



1964

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Recommended Citation

Howard Greenberger, *The Cost of Justice: An American Problem, an English Solution*, 9 Vill. L. Rev. 400 (1964).

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THE COST OF JUSTICE: AN AMERICAN PROBLEM,
AN ENGLISH SOLUTION

HOWARD GREENBERGER†

“EVERYBODY’S DOING IT” — that old refrain that remains the bane of parents is particularly apropos of the reform of adjective law. The literature of judicial administration has grown apace in the past decade signaling the ferment for procedural reform that is sweeping the nation. Amidst the welter of new studies and proposals, it is interesting to note that little, if anything, has appeared concerning English procedure.¹

This past half-century has witnessed substantial procedural reform in almost every American jurisdiction. Despite these often herculean efforts, the nationwide picture remains anything but encouraging.² At best, our efforts at the elimination of intolerable court congestion have produced a breakthrough here, a relapse there. Prescription after prescription has failed to cure the fever and, in our frantic desire to preserve our judicial institutions, we have called for more judges, more courtrooms, and more effective pretrial procedure. Even less commendable nostrums and gimmicks have been advocated and attempted; however, the treadmill appears to frustrate our best efforts to such an extent that respected members of the profession have more and more frequently been heard to advocate fundamental changes. Initially, the threat of an administrative workmen’s compensation approach to personal injury litigation may have been intended as a spur to reform. As frustration increased, the threat became more palatable to many and is now proposed as a solution of merit.³

In the face of what many at the bar would feel to be an ominous departure from basic judicial concepts, the time has arrived when the English solution to this vexing problem of procedure be seriously considered. Such a study appears particularly justified as there are no judicial roadblocks in England such as exist in almost every American urban center. In the face of this fact it is noteworthy that their judicial manpower has remained comparatively stable for ninety years,

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1. KARLEN, *APPELLATE COURTS IN THE UNITED STATES AND ENGLAND* (1963).

2. INSTITUTE OF JUDICIAL ADMINISTRATION, *STATE TRIAL COURTS OF GENERAL JURISDICTION — CALENDAR STATUS STUDY — 1963*.

3. N.Y. Times, June 12, 1963, p. 35, col. 4.

despite the fact that the total population of England and Wales has increased from 22.7 million people to 43.5 million during the period in question.⁴ Obviously, there are a number of factors that contribute to this "consummation devoutly to be wished." The steady decline in the number of jury trials has certainly been of major significance; however, it appears clear that one of the elements contributing to the result is the costs system and its ancillary effects on judicial administration.

Underlying the costs system as it presently exists in English jurisprudence is a precept that only receives lip service in the United States. In England there is general accord on the proposition that damages should make the injured party whole.⁵ Moreover, if the tortfeasor or contract breaker refuses to honor the legitimate demands of the ultimately successful party and forces the latter to resort to litigation, he is considered to have increased the damages inflicted. Having done so and necessitated employment of solicitors and barristers, there is every reason to require him to pay for the expenses his successful adversary has had to incur. It will readily be discerned that the heaviest expenses arise as a result of the employment of solicitors and barristers,⁶ although court costs may and often do subsume a number of other items including court fees, witness fees, and stenographic charges.⁷ These generalizations are, of course, subject to numerous qualifications, some of which will be treated in this article, but suffice it to say that in the vast majority of cases the successful party to litigation will receive as part of his damages the costs incurred in obtaining a successful verdict.⁸

Obviously such a system is based on a proposition that many, if not a majority of American lawyers and judges, reject; that is, that in the majority of legal conflicts the rights are clear. The common

4. The population in millions per Queen's Bench Division Judge has gone from 1.26 to 2.18. INITIAL REPORT OF THE COMMITTEE ON SUPREME COURT PRACTICE AND PROCEDURE, Cmd. No. 7764, Appendix, C, p. 59.

5. Lord Cranworth stated in *Clarke v. Hart*, 6 H.L.C. 633, 667, 10 Eng. Rep. 1443, 1457 (1858): "I think that the general principle upon the subject of costs is, and ought to be . . . that the costs ought never to be considered as a penalty or punishment, but merely a necessary consequence of a party having created a litigation in which he has failed." Quoted with favor in *Foster v. Great W. Ry.*, 8 Q.B.D. 515, 517 (1882).

6. England — solicitor and barrister (or counsel); United States — attorney.

7. Costs include all those expenses of litigation which one party has to pay to the other and must be distinguished from "fees" which have to be paid by each litigant to the officers of the court. Fees ultimately become part of the bill of costs presented on taxation and hence some of the resulting confusion. The distinction is important, for fees normally must be paid to the court prior to any court action, while costs are taxed and become due only after unsuccessful litigation.

