[COURT OF APPEAL]

ABSE AND OTHERS v. SMITH AND OTHERS

1985 Nov. 27, 28; Dec. 11

Sir John Donaldson M.R., May and Glidewell L.JJ.

Solicitor—Right of audience—High Court—Unopposed proceedings in open court—No advocacy skills necessary—Solicitor wishing to exercise right of audience—Whether Bar having exclusive right of audience—Whether solicitor to be granted right of audience—Courts' power to vary established procedure

The parties to a libel action agreed to settle it on terms embodied in a statement in open court pursuant to R.S.C., Ord. 82, r. 5(2), and a statement was accordingly approved by all the parties. The solicitor for the first defendant took the view that the fee payable to counsel for reading out the statement was unnecessarily expensive and sought the leave of the judge to read it in open court himself. Leonard J., after hearing argument in open court presented by counsel, held that he had no general discretion to allow a solicitor to appear before the court to read such a statement, and, in the absence of any special consideration, there was no reason to depart from the established practice, and he refused the application.

On appeal by the first defendant:—

Held, dismissing the appeal, that members of the Bar had a general right of audience in the High Court and the Court of Appeal whereas solicitors did not, but that the right of the Bar was not a monopoly right which would be infringed by an extension of solicitors' rights; that, although every court retained the power of regulating its own proceedings, the public interest required that there should be known practices and procedures in the High Court which should not be changed by individual judges on the basis of personal views; and that, accordingly, since there was no special feature to justify the exercise of a general discretion to depart from the established practice of the High Court, the judge had rightly refused the application (post, pp. 547B–E, 553C–H, 555D–E, 556B).

Per curiam. (i) Limitation of the categories of person whom the courts are prepared to hear as advocates is necessary in the public interest to ensure that advocates have the requisite standards of skill and probity and to maintain a high professional standard, involving a skilled appreciation of how conflicts of duty are to be resolved (post, pp. 545D–E, G, 546A–C, 555F–H, 556B).

(ii) The well-established proposition that every court has inherent power to regulate its own practices, unless fettered by statute, or, possibly, by ancient usage, applies to the judges of that court collectively as well as individually and it is for the judges collectively—as a collegiate body—to decide whether or not to modify established general practices and to promulgate such modifications by practice directions. It is for the judges of the High Court to regulate the practices of the High Court and for the judges of the Court of Appeal to regulate those of that court (post, pp. 555A–C, D–E, 556B).

Decision of Leonard J. affirmed.

The following cases are referred to in the judgments:

Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd. [1981] A.C. 909; [1981] 2 W.L.R. 141; [1981] 1 All E.R. 289, H.L.(E.)

Butterworth v. Butterworth (1913) 57 S.J. 266

Cobbett v. Hudson (1850) 15 Q.B. 988

Collier v. Hicks (1831) 2 B. & Ad. 663

Connelly v. Director of Public Prosecutions [1964] A.C. 1254; [1964] 2 W.L.R. 1145; [1964] 2 All E.R. 401, H.L.(E.)

Doxford & Sons Ltd. v. Sea Shipping Co. Ltd. (1897) 14 T.L.R. 111

Drake v. Morgan (1858) 27 L.J.P. & M. 3

Elderton, In re, Ex parte Russell (1887) 4 Morr. 36, C.A.

Engineers' and Managers' Association v. Advisory, Conciliation and Arbitration Service [1979] 1 W.L.R. 1113; [1979] I.C.R. 637; [1979] 3 All E.R. 223, C.A.

Greene, In re (Practice Note) [1941] W.N. 110, D.C.

London Engineering and Iron Shipbuilding Co. Ltd. v. Cowan (1867) 16 L.T. 573

O'Toole v. Scott [1965] A.C. 939; [1965] 2 W.L.R. 1160; [1965] 2 All E.R. 240, P.C.

Practice Note [1947] W.N. 218, D.C.

Practice Note (Judges' Rules) [1964] 1 W.L.R. 152; [1964] 1 All E.R. 237, C.C.A.

Reg. v. Denbighshire Justices, Ex parte Evans (1846) 15 L.J.Q.B. 335; 9 Q.B. 279

Rondel v. Worsley [1967] 1 Q.B. 443; [1966] 3 W.L.R. 950; [1966] 3 All E.R. 657, C.A.

Serjeants at Law, In re the (1839) 6 Bing. N.C. 187; (1840) 6 Bing. N.C. 232

Shaw v. Shaw, The Times, 6 August 1983

The following additional cases were cited in argument:

Birmingham Citizens Permanent Building Society v. Caunt [1962] Ch. 883; [1962] 2 W.L.R. 323; [1962] 1 All E.R. 163

Lincoln v. Daniels [1962] 1 Q.B. 237; [1961] 3 W.L.R. 866; [1961] 3 All E.R. 740, C.A.

Marsh v. Joseph [1897] 1 Ch. 213, C.A.

Reg. v. Doutre (1884) 9 App. Cas. 745, P.C.

Reg. v. L.C.C. Education Committee Staff Sub-Committee, Ex parte Schonfeld (Practice Note) [1956] 1 W.L.R. 430; [1956] 1 All E.R. 753, C.A.

S. (A Barrister), In re [1970] 1 Q.B. 160; [1969] 2 W.L.R. 708; [1969] 1 All E.R. 949

Stewart Chartering Ltd. v. C. & O. Managements S.A. (Practice Note) [1980] 1 W.L.R. 460; [1980] 1 All E.R. 718

APPEAL from Leonard J.

