. It is hoped, however, that by what has been said the fundamental importance of costs in English procedure has been made sufficiently clear. To describe these rules of practice without mentioning costs is like describing the engine of an automobile without mentioning the fact that it runs on gasoline. The English law is essentially practical, and is based on the pessimistic assumption that some litigants will resort to all possible technicalities and sharp practices to gain their ends if they are not prevented from doing so. It therefore makes adequate provision to see that a plaintiff will not find it profitable to rush into court with a groundless or trumpery claim on the chance that the defendant will prefer to pay this legal form of blackmail rather than incur the expense of fighting the case. It also makes provision so that it will cost a defendant dear to obstruct an action as long as possible, and, after judgment, to appeal to as many courts as are open to him, on the chance that he may tire out the plaintiff. It is true that under the English system a party is still free to raise a number of technical objections, refuse to admit anything, and force his opponent to prove facts which are not in dispute, but if he does so he will have to pay, and pay heavily. Substantial costs make it expensive for the party who adopts such tactics. These costs are an additional weapon of offense for the plaintiff with a just claim to present, and a shield to the defendant who has been unfairly brought into court.

COSTS IN AMERICA

It is impossible in this article to discuss at any length the history and present state of the rules as to costs in the United

[98] 9 & 10 GEO. V, c. 73 (1919). See County Courts Act, 51 & 52 VICT. c. 43 (1888).

[99] 56 & 57 VICT. c. 61 (1893). Under this act, judgment for the defendant carries costs between solicitor and client.

States. A number of interesting questions may, however, be suggested. Why do the American rules differ so fundamentally from the English ones? Is the difference due merely to the accident of historical development, or is it based on some fundamental dissimilarity in social and economic conditions? Was the change from the English common-law practice—for it must be remembered that the English law of costs was in existence long before the settlement of America—a conscious or an unconscious one when the common-law was established in the Colonies? No attempt can be made here to answer these questions, but the following suggestions are tentatively advanced.

During most of the Colonial period lawyers were held in suspicion. This has been well described by Mr. Warren:

"In every one of the Colonies, practically throughout the Seventeenth Century, a lawyer or attorney was a character of disrepute and of suspicion, of whose standing or power in the community the ruling class, whether it was the clergy as in New England, or the merchants as in New York, Maryland and Virginia, or the Quakers as in Pennsylvania, was extremely jealous. In many of the Colonies, persons acting as attorneys were forbidden to receive any fee; in some, all paid attorneys were barred from the courts; in all, they were subjected to the most rigid restrictions as to fees and procedure." [100]

If lawyers were "characters of disrepute," it would hardly be reasonable to expect the law to encourage them by awarding costs to include counsel fees. It must also be remembered that during this period a knowledge of the law was not felt to be an essential in the administration of justice. Many of the judges were laymen without experience in legal matters. The law, it was felt, was not a science but a body of rules which any intelligent man could understand. It would follow that for a litigant to employ a lawyer to present his case was to take a step which was not essential.

By the end of the eighteenth, and the beginning of the nineteenth century, the bar had become more respectable, and it was the practice for parties to be represented by counsel. In some of the states, such as New York for example, counsel fees were allowed as costs. However, due perhaps to the earlier suspicion of lawyers, these were measured by a fixed sum. Thus the Revised Statutes of 1829 contained a large number of provisions dealing with counsel fees, but in every case the amount to be allowed was prescribed.[101] The retaining fee was fixed at three dollars and seventy-five cents, and the same amount was given for arguing a cause. It may be suggested that at this time the fees allowed as costs approximated the actual fees charged by

[100] WARREN, A HISTORY OF THE AMERICAN BAR (1913) 4.

[101] N. Y. REV. STAT. (1829) c. 10, § 4 reads:

the lawyer to his client for, in the absence of agreement, these statutory fees were taken, in case of dispute, to be the proper test for a lawyer's bill.[102] As the taxable costs were fixed in amount, the difference between the statutory fee and the actual fee paid by the client increased as the lawyers raised their charges, until in time they had no real relation to each other.[103] Perhaps if the New York Code in 1829, instead of providing a fixed fee in every case, had allowed the successful party a reasonable counsel fee depending upon the nature of the litigation, its system would have developed along the lines of the present English one.

Apart from purely historical reasons, the American rules as to costs may also be due in part to a vague feeling that they favor the poor man, and are therefore democratic, while the English system helps the wealthy litigant. The argument is that by imposing a liability for costs upon the losing party a poor man [104] "might often become a prey of a dishonest adversary from sheer want of funds to protect his rights." This view is due to a confusion between costs and fees.[105] It is obvious that if the court fees are large, then a plaintiff, who cannot afford to pay them, will necessarily be prevented from seeking the assistance of the law, for the fees must be paid before the action

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"Retaining fee, three dollars and seventy-five cents, to one counsel only;

Perusing, amending, and signing every petition of appeal, and every answer to a petition of appeal, two dollars and fifty cents;

Perusing and amending every other petition to the court, in a case where an appeal is pending, or in which a writ of error shall have been brought, one dollar and twenty-five cents;

Perusing, amending and settling every special pleading, entry or order, one dollar and fifty cents;

Attending the court to make or oppose a motion, or to present or oppose a petition, one dollar and twenty-five cents;

Arguing every special motion or petition, two dollars and fifty cents;

Arguing every cause, or attending for such argument pursuant to notice, three dollars and seventy-five cents;

But the foregoing fees shall be allowed only to one counsel on each side, who shall have been actually employed and rendered the service charged."