8. Two American jurisdictions have systems remarkably similar to that existent in England. ALASKA STAT. § 55-11-51 (1962); ORE. REV. STAT. § 20.010 (1953). For a more detailed description of the costs systems in the two states, see Greenberger, *Appellate Review in England and the United States — Who Bears the Ultimate Burden?* 1 DUQ. U.L. REV. 161 (1963).

law heritage and its mystique is still rather firmly imbedded in English jurisprudence and, although exceptions are readily acknowledged and provided for, the general theory operates on the basis of a law that is static, settled, and known to the public at large. Once this proposition is accepted it is not difficult to justify the operation of the costs system. However, if carried to its dryly logical extreme the system would verge on the absurd, and to prevent such a result a good measure of discretion has been vested in the courts to grant exceptions to the general pattern.⁹

For example, the system might be abused by the wealthy litigant who generates enormous costs in a relatively minor action and attempts to saddle his opponent with them.¹⁰ To avoid such abuse, objective standards are required.¹¹ They first appeared nearly a century ago and have become rather well developed. In its general review of the procedural system as it existed in 1953, the Supreme Court Committee on Practice and Procedure (Evershed Committee) recognized three standards as having won general acceptance,¹² namely, "party and party" taxation, "common fund" taxation, and "solicitor and own client" taxation.

The normal standard applied by the courts in the vast majority of cases is party and party taxation.¹³ On such a taxation the Taxing Master, who acts in a capacity similar to a Referee in Bankruptcy, will allow a party to expend a bare minimum in furtherance of his cause. He need not pursue his cause reasonably, but if he chooses to do otherwise, he will only be reimbursed for that portion of his costs which are reasonable, necessary, and proper. For the excess, which

9. Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. 5, c. 43, § 50. The bill of costs incurred by the successful party is subjected to a process of taxation before a Taxing Master, who by Ord. 65, r. 27(29), *Supreme Court Costs Rules*, is directed to allow only such costs, charges and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party. It is the duty of the Taxing Master to disallow all costs as appear to have been incurred or increased through overcaution, 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.

10. Despite the controls exercised by the taxing masters and the courts, the costs are substantial. In *Graigola Merthyr Co., Ltd. v. Swansea Corp.*, 45 T.L.R. (1920), the unsuccessful plaintiff had to pay more than \$350,000. The costs in the case of *Greene v. Levis and British Broadcasting Co.* which took up four weeks of the court's time, were estimated at \$85,000 to \$110,000. *Daily Herald*, May 28, 1955, p. 1, cols. 6-8. The highly publicized case of *Champagne Ass'n of Great Britain v. Costa Brava Wine Co., Ltd.*, resulted in a cost order of \$40,000. *Newsweek*, December 8, 1958, p. 41.

11. *Gibbs v. Gibbs*, [1952] 1 All E.R. 942 (P. 1952).

12. COMMITTEE ON SUPREME COURT PRACTICE AND PROCEDURE, FINAL REPORT, Cmd. No. 8878 (1954), § 721 (popularly known as the Evershed Report and hereinafter cited as *EV. REP.*).

13. "[O]n a taxation on that basis [*i.e.*, party and party] there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed." SUPREME COURT COSTS RULES 28(2).

might be considered luxuries, he will be on his own.¹⁴ This has been the accepted rule ever since 1875, and was most recently reaffirmed by the Evershed Committee.

Although by no means rare, the common fund standard¹⁵ is employed less frequently. It was originally termed solicitor and client taxation and is nothing more than party and party taxation on a more generous scale.¹⁶ In taxing costs on a common fund basis, the Taxing Masters allow fees and charges of increased size as well as items which would be considered luxuries under the normal taxation.¹⁷ This standard is applied in situations such as the following:¹⁸ (1) where costs are payable out of a fund owned by the unsuccessful party, (2) where solicitor and counsel are acting for a party under a disability, (3) where costs are chargeable to a fund in which both parties to the litigation have interests, and (4) where one or both of the parties is legally aided.¹⁹

The distinction between the standards is in great measure one of emphasis, for in neither instance will the taxing authorities impose outlandish costs.²⁰ The most that the eccentric litigant can hope to achieve is a measure of recovery based upon expenditures that a litigant spending his own funds might reasonably be expected to have incurred. On the other hand, the party and party standard sets as its goal a cost figure based upon a reasonable man doing the litigation as cheaply as possible inasmuch as another may have to bear the burden.²¹ It has been estimated that application of the common fund standard results in a fifteen percent higher bill, and thus it is eagerly sought by the successful party.²²

The third standard — solicitor and own client taxation — is more familiar to the American lawyer for it is present in our own juris-

14. *Smith v. Buller*, L.R. 19 Eq. 473, 475 (1875).