The plaintiffs, Leo Abse, Tam Dalyell, Andrew Bennett, Judith Hart, Ian Mikardo, Norman Atkinson, Hugh Brown, Robert Parry, Ray Powell, Reg Race, John Maxton, Joan Maynard, Stanley Thorne, Bob Cryer, Leslie Huckfield, Stuart Holland, Jo Richardson, Dennis Skinner, Alan Roberts, Andrew Faulds, Dennis Canavan, Ernest Roberts,

Appeal Tribunal and the county courts. That does not really help, because, at least in the case of the Employment Appeal Tribunal, they were given for special reasons. When the courts hear the wife or son of a litigant such a person is usually treated as an extension of the litigant, avoiding the need for a McKenzie man. It is a pragmatic approach which probably does not bear too close an analysis. That is really what was being done in the *Engineers' and Managers' Association* case. Lawton L.J. justifies it on a slightly different ground, and says that since trade unions were unknown to the law in 1831 there could be no ancient usage. That could be said in many situations, and is not good reasoning.

The authority of the judge to hear whom he likes in any manner is exceptional only. It cannot be made into a rule. The principle is that if a court cannot do justice without making an exception to the general rule, then it can make an exception. *Reg. v. Denbighshire Justices, Ex parte Evans*, 15 L.J.Q.B. 335; 9 Q.B. 279, does not assist.

The Bar's right of audience cannot be shown to have existed from time immemorial; the mists of obscurity may have descended after 1189. The right of the Crown to stand jurors by developed after the Crown's right of peremptory challenge was taken away by statute in 1385, which shows that a rule of law can develop after 1189.

Pannick in reply. In the *Engineers' and Managers' Association* case I rely not on the reasons there given, but on the broad principle stated by Lord Denning M.R. at p. 1116H.

On the question whether there is a custom and practice preventing the court from amending its practice, see *Reg. v. L.C.C. Education Committee Staff Sub-Committee, Ex parte Schonfield (Practice Note)* [1956] 1 W.L.R. 430, where the Court of Appeal exercised a discretion to change its practice in a particular case notwithstanding long custom and practice to the contrary. The existence of custom and practice to the contrary does not fetter the court and prevent it from acting in pursuance of expedient dispatch of business.

On the exercise of discretion by a particular judge I rely on the *L.C.C. Education Committee* case. There was no indication there that that particular court thought that it could not be done without consultation. That must also be true of the High Court.

The High Court has changed its practice on litigants in person: see *In re Greene (Practice Note)* [1941] W.N. 110 and *Practice Note* [1947] W.N. 218.

Cur. adv. vult.

11 December. The following judgments were handed down.

SIR JOHN DONALDSON M.R. All the parties to this appeal are well known in public life, but the appeal itself is only marginally about their dispute. Essentially it is about the parts played by the two branches of the legal profession in the administration of justice. As such it is of no little public interest and importance.

The story begins in June 1982 when Mr. Cyril Smith M.P. gave an interview to Radio Trent. It was the time of the Falklands crisis and Mr.

A Smith commented adversely on the conduct of Mr. Leo Abse M.P. and other members of Parliament in voting as they did. The word "treason" was mentioned. The interview was broadcast and Mr. Abse, together with 24 other members of Parliament, sued Mr. Smith and Radio Trent for libel. As is not unusual in such cases, time has proved a great healer and by November 1984 the parties had agreed that the matter could be settled by an explanation and apology in the form of a statement in
B open court pursuant to R.S.C., Ord. 82, r. 5(2).

This procedure involves the preparation of an agreed script of what the parties or their counsel intend to say in open court and its approval by the judge before whom they will be appearing. The first draft of the agreed statement was prepared by Mr. Alastair Brett, who is a solicitor. It appears that his primary employment is as senior legal assistant with
C Times Newspapers Ltd., the publishers of "The Times" and "The Sunday Times," but that, with the consent of his employers, he also has a small private practice based upon his home address, most of his clients being personal friends. It was in the context of this private practice that Mr. Brett came to advise Mr. Smith in the capacity of London agent for Mr. Smith's Rochdale solicitors. The draft agreed statement was
D circulated to other parties to the action and approved by them with minor modifications. Mr. Brett then consulted very experienced counsel who had settled the defence (not Mr. Pannick) and he approved the draft with one amendment. This in turn was accepted by all the parties.

All that then remained was for arrangements to be made for the statement to be made in open court and this task was entrusted to counsel's clerk. On 2 October 1985 counsel's clerk told Mr. Brett that
E the statement could be made on 7 October. It seems that at this stage Mr. Brett, for the first time, inquired what would be counsel's fee for this appearance. He was quoted a figure which he has characterised as "ridiculously expensive." Upon further inquiry whether less experienced counsel would appear for a lesser fee, it emerged that the fee of the most junior member of the chambers would be one which Mr. Brett
F considered to be "unnecessarily expensive." In this situation Mr. Brett decided that he would seek the leave of the court himself to appear and to read the statement on behalf of Mr. Smith. With this in view, he saw Leonard J., the judge concerned, on 4 October 1985 in his private room. The judge considered that to give his consent would involve a departure from the general practice of the courts and that, in the circumstances, he should hear argument in open court before reaching a
G conclusion. He also considered that he would need the assistance of an amicus curiae. A new date was therefore fixed for the hearing, namely 18 October 1985.