[102] Scott v. Elmendorf, 12 Johns. 315 (N. Y. 1815); Brooklyn Bank v. Willoughby, 3 Super. Ct. 669 (N. Y. 1847); Brady v. Mayor, etc. of New York, 3 Super. Ct. 569 (N. Y. 1848); Starin v. Mayor, etc. of New York, 106 N. Y. 82 (1887).

[103] 2 ABBOTT, NEW YORK CYCLOPEDIC DIGEST (1901) 232. "The taxable costs are not now the measure of the attorney's compensation."

[104] W. Watson, *A Rationale of the Law of Costs* (1893) 16 CENT. L. J. 306.

[105] It is unfortunate, for example, that Mr. Reginald Heber Smith in his excellent report "Justice and the Poor," published by the Carnegie Foundation for the Advancement of Teaching, fails to distinguish between court fees and costs. His criticism of "costs" is to a large extent concerned with fees. He fails to see, therefore, that a proper system of costs may be of great benefit to the poor litigant.

is commenced. But as the losing party does not have to pay the costs until after the action has been determined he is not thereby precluded from prosecuting his claim. Experience in England has shown that it is the wealthy defendant who suffers under this system for if he loses he will have to pay the plaintiff's costs, while if he wins he will not be able to collect his own from his unsuccessful and impecunious adversary. It is only where the law requires that a plaintiff, before commencing an action, shall give security for costs that the poor man is at a disadvantage. Strange to say, it is not in England but in some of the states, that this unfortunate provision exists. Mr. Smith has illustrated this in his "Justice and the Poor":

"How the existing system of costs literally forbids resort to the courts by the poor is illustrated by the laws requiring security for costs. A plaintiff must not only pay the costs [fees] for summons, service, entry, trial, judgment, and the like, but in addition he must, on motion, furnish a bond to guarantee that the defendant, if successful, shall not be out of pocket [costs]. In the Connecticut law, for example, the bond is in the sum of fifteen dollars in the City Court of Hartford and seventy-five in the Superior Court." [106]

To guard against such a denial of justice, the English Rules of Court are specific that security shall never be required in the court of first instance on the ground of the plaintiff's poverty.[107] The courts are strict in enforcing this rule, even in cases in which the plaintiff's claim seems to be a hopeless and unjustifiable one.[108] This solicitude for the poor litigant has a long history, for the first statute on the subject dates from 1495.[109]

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[106] SMITH, JUSTICE AND THE POOR (1919) 28.

[107] See Order 65, r. 6. The ordinary grounds on which security for costs are ordered is residence abroad of the plaintiff, or because the plaintiff's residence is not stated, or is incorrectly stated, in the writ of summons.

[108] Knight v. Ponsonby, [1925] 1 K. B. 545. The only exception to the general rule stated above is found in 51 & 52 VICT. c. 43, § 66 (1888) which provides that:

"In any action of tort, on an affidavit that the plaintiff has no visible means of paying the defendant's costs if plaintiff does not win the action, the defendant may—unless the plaintiff can satisfy the judge that he has a cause of action fit to be prosecuted in the High Court—obtain an order for him to give security for such costs, or for the action to be remitted for trial to a County Court to be therein named."

But even under this provision security need not be given if the judge is satisfied that the claim is a substantial one.

[109] See 4 HOLDSWORTH, A HISTORY OF ENGLISH LAW (1924) 537:

"Provision was made in 1495 for the poor man by the introduction of suits *in forma pauperis*. A statute of that year provided that poor persons should be entitled to writs without payment, and that judges should assign attorneys and counsel to act without fee. It was provided in 1531 that, when the unsuccessful plaintiff was a pauper, he should not be compelled to pay costs under this statute, but should suffer such other punishment

But the English system of costs is of advantage to the poor litigant in another way that is less obvious but even more important. As long as the cost of fighting a case is merely nominal, as it is under the American practice, the wealthy defendant, especially if the defendant is a corporation, will frequently refuse to pay a just claim on the chance of winning on a technicality or of tiring out the plaintiff. It is the poor man who cannot afford to wait for his money and can, therefore, be forced to accept an unfair settlement by fear of long delay. In England a defendant who knows that he has an uncertain defence to an action will pay the claim rather than face the danger of incurring heavy costs, while in America, as every lawyer knows, the courts are clogged both by claims that ought never to have been brought and by those that ought never to have been defended. It was primarily on this ground that the Massachusetts Judicial Council in its 1925 Report favored the English system of substantial costs:

"The possibility of having to pay the lawyer's bills of both parties to the action makes a plaintiff think twice before he sues out a writ and a defendant think twice before he defends an action which ought not to be defended, and that is a direct deterrent on the number of cases put or kept in suit." [110]

Another objection to the introduction of substantial costs is based on the view that the law at best is a gamble, and that it is unfair to penalize the losing party. Perhaps this is a result of the sporting theory of justice so well described by Dean

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as appeared reasonable to the judges. In the seventeenth century the practice appears to have been to tax the costs, and, if the costs were not paid, the court could adjudge that the plaintiff be whipped. But after the Revolution this practice seems to have been gradually discontinued. Holt C. J., on a motion that a pauper be whipped for non-payment of costs on a nonsuit, refused, saying that 'he had no officer for this purpose and never knew it done.' "

[110] FIRST REPORT OF THE JUDICIAL COUNCIL OF MASSACHUSETTS (1925) 63-64.

Unfortunately in the 1926 report the Judicial Council shelves the idea of costs, and substitutes in its place a recommendation on increased court fees. "While it is true, as we said a year ago, that the substantial costs between party and party would diminish the volume of litigation there is another policy which will have that effect if adopted by the Legislature. This other policy will give relief to the general taxpayer." The Council then recommends a considerable increase in court fees.

Although such an increase in the fees will undoubtedly decrease the amount of litigation, it will do nothing to affect the unfairness of the present system so well pointed out in the 1925 report. Nor will it prevent the parties from raising every technical objection, delaying the action whenever such a course is advantageous, filing great numbers of interrogatories, refusing to admit anything, forcing the opponent to prove facts which are not in dispute, and appealing against every adverse judgment.

Pound.[111] It is unfair to hit a man when he is down, and to give costs against the man who has lost seems to be perilously like it. This view has been strongly put in a recent article by Mr. Satterthwaite:

"The scheme urged [the loser to pay all costs] is based on the wholly unwarranted assumption that the losing party in litigation is always, or even ordinarily, in the wrong. Its sole justification must be that an adverse verdict by a jury or an unfavorable decision of the Court carries with it the necessary conclusion that the defeated party was morally culpable in bringing action, or in resisting suit, as the case may be. Nothing could be further from the actual facts of life. . . .

"An enlightened Judge must realize that, in spite of his most conscientious and painstaking efforts, he is, in a given case, as like as not to do injustice when he seeks to do justice." [112]

Is not the answer to this that the costs must be paid by one party or the other, and that, in spite of Mr. Satterthwaite's pessimism, it is at least more probable that the losing party was in the wrong? If New Jersey justice is so much a matter of luck, it hardly seems worthwhile to have courts and lawyers; it would be cheaper, and certainly less dilatory, to spin a coin.

There are, however, two objections to the adoption of the English system of costs as a whole which the writer considers more serious. The first one is a question of form. An English bill of costs goes into unnecessary details. As has been pointed out, every step, however minute and unimportant, is carefully listed and separately charged. Such meticulous exactitude could be avoided by allowing a lump sum for the numerous small items. On this point the Massachusetts Judicial Council has said:

"Though the principle of the English system of costs ought to be adopted, the system in detail would not and ought not to be made part of our jurisprudence. It is enough to read an English bill of costs to be convinced of that." [113]

The second objection is more fundamental. To allow the judge or the taxing Master such wide discretion as is inherent in the English system would be contrary to the general American conception of a judiciary bound by fixed rules. As the English judge has discretion both as to whether costs will be allowed and as to their quantum, it is obvious that the power given to him is considerable. It would, however, be possible to adopt a modified system of substantial costs which, while limiting to some extent the discretionary element, would nevertheless prevent the abuse of the legal process which follows from the American system.

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[111] THE SPIRIT OF THE COMMON LAW (1921) 127.

[112] Satterthwaite, *Increasing Costs to be Paid by Losing Party* (1923) 46 N. J. L. J. 133.

[113] *Supra* note 110.

Finally it may be noted that a number of recent federal and state statutes include provisions giving substantial costs to the successful party.[114] Thus the Clayton Act [115] allows the successful plaintiff to recover reasonable attorney's fees from the defendant. In *Scherzer v. Keller* [116] the opinion lists six instances in Illinois in which attorneys' fees are now made recoverable by one of the parties. These are, however, only isolated instances, and do not indicate that the use of substantial costs as a means of decreasing unfair and unnecessary litigation has been seriously considered in this country.

[114] 15 C. J. 114.

[115] See 38 STAT. 731, § 4 (1914), 15 U. S. C. § 15 (1926).

[116] 321 Ill. 324, 151 N. E. 915 (1926).