15. The Evershed Committee advocated the substitution of the term "full action costs" in order to distinguish this concept from the solicitor and own client taxation with its strikingly dissimilar incidents. *Ev. REP.* § 720.

16. In the promulgation of the *Supreme Court of Judicature Costs Rules*, (1959), effective January 1, 1960, the recommendation of a change of name was accepted, and the standard entitled "common fund basis of taxation."

"On a taxation on the common fund basis, being a more generous basis than that provided for by paragraph (2) of this rule [that is, party and party basis], there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and paragraph (2) of this rule shall not apply; and accordingly in all cases where costs are to be taxed on the common fund basis the ordinary rules applicable on a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested shall be applied, whether or not the costs are in fact to be so paid." *Id.*, Rule 4(4).

17. *Giles v. Randall*, [1915] 1 K.B. 290, 295 (C.A.).

18. *Gibbs v. Gibbs*, [1952] 1 All E.R. 942 (P. 1952).

19. *Legal Aid and Advice Act*, 1949, 12 & 13 Geo. 6, C. 51, p. 650.

20. *Peel v. London & N.W. Rwy. Co.* (No. 2), [1907] 1 Ch. 607.

21. *Id.* at 613.

22. *SACHS, LEGAL AID* 136 (1951).

prudence. Putting aside that rather extensive area of practice now covered by legal aid in England, the general rule is similar to that existent in the United States; namely, that it is for the lawyer and his client to determine what fee is to be paid. However, it is recognized in both countries that the client may well be at disadvantage in negotiating with his attorney or solicitor. The client is likely to be unaware of the complexities involved in his problem and place undue reliance on the advice proffered by his solicitor both as to his fee and that of the barrister. To prevent overreaching by the solicitor, the taxing masters and the courts employ the solicitor and own client standard. It normally approaches indemnification except in those instances in which it is felt that the solicitor has made an exorbitant or improper charge.²³ Although often considered an integral part of the English system of court costs, it can readily be seen that it is directed at a completely different problem and has little, if anything, in common with the other standards — party and party and common fund taxation.

The system of court costs is operative in the appellate courts as well as in the trial courts. Thus, an appeal may well result in a new direction as to costs, for, as a general rule, costs abide the ultimate result.²⁴ The unsuccessful litigant on appeal will normally find that he has been ordered to pay his adversary not only the disbursements and fees incurred in the primary action, but those incurred on the appeal.²⁵

The general pattern, sketchily set forth above, provides the framework for this article which will itself concentrate on the exceptions to the rules regarding costs. At the outset, it should be noted that the costs system was not originally intended as a means to effective judicial administration, nor is it primarily directed to that goal today. However, it has contributed to the efficiency of the English judicial system and is undoubtedly destined to continue to do so.

Since the costs of an action include a multitude of charges and expenses, including attorney's fees, a plaintiff who carries and dis-

23. "Generally speaking the decision of the Master on taxation is final: he is the sole judge of the fact, whether the business has been done, and of the proper charge to be made for it; and it is further his duty to inquire whether the business was required to be done; for if the solicitor negligently or ignorantly takes any unnecessary proceedings, it is the duty of the Master to protect the client from any charge in respect of such proceedings. The court will only interfere where the Master acts upon some mistaken principle." *Alsop v. Lord Oxford*, 1 My. & K. 564 (1833), quoted with favor in *Estate of Ogilvie*, [1910] 243, 244 (C.A.).

24. "In the case of an appeal the costs of the proceedings giving rise to the appeal, as well as the costs of the appeal and of the proceedings connected with it, may be dealt with by the Court hearing the appeal. . . ." SUPREME COURT COSTS RULES 1959, 4(2).

25. *In re Barangah Oil Refining Co.*, 36 Ch. D. 702 (1887); *Ex parte Hauxwell*, 23 Ch. D. 626 (1883); *Chard v. Jervis*, 9 Q.B.D. 178 (1881); *Hussey v. Horne-Payne*, 8 Ch. D. 670 (1878).

continues his action on the eve of the trial may well have incurred quite a substantial amount of the costs expended by his adversary. When coupled with his own expenditures, the incentive to early settlement becomes quite apparent. Thus, the very existence of the costs system encourages settlements, discourages procrastination, and stimulates speedy, efficient trials.²⁶ Much as the effect of taxation on every business transaction must be considered by the astute lawyer, so the effect on costs of every contemplated act must be considered by the solicitor.