At this stage it appears that both Mr. Brett's employers, Times Newspapers Ltd., and The Law Society became interested and they agreed to defray the cost of instructing Mr. Pannick to appear on behalf
H of Mr. Smith and to submit that Mr. Brett should be allowed to read the statement in open court. Mr. R. Griffiths, of counsel, appeared as amicus curiae.

The judge was referred to various authorities and accepted that he had a discretion in a situation of emergency to allow a solicitor to

appear on behalf of his client and to address the High Court in open court, as contrasted with chambers. However, it was not suggested that this was such a situation. All that was said was that no skills as an advocate were involved in this particular appearance, the Royal Commission on Legal Services had recommended that solicitors should be heard by the superior courts where proceedings were formal or unopposed which, it was submitted, was the case here and that, bearing in mind Mr. Brett's authorship of the statement, it would be more appropriate and economical that it should be read by him rather than by specially briefed counsel.

The judge refused the application, saying:

> "It seems to me that if there were a general discretion in the court to allow persons other than barristers to appear before the court the situation which is in contemplation in the present case is the sort of situation which might attract the discretion of the court in its favour, because there seems to be no possibility of real complication arising from the mere making of a prepared statement in open court. So the real issue in this case, as it seems to me, is whether there is a general discretion . . . I do not think that I am in a position where I can make a general exception by exercising a general discretion in favour of solicitors being allowed to read statements in open court. This, I emphasise, is not, as other cases have been, a question of emergency. There is no established practice which would allow Mr. Brett to read the statement. I do not think that it is within my power at this stage to alter the established practice in a general way. I emphasise that by deciding the matter in that way I am not putting Mr. Smith in any real difficulty. If he wanted to he could come and address the court himself."

Mr. Smith has appealed to this court and Mr. Pannick has again appeared on his behalf. No other party to the action has appeared or been represented, but we have received invaluable assistance from Mr. Andrew Collins as amicus curiae, who was instructed at short notice following an application by Mr. Pannick which led us to believe, mistakenly as I now know, that the settlement of the action might be imperilled by any delay. In the event there has been the fullest argument and we have now to address ourselves to the following issues. (1) Was Leonard J. mistaken in thinking that, in the circumstances of this case, he had no discretion to permit a solicitor to appear on behalf of Mr. Smith? (2) If he was so mistaken, should he have exercised that discretion in favour of granting permission and, on appeal, should we do so? (3) If he was right, have we any greater discretion on appeal and, if so, how should we exercise it? (4) If neither he nor we have such a discretion, have the judges generally, or the judges of the High Court and the judges of the Court of Appeal separately, in relation to their respective courts, any power to change the general practice of the court to grant audience only to litigants in person or to counsel?

No decision on this last issue is necessary for the determination of this appeal, but I have no doubt that it is in the public interest that we

A should consider it. I say this because both branches of the legal profession and the Lord Chancellor's Department have under consideration the desirability of changes in the general practice of the courts and they need to know what are the powers of the judiciary in this context. Whether, assuming that the judges have such powers, they should exercise them is not, of course, a matter for a single division of the Court of Appeal and I propose to express no view on that aspect.

B Limitation of the categories of persons whom courts are prepared to hear as advocates for parties to proceedings before them is, so far as I know, a feature of all developed systems for the administration of justice. In our own jurisdiction the categories are defined by reference to the possession of particular professional qualifications, there being no limitation in the case of members of the Bar and some, but very far C from total, limitation in the case of members of the solicitors' branch of the profession. In many, and possibly most, other jurisdictions it takes the form of "licensing" individual lawyers to practise in specified courts or courts at a particular level or courts in a particular district, province or state. I use the word "licensing," not in a strict or technical sense, but as indicating some formality which directly or indirectly grants the lawyer a standing permission to appear before and practise in the court D concerned. Occasionally in Commonwealth countries the "licence" is granted to a lawyer with an overseas legal qualification and is limited to appearing before that court in a particular cause or matter.

These limitations are not introduced in the interests of the lawyers concerned, but in the public interest. The conduct of litigation in terms of presenting the contentions of the parties in a concise and logical E form, deploying and testing the evidence and examining the relevant law demands professional skills of a high order. Failure to display these skills will inevitably extend the time needed to reach a decision, thereby adversely affecting other members of the public who need to have their disputes resolved by the court and adding to the cost of the litigation concerned. It may also, in an extreme case, lead to the court reaching a wrong decision.

F We are fortunate in this country in having a legal profession, both of whose branches aspire to, and usually attain, equally high standards of professional skill. However, partly as a result of the existing practices of the courts in relation to rights of audience and partly as a result of the Bar's rules of conduct which prevent barristers from doing solicitors' work, their skills and experience are undoubtedly different.