The early view as to costs was summed up in a dictum in *Foster v. Great W. Ry.*,²⁷ where Lord Justice Cotton quoted with favor from *Clarke v. Hart*:²⁸ "I think that the general principle upon the subject of costs is, and ought to be . . . that the costs ought never to be considered as a penalty or punishment, but merely as a necessary consequence of a party having created a litigation in which he has failed."²⁹ Even as early as 1882 the viewpoint of the judiciary had begun to change, and recognition was given to the efficacy of costs as an instrument of administration. It must be remembered that *Clarke* was decided before the Supreme Court of Judicature Act delegated the extensive discretion to the judges that they now enjoy. Clearly, the appellate courts have now recognized that costs may be used for the purpose of doing substantial justice as between the parties, regulating the flow of cases to various courts and controlling the actions of parties before the tribunals.³⁰ Various recommenda-

26. A recent work of fiction about the English bar reported the following colloquy between a barrister and a judge. The discussion involved a subsidiary item of damage that was being contested for want of proof of its value.

"What is the item not agreed?"

"A pair of trousers, me Lud. I can't think why my learned friend won't admit it."

"Let me see," said the judge. "You're claiming £7 10s. They were new, I suppose?"

"Oh, yes, me Lud."

"You want to fight the pair of trousers, do you, Mr. Ferret?" asked the judge.

"Well, my Lord, no bill has been produced nor have the trousers."

"Well, I hope we're not going to spend too much time on them," said the judge. "If we do, one side or the other would be able to buy a whole suit with the amount expended in costs."

Cecil, *BROTHERS IN LAW* 22 (1950).

27. 8 Q.B.D. 515, 517 (1882).

28. 6 H.L.C. 633, 10 Eng. Rep. 1443 (1858).

29. *Id.* at 667, 10 Eng. Rep. at 1457.

30. Suggestions of this nature were made to the Temporary Commission on the Courts of the State of New York. The following is pertinent: "Suggestions have been made that some demands for jury trials would be deterred by the adoption of higher fees to be paid by the party making the jury demand. Another suggestion is that provision be made whereby the plaintiff (except where the defendant has refused to consent to transfer to a lower court) would be liable for the defendant's costs unless he recovered by judgment at least the maximum jurisdictional amount of the next lower court. A third suggestion is that a penalty be exacted from a plaintiff who has unreasonably refused a settlement offer made at a pretrial hearing if he fails to recover by judgment at the trial an amount at least equal to that offered. Similarly,

tions of the Evershed Committee's report assume not only the legality, but also the advisability of such action.

Despite differences in court organization, the organization of the legal profession, and organized legal assistance between the United States and England, a number of similar problems have arisen. That the costs system has been effectively employed by the English to mitigate these problems appears significant and instructive.

Despite the propensity in all lawyers for procrastination, the English judicial system is not beset by the intolerable delays that so many American jurisdictions report.³¹ The very existence of the costs system discourages delaying tactics and destroys much of their economic benefit. Rule three of the Supreme Court Costs Rules is specifically directed to the problem of repeated postponements and adjournments:

The costs of and occasioned by any application to extend the time fixed by the Rules of the Supreme Court, 1883, or any direction or order thereunder, for delivering or filing any document or doing any other act (including the costs of any order made on the application) shall be borne by the party making the application, unless the Court otherwise orders.³²

The analogous problem of delaying amendment of pleadings was considered in the recent case of *Anglo-Cyprion Trade Agencies, Ltd. v. Paphos Wine Indus., Ltd.*³³ The plaintiffs pleaded that the wine supplied by the defendants was unsound, unmarketable, and of inferior quality, and requested the return of the full purchase price of two thousand nine hundred and twenty-eight pounds. In their answer, the defendant asserted that the taint was so slight that it could easily be put right, and, therefore, that there was no breach of contract or at worst a minimal one that could be compensated for by trivial damages. Only after the trial had commenced did plaintiffs request permission to amend their pleadings to incorporate damages based on defendant's answer. Their request was granted, and it was on that basis that they prevailed, albeit for only fifty-two pounds. Mr. Justice Devlin, in considering the appropriate costs order treated the case as one where only nominal damages had been recovered. The ordinary rule in that instance, he stated, was that "when plaintiff has been successful, he ought not to be deprived of his

a penalty would be assessed against a defendant who has unreasonably refused to pay a demand made at a pre-trial hearing where the plaintiff, upon trial, recovers a judgment in excess of that demand." PRELIMINARY REPORT TO THE GOVERNOR AND LEGISLATURE 42 (1954).

31. INSTITUTE OF JUDICIAL ADMINISTRATION, STATE TRIAL COURTS OF GENERAL JURISDICTION — CALENDAR STATUS STUDY — 1963; MEGARRY, LAWYER AND LITIGANT IN ENGLAND (1962).

32. SUPREME COURT COSTS RULES, 1959, 3(4).

33. [1951] 1 All E.R. 873 (K.B. 1951).

costs, or at any rate, made to pay the costs of the other side, unless he has been guilty of some sort of misconduct. I do not think that a plaintiff who recovers nominal damages ought necessarily to be regarded as a 'successful' plaintiff."³⁴ Having determined that the amendment was a necessary one, and not merely technical, he went on to note that it is customary in such instances for the defendant to request, and the judge to grant, that any late amendment of pleadings not affect costs. Thus, "the success on the amendment ought not to make any difference to the order which I would have made if the pleadings had stayed as they were originally and judgment had been entered accordingly";³⁵ that is, for the defendants.

The costs order rendered in *Harvey v. Municipal Permanent Investment Bldg. Soc'y*³⁶ was grounded on the same reasoning. The plaintiff had made, with leave of the court, a major amendment in the pleadings after the defendant had prevailed in a counterclaim and had received a costs order in its favor. On appeal, the plaintiff ultimately received judgment, but the court held that inasmuch as the decision of the trial court was correct on the pleadings then before it, the costs order should not be disturbed. Hence, where the court finds a plaintiff unreasonably delaying a final determination of rights, there is an effective means of dealing with him. Perhaps even more importantly, this power acts as an incentive to prospective dawdlers.

Clearly a case of delay in instituting an action, amounting to more than mere procrastination, is enough cause in equity for denying any recovery at all on the ground of laches. However, in cases of simple procrastination where the defendant has been put to no real disadvantage by the loss of evidence or the like, the court still has power to award costs against the party who fails to act with due diligence. In *Bourne v. Swan & Edgar, Ltd.*,³⁷ the plaintiff, although aware of defendant's trademark for over five years, had not moved to expunge it from the trademark register until the defendant brought an infringement action against him. Although the court held that the expunging action would lie, they ordered the plaintiff to pay three-fifths of the taxed costs of the action. The court stated that "unless therefore, the action or neglect of the applicants has put the respondent at some unfair disadvantage, it appears to me that his laches is sufficiently vitiated by punishment in the way of getting no costs if he should succeed."³⁸ Closely related thereto is Costs Rule 3(5) which

34. *Id.* at 874.

35. *Id.* at 876.

36. 26 Ch. D. 273 (1884).

37. [1903] 1 Ch. 211.

38. *Id.* at 219.

provides that failure to admit documents or facts within a six day period, when called upon to do so, will result in a costs order for the expense of proving same against the delaying party.³⁹

The area of appellate procedure is replete with instances in which the efficacy of costs as an administrative tool has been demonstrated. On appeal in a 1949 case,⁴⁰ the four respondents who were all interested in the residue under a will were represented by three different counsel. The Master of the Rolls, Lord Greene, stated:

. . . that when appeals are brought to this court and there are several parties in precisely the same interest with precisely the same arguments who below may have been separately represented, it is the duty of the solicitors concerned to do everything possible to avoid unnecessary costs in this court. In this present case with a little goodwill and with a desire to avoid multiplication of costs one set of costs only should have been incurred.⁴¹

Accordingly, the court allowed only one set of costs, these to be shared among the four respondents.

Just as delay in amendment of pleadings may result in deprivation of costs, so may delay in formulating one's successful line of argument on appeal. In *Cooper v. Cooper*,⁴² the House of Lords considered the validity of an ante-nuptial contract made by an infant. The appellant failed to argue "reduction"⁴³ until she arrived in the House of Lords, and it was on this point that she ultimately prevailed. The House agreed with Lord Halsbury that "this may affect the costs; and . . . ought to affect costs to the extent that . . . the successful appellant ought not to get the costs of such an appeal which was brought and successfully argued upon a point not passed upon in the Court below either by argument or evidence."⁴⁴ A similar result obtained in *Simpson v. Crowle*⁴⁵ where the appellant first raised a question of jurisdiction on appeal. The case was finally determined on that issue, and the appellate court refused costs to the successful appellant inasmuch as the issue was not raised in the lower court.

Costs have also been denied where the appellant succeeded on fresh evidence never presented to the lower court.⁴⁶ If the issue had

39. SUPREME COURT COSTS RULES, 1959, 3(5).

40. *In re Gilson*, [1949] 1 Ch. 99.

41. *Id.* at 107.

42. 13 App. Cas. 88 (1888).

43. Reduction — an action for the purpose of setting aside or rendering null and void some deed, will, right, and so forth. OPPE, WHARTON'S LAW LEXICON 851 (14th ed. 1938).