G But quite apart from the public interest in ensuring that advocates appearing in the courts have the requisite standard of skill, there is another and even more important requirement. Here there is no difference between what is expected of the members of each branch of the profession. This is the requirement of absolute probity. The public interest requires that the courts shall be able to have absolute trust in H the advocates who appear before them. The only interest and duty of the judge is to seek to do justice in accordance with the law. The interest of the parties is to seek a favourable decision and their duty is limited to complying with the rules of the court, giving truthful testimony and refraining from taking positive steps to deceive the court. The

interest and duty of the advocate is much more complex, because it involves divided loyalties. He wishes to promote his client's interests and it is his duty to do so by all legitimate means. But he also has an interest in the proper administration of justice, to which his profession is dedicated, and he owes a duty to the court to assist in ensuring that this is achieved. The potential for conflict between these interests and duties is very considerable, yet the public interest in the administration of justice requires that they be resolved in accordance with established professional rules and conventions and that the judges shall be in a position to assume that they are being so resolved. There is thus an overriding public interest in the maintenance amongst advocates not only of a general standard of probity, but of a high professional standard, involving a skilled appreciation of how conflicts of duty are to be resolved.

These high standards of skill and probity are not capable of being maintained without peer leadership and pressures and appropriate disciplinary systems and the difficulty of maintaining them increases with any increase in the size of the group who are permitted to practise advocacy before the courts. Furthermore, whilst the need for high standards of probity is universal, the occasions upon which problems of conflict of interest or duty will arise are more frequent in some courts or stages of proceedings than in other. Again the general standard of professional skill demanded is not the same in all courts and at all stages of proceedings. In some courts it is higher than in others due to the complexity or specialised nature of the legal problems which may be expected to arise. Accordingly there is a public interest in ensuring that the size of the group of permitted advocates is not unduly large and, in the context of special skills, that the group is smaller in the case of some courts than of others. Against this must be set the public interest in ensuring the availability of qualified advocates in sufficient numbers and places and at a cost which will deny no one the services of such an advocate when the interests of justice so require.

I have ventured to emphasise the fact that restrictions upon rights of audience are, or should be, imposed solely in the public interest, because whilst sectional interests may understandably prompt suggestions for their removal or modification as well as resistance to these suggestions, those with the power amd duty to amend them must, and I do not doubt will, have regard solely to the public interest.

This appeal is concerned with rights of audience of solicitors in the High Court, such rights being in general governed by practice and not by statute. Save as is noted below in relation to bankruptcy matters, the same rights obtain in the Court of Appeal and the decision on this appeal is thus applicable to both courts. The position is slightly different in relation to the Crown Court, which forms the third element in the Supreme Court, since under section 83 of the Supreme Court Act 1981 and its predecessor, section 12 of the Courts Act 1981, the Lord Chancellor is empowered to give directions that solicitors may appear in, conduct, defend and address the court in any proceedings in the Crown Court, or proceedings in the Crown Court of any description specified in the direction. It is also different in relation to the Employment Appeal

Tribunal, which is a superior court of record, and the county courts, where both barristers and solicitors have a right of audience conferred by statute. Such rights can only be restricted by statute, apart from an inherent right in all courts to refuse to hear any individual barrister or solicitor who is so conducting himself and this course is essential to the proper administration of justice.

All members of the Bar have a general right of audience in the High Court and Court of Appeal, but by the rules of the profession they are required to refrain from exercising it until they have completed certain post-qualification training. Solicitors have a general right of audience in the High Court when sitting in chambers, whether before a judge or a master and this seems to extend to their responsible representatives: *Halsbury's Laws of England*, 4th ed., vol. 44 (1983), p. 47, para. 69(4). They also have a special right of audience in the High Court, including the Divisional Court, in bankruptcy matters, which is based upon statute: *Halsbury's Statutes*, 4th ed., vol. 4 (1985), p. 620, note to section 152 of the Bankruptcy Act 1914. It does not apply in the Court of Appeal (*In re Elderton, Ex parte Russell* (1887) 4 Morr. 36) but has been extended to hearings of matrimonial judgment summonses in open court in the Family Division of the High Court, that jurisdiction having been transferred to its predecessor, the Probate Divorce and Admiralty Division, from the Bankruptcy Court in 1932: see Debtors Act (Matrimonial Causes) Jurisdiction Order 1932 (S.I. 1932 No. 503), *Rayden on Divorce*, 14th ed. (1983), vol. 1, p. 972 and *Shaw v. Shaw*, The Times, 6 August 1983.

For the purposes of this appeal, it is sufficient to say that members of the Bar do, and solicitors do not, have a right of audience in the High Court when sitting in open court and for this reason Mr. Brett had to apply for leave to be heard by Leonard J. and Mr. Pannick did not.

This brings me to the power of a judge of the High Court to give permission for a solicitor, or indeed anyone else other than a barrister or a litigant in person, to be heard. The point arose indirectly in *Collier v. Hicks* (1831) 2 B. & Ad. 663 in the context of the right of an attorney to appear before magistrates on behalf of the informer upon the laying of an information. Lord Tenterden C.J. said, at pp. 668–669:

> "The question raised in this case is not whether any person has a right to be present on the trial of an information before a magistrate as long as he conducts himself with decency and propriety, nor whether any one, whether attorney or counsel, or of any other description of persons, may or may not be present and takes notes, and quietly give advice to either party: but the question is, whether any one is entitled, without permission of the magistrates, and as a matter of right, to attend and take part in the proceedings as an advocate, by expounding the law, and examining the witnesses. This was undoubtedly an open court, and the public had a right to be present, as in other courts; but whether *any* persons, and *who* shall be allowed to take part in the proceedings, must depend on the discretion of the magistrates; who, like other judges, must have the power to regulate the proceedings of their own courts. The superior courts do not allow every person to interfere in their proceedings as

an advocate. but confine that privilege to gentlemen admitted to the Bar by the members of one of the Inns of Court. They do not allow attorneys to act as advocates; and in one of them (the Court of Common Pleas), even all gentlemen of the Bar are not allowed to exercise *all* the duties of advocates; but the full privilege of so doing is confined to those who are of the degree of the coif. So doctors of the civil law are not entitled to act as advocates in the courts at Westminster, although they may do so by special permission of those courts. So at the quarter sessions, the justices usually require that gentlemen of the Bar only should appear as advocates; but, in remote places, where they do not attend, members of the other branch of the profession are permitted to act as advocates. Persons not in the legal profession are not allowed to practise as advocates in any of these courts."