44. 13 App. Cas. 88, 101 (1888).

45. [1921] 3 K.B. 243.

46. *Ex parte Hauxwell*, 23 Ch. D. 626 (1883).

been raised, or the evidence proffered, the need for appeal might well have been obviated.⁴⁷

The judicial discretion is frequently exercised by the court where the prevailing party is only partially successful on the appeal. In *Port of London Authority v. Cairn Line*,⁴⁸ the plaintiff prevailed, albeit only on a minor point, while the defendants raised a number of points on which they failed. The court indicated that both sides had avoided trying the real question in dispute between them; accordingly, no costs were awarded to either side. The decision rendered in *William v. Stanley Jones & Co.*,⁴⁹ was to similar effect. The appellant succeeded on a minor issue involving fourteen pounds while occupying three days of the time of the High Court and increasing the costs of one side alone to over two hundred pounds. Furthermore, the appellee was sustained on by far the great majority of the points in contention, and therefore no costs were allowed the prevailing party.

At the present time, appeal to the House of Lords is strictly regulated, and leave to appeal must be obtained from either the House of Lords or the Court of Appeal. Such leave is often granted on condition that the costs of both sides be paid by the appellant.⁵⁰

Far more rare are those instances where the appellate court determines that the prevailing party should bear its own costs inasmuch as its conduct justified the appellant's resort to the higher court.⁵¹ Furthermore, there have been a few instances where the courts have noted that inasmuch as the questions involved were new, difficult, and of general importance, the losing party should not be saddled with the burden of paying the costs incurred by the successful party.⁵²

Undoubtedly, one of the important problems in any judicial system is the regulation and distribution of the flow of cases. In a system such as that existent in England, where some cases may be initiated either in the county courts or the High Court of Justice, the power over costs may be utilized quite effectively to channel cases into the less congested county courts. This is of great benefit to the litigant of modest means, for not only are court fees smaller, but costs generally are lower in the county courts.

47. *Accord*, *Chard v. Jervis*, 9 Q.B.D. 178 (1882).

48. 82 L.J.K.B. 340 (1913).

49. [1926] 2 K.B. 37.

50. *Re Ashton's Estate*, 158 L.T.R. 441 (1938); *Re Drake's Settlement*, 157 L.T.R. 559 (1937).

51. *Paterson v. St. Andrews Provost*, 6 App. Cas. 833 (1881).

52. *In re Mersey Ry. Co.*, 37 Ch. D. 610 (1888); *Ex parte Walton*, 17 Ch. D. 746 (1881). The discretion to vary from the general rule as to costs has also been exercised in cases where the law was changed while the appeal was pending from the judgment below. *Luther v. Sagor*, [1921] 3 K.B. 532.

Pursuant to the County Courts Act of 1959,⁵³ a county court has jurisdiction, subject to some limitations, to hear and determine any action founded upon contract or tort when the amount in issue is not more than four hundred pounds. In an effort to encourage resort to the county court in lieu of an action in the High Court, the same act provides as follows:

Where an action founded on contract or tort is commenced in the High Court which could have been commenced in the County Court and the action is not referred for trial to an official referee, then . . . the plaintiff (a) if he recovers a sum less than three hundred pounds, shall not be entitled to any more costs of the action than those to which he would have been entitled if the action had been brought in the County Court; and (b) if he recovers a sum less than seventy-five pounds, shall not be entitled to any costs of the action. . . .⁵⁴

The section quite obviously implements the desire of the legislature that cases involving lesser amounts be handled with dispatch. In order to prevent injustice arising out of the application of the section, any High Court judge may grant an exception to its terms if he finds that there was reasonable ground for supposing that the amount recoverable under plaintiff's claim would be in excess of the jurisdictional limit of the county courts, namely four hundred pounds.⁵⁵

When an action is remitted to a county court, it is the usual practice to leave the costs to the county court judge's discretion. He may be of the opinion that the case ought never to have been commenced in the High Court, marking his disapproval of the plaintiff's action in his order as to costs. Where the action could not normally have been commenced in a county court (for example an action for defamation) it is obvious that he must award costs on the High Court scale in respect to all proceedings taking place prior to remission to the county court.⁵⁶

The Evershed Committee took especial note of the effectiveness of utilizing costs to deter small claimants from suing in the High Court. A number of its recommendations were embodied in the new County Courts Bill.⁵⁷ In discussing the bill in the House of Lords, Lord Kilmuir, L.C., explained that its general aims were to make justice more speedy, less expensive, but no less just.