Littledale J. said, at p. 670:

"Every court of justice has the power of regulating its own proceedings. In the superior courts in Westminster Hall, when barristers attend, they only are permitted to act as advocates. Perhaps if they did not attend, attorneys might be heard as advocates. There is a difference even in the superior courts in this respect. In the Common Pleas barristers only of a certain rank and degree are permitted to plead."

Parke J. said, at p. 672:

"No person has a right to act as an advocate without the leave of the court, which must of necessity have the power of regulating its own proceedings in all cases where they are not already regulated by ancient usage. In the superior courts, by ancient usage, persons of a particular class are allowed to practise as advocates, and they could not lawfully be prevented; but justices of the peace, who are not bound by such usage, may exercise their discretion whether they will allow any, and what persons, to act as advocates before them."

This judgment of Parke J. was referred to by Lord Denman C.J. in *Reg. v. Denbighshire Justices, Ex parte Evans* (1846) 15 L.J.Q.B. 335; 9 Q.B. 279. The issue was whether the court should quash an order of the justices that the Bar be granted exclusive rights of audience if four or more barristers were present at quarter sessions. Unfortunately in a crucial respect the reports differ. The Law Journal reports the Lord Chief Justice as saying:

"It is a most important rule that all courts of justice should have the power of regulating their own proceedings. The exception alluded to by my Brother Parke does not apply to the present case, where the question is between two branches of the profession."

In the Queen's Bench report he is quoted as saying:

"The exception mentioned by Parke J. does not reach the present case, but those only in which, by usage, some privilege is given to particular persons exclusively."

The next authority is the intriguing case *In re the Serjeants at Law* (1839) 6 Bing. N.C. 187; (1840) 6 Bing. N.C. 232. The rank and status of serjeant was granted to some barristers by Royal Patent and, prior to 1834, they alone were permitted to practise as advocates in the Court of Common Pleas. In 1834 King William IV by Royal Warrant authorised other barristers to practise in that court: see p. 234. It seems that at the time the validity of the warrant was accepted by the serjeants, perhaps because collaterally it gave them some seniority over barristers subsequently appointed King's Counsel: see p. 236. However, in 1839 its validity was challenged by Serjeant Wilde appearing on behalf of himself and four other serjeants. It is not without interest that in argument (see p. 190) he recalled that at some stage a memorial had been presented to the Crown seeking the withdrawal of the warrant and that this had been referred to the Privy Council. There the law officers had not sought to uphold the warrant, stating in express terms that "They apprehended that the matter rested with the judges, who alone had the power to regulate the practice of the court." Tindal C.J., giving the judgment of the court said, at pp. 237–238:

> "Now, we think the question before us turns upon the single point, whether the serjeants at law have, by the constitution of the court, and consequently by law, held and enjoyed the sole and exclusive privilege, by virtue of their office or degree of serjeant, of practising, pleading, and audience in the Court of Common Pleas; for if they are so entitled, we think they cannot be deprived of it by a warrant from the Crown under the sign manual, nor indeed by any power short of an act of the whole legislature . . . from time immemorial the serjeants have enjoyed the exclusive privilege of practising, pleading and audience in the Court of Common Pleas. Immemorial enjoyment is the most solid of all titles; and we think the warrant of the Crown can no more deprive the serjeant who holds an immemorial office of the benefits and privileges which belong to it, than it could alter the administration of the law within the court itself. The rights and privileges of the serjeant, and rights and privileges of the peer of the realm, stand upon the same foundation, immemorial usage."

The judgment nevertheless recognised that emergency situations could arise in which the court would have to permit others to plead and practise before it "in order to prevent a failure in the administration of justice to the Queen's subjects, for which end all courts of justice were instituted" (pp. 238–239) and indeed when the court reasserted the exclusive rights of audience of the serjeants, barristers were permitted to conclude all matters pending before the court in which they had been instructed.

No one today would quarrel with the proposition that it is not open to the Crown, by prerogative or executive act, to alter the usages and practices of the courts and that to achieve changes which the judges did not themselves think it right to institute would require an Act of Parliament. What I find more surprising is that a right of audience should be regarded as a property right appurtenant to a rank or dignity.

However, the position of a serjeant at law was clearly distinguishable from that of a member of the Bar, since it was based upon patents from the Crown and seems to have been regarded as an office under the Crown. The Court of Common Pleas was later opened to the Bar by the Practitioners in Common Pleas Act 1846 (9 & 10 Vict. c. 54).

In *Cobbett v. Hudson* (1850) 15 Q.B. 988, a wife was refused permission to appear on behalf of her husband in a civil cause on the grounds that it would be better that her husband should be represented by a member of the Bar, if necessary without honorarium, than that she should "come into court to wrangle at nisi prius, and engage in scenes inconsistent with the character of her sex" (see p. 989). However, Lord Campbell C.J. said that it would have been otherwise if her husband had been seeking a writ of habeas corpus as on such occasions the liberty of the subject was at stake and great inconvenience might arise from refusing to hear a wife or any person on behalf of a party who was under restraint. The practice in relation to habeas corpus seems to have changed by 1941 when Humphreys J. with the concurrence of the Lord Chief Justice (Viscount Caldecote), stated that applications for such writs had to be made by counsel to the exclusion of the right of the applicant himself to be heard unless sufficient ground was shown to justify a departure from this practice: *In re Greene* (*Practice Note*) [1941] W.N. 110. However, by 1947 there had been a further change and litigants in person were allowed themselves to apply for prerogative writs: *Practice Note* [1947] W.N. 218.

Drake v. Morgan (1858) 27 L.J. P. & M. 3 is not directly relevant, but is of historical interest in that upon the transfer of probate matters from the Prerogative Court, which did not confine rights of audience to counsel, to the Courts at Westminster Hall, the practices of the latter courts prevailed, including that whereby all motions in court had to be made by counsel.

In the context of an appeal in which it is urged that a solicitor should have been permitted to appear in connection with an unopposed application, it is worthy of note that in *London Engineering and Iron Shipbuilding Co. Ltd. v. Cowan* (1867) 16 L.T. 573, 574, Byles J. refused to allow the defendants' attorney to appear and consent to a verdict for the plaintiff for an agreed sum and is reported to have done so "for the sake of members of the Bar."

The Law Journal for 17 November 1883 records, 18 L.J. 617, under the heading "Obiter Dicta" that in the course of a case before Smith J. the defendant's sole counsel left the court to attend to another matter. After a short adjournment, the judge called upon the defendant's solicitor to proceed with the case, but he was also absent and "the only alternative was to put the defendant into the witness box until the truant counsel appeared." The anonymous contributor, who must surely have been a member of the Bar, remarked that if any counsel present had objected to the solicitor being heard there would have been no answer to the objection since "Nothing short of an Act of Parliament can take away the exclusive privilege of counsel in this matter, and the only person entitled to address the court in the absence of counsel is the party himself."

A The reports contain references to two other instances of solicitors being given or offered a right of audience upon the unexpected absence or disappearance of counsel, namely *Doxford & Sons Ltd. v. Sea Shipping Co. Ltd.* (1897) 14 T.L.R. 111 where the solicitor appeared and cross-examined a witness and *Butterworth v. Butterworth* (1913) 57 S.J. 266, where Sir Samuel Evans P. refused to hear a solicitor's clerk, but indicated that he would have heard him if he had been a qualified B solicitor.

It is, of course, well settled that a litigant in person may be advised by a solicitor and this was extended slightly, without consideration of any principles involved, when in *Rondel v. Worsley* [1967] 1 Q.B. 443 the plaintiff, who was appearing in person, was allowed to put in a written argument which had been prepared by an independent solicitor C who was voluntarily advising him in connection with his claim that barristers were no longer immune from actions for negligence.

No review of the authorities would be complete without a consideration of the opinion of the Privy Council in *O'Toole v. Scott* [1965] A.C. 939, albeit it was an appeal from the Supreme Court of New South Wales and concerned magistrates' courts. The informant, a police officer, laid an information against the defendant alleging a D breach of road traffic regulations. When the case was heard, the magistrate gave permission for the prosecution case to be presented by another police officer. The Justices Act 1902 of New South Wales (No. 27 of 1902) provides by section 70(2) that "The prosecutor or complainant may himself, or by his counsel or attorney, conduct his case . . ." and, by section 74:

E > "If, upon the day and at the time and place appointed by the summons . . . the informant or complainant does not appear in person or by his counsel or attorney, but the defendant attends . . . the justice or justices shall dismiss the information or complaint unless for some reason he or they think proper to adjourn the hearing . . ."

F There was no suggestion that the law of England differed from that of New South Wales in any material respect.

The defendant had sought a writ of prohibition requiring the magistrate not to enforce the order whereby he had been convicted and fined £2. His primary contention was that the statute deprived the justices of any discretion to permit the information to be prosecuted G other than by the informant or his counsel or attorney. That contention failed, but there was an alternative contention, namely that (a) any discretionary power must be exercised specially in a particular case and not by way of a general practice and (b) that the discretionary power is properly exercisable only when its exercise is necessary for the administration of justice and not when it is merely desirable for convenience and expedition and efficiency in the administration of H justice. Both contentions were rejected, Lord Pearson saying, at p. 959, that there was no statutory limitation upon the discretion which was an element or consequence of the inherent right of a judge or magistrate to regulate proceedings in his court.

The nature and scope of the High Court's inherent powers were considered in *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] A.C. 909 and in *Connelly v. Director of Public Prosecutions* [1964] A.C. 1254. In the *Bremer Vulkan* case Lord Diplock said, at p. 977, that the phrases "inherent power" and "inherent jurisdiction" should be confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice. In *Connelly's* case Lord Devlin said [1964] A.C. 1254, 1347:

> "the judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides."

It is in the exercise of this power that practice directions are given and that the Judges' Rules were formulated by a committee of judges and promulgated on behalf of the judges as a collegiate body: see *Practice Note* (*Judges' Rules*) [1964] 1 W.L.R. 152.