In order to accomplish these purposes, the bill provided for an increase in county court jurisdiction from two to four hundred pounds,

53. 7 & 8 Eliz. 2, ch. 22.

54. 7 & 8 Eliz. 2, ch. 22 § 47.

55. *Id.* at § 47(3).

56. 1 ANNUAL PRACTICE 1852 (Diamond ed. 1962).

57. County Courts Act 1959, 7 & 8 Eliz. 2, ch. 22.

a small increase in the county court judiciary, and an extension of legal aid to actions in the county courts. It has been estimated that although a case can be heard in the county courts within six weeks of issuance of summons, there is infrequently as long as a year's delay in the High Court. Although generalizations as to costs may often be misleading, the Evershed Committee estimated that in personal injury actions costs run two hundred and fifty percent higher in the High Court. This substantial difference is accounted for by larger counsel's and solicitor's fees, increased allowances for expert witnesses, and stenographic assistance. Although justice is a rather intangible quality, the number of reversals or varied decisions of the county courts compare favorably with the record of the High Court.⁵⁸

One final group of cases deserves attention. It includes the vexatious prosecutions brought by litigious parties — actions which are often of little social or economic merit. No one denies the right of the plaintiffs to prevail; however, under the present state of the law, the right to recover costs is often withheld.

A most interesting example of the use of the discretion to deny costs is the case of *Gulbenkian v. British Broadcasting Corp.*⁵⁹ Nuban Gulbenkian, the wealthy and picturesque son of the fabulously wealthy oil financier, sued the BBC for breach of contract, charging that they had failed to supply him with a telerecording of an interview he had granted them. BBC would not give him the recording because it contained defamatory matter which had been deleted from the broadcast version. Gulbenkian had delivered the invective against the Gulbenkian Foundation, founded by his late father, and the manner in which the Foundation handled the funds at its disposal. Justice Glyn-Jones found that there had been a breach of contract, but that due to the substantial risk of an action for defamation by the Foundation trustees, it would be undesirable to encourage further dissemination of the defamatory matter. Accordingly, he awarded Gulbenkian a nominal two pounds and directed him to pay the court costs, which were estimated to have amounted to approximately forty thousand dollars.⁶⁰

The breach of promise action involved in *Gamble v. Sales*⁶¹ was equally farcical in result. The defendant, a pensioner in a veteran's hospital, had agreed to marry the plaintiff before leaving for military service. He was subsequently injured and refused to conclude the

58. In a typical year the Court of Appeal heard 581 appeals from the High Court and revised or varied decisions in 173; it also heard 207 appeals from the County Courts and reversed or varied thirty-eight. *The Law's Delay*, THE ECONOMIST, May 28, 1955, p. 747.

59. N.Y. Times, July 28, 1962, p. 7, cols. 1 & 3.

60. *Accord*, Anglo-Cyprian Trade Agencies, Ltd. v. Paphos Wine Indus. Ltd., [1951] 1 All E.R. 873 (K.B. 1951).

61. 36 T.L.R. 427 (1920).

marriage. Although there were few, if any, prospects of satisfying a judgment, the plaintiff brought the action and the defendant's plea, that he was entirely unfit to marry, was not made out. The court could not find that the evidence sustained his plea that marriage would be dangerous to his life or disastrous to the state by the begetting of idiot children. Nonetheless, the judge felt that actions which are of only dubious advantage to the plaintiff should be discouraged and therefore denied plaintiff her costs.

Perhaps a more common occurrence is the suit for nominal infringement of a trademark. *American Tobacco Co. v. Guest*⁶² involved a retail trader who innocently purchased a small quantity of cigarettes which turned out to be an infringement of plaintiff's trademark. The court acknowledged that the plaintiff was entitled to an injunction, but felt it was not its duty to saddle the defendants with costs in such a case. He thought that this type of action was to be discouraged, for the party who placed the spurious goods on the market was the real culprit deserving prosecution, not an "innocent" retailer.

Not only have prevailing plaintiffs been denied costs, but unsuccessful plaintiffs have, on occasion, been saved from paying the defendant's expenses. In the case of *Borthwick v. The Evening Post*,⁶³ an old established newspaper, *The Morning Post*, sued to enjoin the use of a similar name, *The Evening Post*, by the defendant newspaper. The Court of Appeals held that although the new name might be calculated to deceive the public, there was no probability of injury to the plaintiff. The injunction was denied, but due to the nature of the deception attempted by defendant, no costs were awarded against plaintiff.