The last authority to which I need refer is *Engineers' and Managers' Association v. Advisory, Conciliation and Arbitration Service* [1979] 1 W.L.R. 1113. It is not only the latest and the only relevant decision of this court, but it is that which is most strongly relied upon by Mr. Pannick. On the hearing of the appeal, Mr. Hickling, the Deputy General Secretary of the United Kingdom Association of Professional Engineers, which was a small trade union with very limited resources, sought leave to intervene and personally to make representations on its behalf on a comparatively minor aspect which could affect it.

Lord Denning M.R. referred to the new status of a trade union as a legal entity, but not one to be treated as if it were a body corporate, and to the statutory provisions governing rights of audience in the Employment Appeal Tribunal and the County Court, both of which would have allowed Mr. Hickling to be heard. He then said, without further explanation, at p. 1116:

> "I do not think that the High Court or the Court of Appeal should be in any different position. . . . The general rule in the High Court and the Court of Appeal is that we only hear members of the Bar. But we do allow exceptions when the circumstances make it desirable. Take litigants in person. Sometimes we have heard a husband speaking for his wife: or a son speaking for his mother: and so forth. So also it seems to me that with this new thing—a trade union which is a legal entity but not a body corporate—we can ourselves decide whom we should allow to speak on its behalf. In the ordinary way I should have thought that a trade union as a legal entity—especially a large trade union with ample funds—on a complicated matter would think it right and proper to employ a solicitor to conduct the proceedings and instruct counsel to appear in the High Court to put its case on its behalf. While that is the general rule, it seems to me it can be subject to exceptions. If the

court in its discretion thinks it right to make an exception, then it can do so."

Lawton L.J. said, at p.1117, that the practice of the court must be adjusted to deal with the rights of audience of trade unions and that the court should regulate its own procedure in the way proposed by Lord Denning M.R. Cumming-Bruce L.J. agreed.

There appears to be no primary legislation which is relevant to the issues in this appeal. So far as subordinate legislation is concerned, R.S.C., Ord. 5, r. 6 provides that any person may begin and carry on proceedings in the High Court by a solicitor or in person and that a body corporate may not begin or carry on proceedings otherwise than by a solicitor. Ord. 12, r. 1 makes similar provision for defendants. Neither of these rules, nor any other rule, is concerned with appearance as an advocate, as the omission of any reference to counsel makes clear.

This appeal is concerned with extending the rights of audience of solicitors and not with curtailing the rights of audience of barristers. Unless, therefore, the right of members of the Bar is a monopoly right which would be infringed by any extension of the rights of solicitors, it is unnecessary to consider whether ancient usage has rendered the Bar's rights inviolable, except by Parliament. Parke J. in *Collier v. Hicks* (1831) 2 B. & Ad. 663 certainly suggested that members of the Bar could not be denied a right of audience, but he is not reported as having said that it was an exclusive right. This extended view of the Bar's right of audience is only supported by an interpretation of Parke J.'s judgment attributed to Denman C.J. in one of the two reports of *Reg. v. Denbighshire Justices, Ex parte Evans*, 15 L.J.Q.B. 335 and, perhaps, by the reported remark of Byles J. in *London Engineering and Iron Shipbuilding Co. Ltd. v. Cowan*, 16 L.T. 573, 574, that it existed "for the sake of members of the Bar." Such a view would be quite inconsistent with the practice of the High Court to allow persons other than members of the Bar to appear in exceptional circumstances. Finally, it would be surprising, to say the least, if the courts had allowed a right to arise which could fetter their inherent power to regulate their own practices in the interests of enabling them to act effectively within their jurisdiction. I do not therefore consider that the rights of audience of the Bar constitute any obstacle to extending the rights of audience of solicitors.

It was not contended before Leonard J. or before this court, that this was a "one-off" case in which the court could not act effectively unless a solicitor was permitted to appear. Had this been the situation, Leonard J. would, on the authorities, have been abundantly justified in permitting Mr. Brett to appear. Instead it was conceded that this case was typical of many other more or less formal and unopposed proceedings in the High Court, in respect of which the practice of the court has always been to limit rights of audience to the parties in person and to counsel appearing on their behalf. The departure from established practice which was sought was said to be justifiable and even necessary for five reasons. (1) The hearing was a formality involving no skills of advocacy whatsoever. (2) In 1979 the Royal Commission on Legal

Services had reported as follows under the heading "Minor Extensions of Rights of Audience" (Cmnd. 7648), at p. 219:

> "18.61 In its evidence to us The Law Society suggested a number of minor proceedings in the High Court and Crown Court which it considered could be handled by solicitors. As an example, it suggested that, in the High Court, solicitors should appear in unopposed applications for adjournments and other purposes, or to mention terms of settlement to the court. It would be inappropriate for a solicitor to make an application for an adjournment which is opposed and which may be refused, for in that event the case would have to proceed. But where proceedings are formal or unopposed, we consider they should be dealt with by the most economical means possible and that for this purpose a solicitor should have the appropriate right of audience—if, indeed, the matter cannot for any reason be dealt with by letter or telephone."

(3) The Government in its response to the report had said (Cmnd. 9077), p. 19:

> "The Government accepts that a solicitor should have a right of audience to deal with certain formal matters in any court and is considering which matters should be covered by such an extension."