It is in the area of unfair tactics and burdensome conduct that the court's discretion as to costs is most effectively employed. For example, where a defendant, who has a good defense by statute, such as the statute of limitations, misleads his opponent into supposing that he will not utilize the defense, the court may well deprive the defendant of his costs.⁶⁴ The extraordinary case of *Parkinson v. College of Ambulance, Ltd. & Harrison*⁶⁵ is perhaps the clearest illustration of this exercise of judicial power to prevent oppressive acts by a party defendant. Parkinson entered into an illegal contract with Harrison, agent of the ambulance society, who promised that he would arrange for the grant to Parkinson of a knighthood if he made a substantial donation to the society. After contributing three thousand pounds and failing to receive the title, Parkinson sued for the return of the dona-

62. [1892] 1 Ch. 630.

63. 37 Ch. D. 449 (1888).

64. *In re Speight*, 13 Q.B.D. 42 (1884); *In re Blyth & Young*, 13 Ch. D. 416 (1880).

65. [1925] 2 K.B. 1.

tion. The court was clear that he could not prevail, but denied Harrison his costs inasmuch as he "increased the costs of the litigation by denying the fraud, and having a long cross-examination administered to the plaintiff, and has not gone into the witness box or called any witnesses to meet it."⁶⁶ In summation, the court characterized Harrison's actions as oppressive.

Where both parties take unreasonable, extreme positions, and therefore unduly exacerbate the litigation, the courts deny costs to either side without hesitation.⁶⁷ They also do so where one or both of the parties obstinately insists on a vindication of rights by expensive means when inexpensive resolution of the dispute is possible. Such was the case in *Young v. Thomas*⁶⁸ where an action was brought for a declaration that the plaintiff was entitled to an estate in fee simple to an undivided moiety of an undivided sixth part of certain hereditaments. Four other actions were brought, for similar declarations, against the same and other defendants as to other undivided shares of the same hereditaments. It appeared that none of the shares claimed was valued at more than fifteen pounds and four of them were valued at less than ten pounds each. Defendants failed to put in a statement of defense and judgment went for the plaintiffs. However, Justice Kekewich "being of the opinion that so many actions for such small amounts were unnecessary and oppressive, and not being convinced that the defendants would not have acceded to the plaintiff's demands without litigation, if properly applied to, refused any of the plaintiffs their costs up to the hearing."⁶⁹

Few would be so bold as to suggest that the adoption of the English costs system is the solution to all the problems that beset our judicial system. Certainly the relative efficiency of the administration of justice in England is due to a number of factors, only one of which is the system of costs.

However, as an increasing amount of attention is paid to measures for procedural reform, thoughtful consideration should be given to the English practice for it has the merit of efficiency. One potential point of criticism deserves special attention. Bearing in mind the uncertainty of many points of law, some reviewers have felt that it is particularly iniquitous to saddle the losing party with the still greater burden of costs.⁷⁰ However, as Professor Gower has so aptly stated, "[U]nder

66. *Id.* at 17.

67. *Petty v. Parsons*, [1914] 2 Ch. 653.

68. [1892] 2 Ch. 134.

69. Costs were also denied the successful party in *Diamantide v. Grosvenor Sec.*, [1937] 1 All E.R. 703, inasmuch as undue delay resulted from the presentation of irrelevant evidence. *Accord*, *Ellis v. Leader*, 22 T.L.R. 574 (1906).

70. Goodhart, *Costs*, 38 *YALE L.J.* 849 (1929); Loesch, *Reducing the Cost of Justice*, 22 *NAT'L MUNIC. REV.* 427 (1933); Lyman, *Our Obsolete System of Taxable*

our Common Law it has always been the case that the individual litigant is made to pay for the clarification of the law for the benefit of the general public."⁷¹

Although this result is axiomatic under our common law system, it, standing alone, hardly justifies an increase in the expense of the unsuccessful party. Other factors, however, lend substance to the argument in favor of a meaningful system of costs. Certainly, weight must be given to the desire of a successful party to be made whole by the recovery, and the salutary effect of costs on judicial congestion can scarcely be ignored. In our earnest efforts to avoid something akin to the costs system, we have perpetrated an injustice of a far greater order; namely, deprived many of our citizens of a forum for a speedy resolution of their judicial controversies. As Mr. Justice Jackson summed it up shortly before his death: "Delayed justice has become little less than scandalous."⁷²

Costs, 25 CONN. B.J. 148 (1951); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931); Williamson, *Costs*, 7 Mo. B.J. 63 (1936); Note, *Problems in Allowance of Attorney's Fees in America*, 21 VA. L. REV. 920 (1935); 44 ILL. L. REV. 507 (1949).

71. Gower, *The Costs of Litigation*, 17 MOD. L. REV. 1, 13 (1954).

72. 41 A.B.A.J. 336 (1955).