(4) The Senate of the Inns of Court and the Bar had responded similarly. (5) The public interest required such an extension in a solicitor's rights of audience.

I confess to some surprise that the views of the Government were prayed in aid of this application. It is fundamental that the courts are wholly independent of the executive. If and in so far as the Government was impressed by considerations of the public interest, those same considerations might indeed be relevant, but the views of the Government as such are not. If the Government wishes to give effect to those views, it can only do so by persuading Parliament to legislate.

Different considerations may be thought to apply to the views of the Royal Commission and of the Senate, but, in the end, in so far as individual judges, or the judges collectively, have power to alter the established practices of the court, they must be guided solely by their own view of what is required in the interests of the efficient and effective administration of justice.

Leonard J. rightly approached the application that Mr. Brett be heard as an advocate on the basis that he was being asked to exercise a general discretion to depart from the established practice of the High Court in a situation in which there were no exceptional features. In my judgment, he was wholly right to refuse. The public interest requires that there shall be known general practices and procedures in the High Court and that these shall not be changed or departed from piecemeal by individual judges on the basis of their personal view of what those practices and procedures should be.

The Court of Appeal is an appellate court which could only intervene if (a) it considered that Leonard J. had failed to appreciate the width of his discretion or had misdirected himself in its exercise or (b) Leonard J.

had been bound by the authority of a divisional court which this court was prepared to overrule as being erroneous in law. Neither is the case and I would therefore affirm the judge's decision.

This leaves only the question of how the established practices and procedures of the High Court and of this court can be modified if the public interest so requires. In my judgment the well established proposition that every court has inherent power to regulate its own practices, unless fettered by statute or, possibly, by ancient usage, applies to the judges of that court collectively as well as individually and it is for the judges collectively—as a collegiate body—to decide whether or not to modify established general practices and to promulgate such modifications by practice directions. And I stress the words "the judges of that court." It is for the judges of the High Court to regulate the practices of the High Court and for the judges of this court to regulate those of the Court of Appeal. The only concern of this court with the practices of the High Court is in an appellate capacity, namely to consider whether individual judges of the High Court are correctly applying the general practices of that court, subject always to their discretion to depart therefrom in appropriate circumstances.

This appeal has served the useful purpose of causing us to consider the powers of the judiciary in relation to matters of practice and procedure. Subject to any further appeal, I do not doubt that the judges will now give consideration to whether and to what extent those powers should be exercised.

MAY L.J. I have had the advantage of reading in advance the judgment which has just been given by Sir John Donaldson M.R. and with which I wholeheartedly agree. I merely add a few comments of my own in order to emphasise what I think are the most important of the points which have arisen in this case.

First, I have no doubt that it is essential for the proper administration of justice in the courts of this country and the maintenance of the rule of law throughout the land that every court must retain the untrammelled power of regulating its own proceedings at least in all cases where these are not already regulated by ancient usage or statute.

Secondly, from the accumulated wisdom of the courts, as exemplified in the authorities to which Sir John Donaldson M.R. has referred, as well as from my own experience both as advocate and judge, I think that it is essential that those who act as advocates in our courts, particularly in the higher courts such as the Crown Court, the High Court and above, should be members of a profession or professions subject to a strict code of discipline and etiquette and who have been thoroughly trained and practiced in the skills of advocacy, in the proper and expeditious conduct of litigation and in the law. One of the most important factors tending not only to the just, but also to the swift, determination of litigation, which is so desirable, is that those who act as advocates for the litigants concerned have been thoroughly trained and are indeed adequately experienced to do so.

Whilst it may be that some unopposed applications made in open court in the High Court could without disadvantage be conducted by

those who are not members of the Bar with the training and experience to which I have referred, I think that any changes in the practice to permit this to be done should be carefully considered to ensure that the public interest is indeed being served. For I agree with Sir John Donaldson M.R. that the overriding concern in the matters to which this case has drawn attention is that of the public interest. I have no doubt that both branches of the profession have this well in mind and will only suggest or countenance any charges in established practice which are clearly demonstrated to be in that interest.

GLIDEWELL L.J. I agree with both the judgments delivered. I have tried, but failed, to think of something I could usefully add.

Appeal dismissed.
No order as to costs.
Leave to appeal refused.

Solicitors: Alastair J. Brett for J. Bright Clegg & Son, Rochdale; Treasury Solicitor.

R. C. W.

REGINA v. SECRETARY OF STATE FOR TRANSPORT *Ex parte* GREATER LONDON COUNCIL

1984 Dec. 3, 4, 5, 6, 7, 10, 11, 12, 13;
1985 Jan. 11

McNeill J.

Crown—Minister—Statutory powers—Statute transferring control of transport authority—Determination by minister of grant payable by former controlling body for rest of financial year—Former controlling body not consulted—Determination failing to make sufficient allowance for grant already paid—Grant containing provision for needs beyond first year—Whether direction unlawful—Whether certiorari available to quash part only of ministerial direction—Whether unlawful sums capable of excision—London Regional Transport Act 1984 (c. 32), s. 49(1)

On 29 June 1984 the London Regional Transport Act 1984 transferred control of the London Transport Executive ("L.T.E."), the body responsible for running London transport services, from the Greater London Council ("G.L.C.") to the Secretary of State for Transport, renaming it London Regional Transport ("L.R.T.").