On Civil Procedure

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Introduction

It has been rightly said that lawyers must learn to appreciate some of the more basic assumptions that are made by their counterparts in other countries and of the consequences of them.[2] Common lawyers must not, of course, fall into the trap of supposing that all continental systems are the same, but Western European countries do have a common heritage in the Romano-canonical procedure of Byzantium.[3] This makes it possible to differentiate on a broad scale between common law and continental systems and to suggest that, in terms of assumptions, the fundamental difference is that the common law system assumes that there will be a trial while the continental assumes no such thing. In other words – and it really is 'in other words' – the fundamental division between the two principal families of procedural law of the Western world is that between those legal systems which do – or did in the past – make use of the civil jury and those to which the civil jury has always been unknown.

The significance of this to the fact-finding process as such lies in the fact that the members of a jury can be brought together only for a single session; once it came to be settled that the jury must decide on the basis of materials presented to it in court – largely, if not entirely, by word of

[1] Based principally on a report delivered to the Colloquium of the United Kingdom National Committee of Comparative Law on 'The Option of Litigating in Europe' in 1991, published as chapter 10 of Carey Miller. The chapter also draws on an article published under the title 'The Parties, the Judge and the Facts of the Case' in M. Taruffo *et al.* (eds.), *Studi in Onore di Vittorio Denti* (1994), Vol. II, p. 233.

[2] D. Edward, 'Different Assumptions – Different Methods', SSC Biennial Lecture 1990, published by the Society of Solicitors in the Supreme Court of Scotland. See also Edward, 'Fact-finding – A British Perspective', in Carey Miller, p. 43.

[3] The Romano-canonical influence can be detected in the procedure of the old Court of Chancery, but it played no part in the formation of the procedure of the common law. Scottish civil procedure may be classified as a common law procedure for present purposes since civil jury trial was introduced into Scotland in 1815. See Edward, 'Fact-finding', p. 46.

mouth – the essential characteristic of the trial was established. 'Trial' means a single uninterrupted session of the court at which all the evidence furnished by the parties is presented once and for all.

On the continent of Europe the civil jury never emerged, and there is no compelling need for a single session trial where professional judges deal with all aspects of a case. Continental procedure has nothing that corresponds to the common law trial and the word 'trial' itself is untranslatable. When continental lawyers write in English they tend to use the word 'trial' to refer to the proceedings as a whole.[4]

More is involved here than a mere matter of language. There is a divide – perhaps no longer unbridgeable given recent developments on both sides of the Channel, but a divide none the less. The basic assumption of the common law is – or was until recently – that the information on which the judgment will be founded is supplied to the court only at the trial. On the continent, no such assumption is, or could be, made: on the contrary, provision is made for the information on which the decision will be founded to come in piecemeal. Both types of system see the legal process as consisting of two principal stages, the first of which is preparatory. However, common lawyers see the business of the preparatory stage as preparation for trial; the others see it as preparation for decision. What is more, once the decision stage has been reached, it is, virtually by definition, too late for additional information about the facts to be offered to the court. It is during the preparatory stage – the 'instruction', as it is known in France – that the court acquires the information on which its decision will be based.

This being so, it is almost inevitable that the process of 'fact-finding' should be differently conducted in the two systems, but before turning to that it is necessary, first, to say a word about the constitution of the action and, secondly, about the concept of fact-finding as such.

The constitution of the action and the parties' documents

Whether it is seen as a matter of principle, as it usually is, or as no more than an unavoidable necessity, as it might be in an avowedly inquisitorial system of procedure, it is undoubted that it is for the parties, at least in the first instance, to allege the facts that form the basis of their claims and defences. An account of the process of fact-finding must, therefore, refer at the outset to the procedures whereby an action is constituted and to the mode in which the parties' allegations are presented to the

[4] For the dangers of this, see P. Gottwald, 'Fact-finding: A German Perspective', in Carey Miller, p. 67 at p. 69.

court. For this purpose the English, French and Italian systems are briefly compared.

The constitution of the action

In France and Italy the initial act of the plaintiff, by which proceedings are started, is to serve on the defendant, through an official process-server, a full statement of his claim – in France, usually, an 'assignation', in Italy, usually, a 'citazione'.[5] The machinery of the court is engaged when the plaintiff deposits a copy of this document; the court is thus informed of the particulars of the plaintiff's claim as soon as the action is on foot. In Italy the defendant is also required, in order to constitute himself a party, to deposit with the court his full answer to the claim – his 'comparsa di risposta'.[6] In France, on the other hand, the defendant joins the proceedings simply by the appointment of his *avocat*, giving notice of the appointment to both the plaintiff and the court. The judge to whom the case is assigned from its inception – the 'juge de la mise en état' – will, however, fix a time within which the defendant must produce his 'conclusions en défense', a copy of which is supplied to the court at the same time as it is communicated to the plaintiff.[7] In both countries, therefore, the court is informed of the parties' contentions at an early stage of the proceedings.

This is not the case in England. There, in the normal procedure in the High Court, the action is started – the machinery of the court is engaged – when the plaintiff 'issues' his 'writ' or other originating document. The writ is prepared by the plaintiff, is addressed to the defendant and, in its modern form, calls on the defendant either to satisfy the plaintiff's claim or to acknowledge service and indicate whether he proposes to contest the proceedings or not.[8] To issue his writ the plaintiff must have it sealed in the office of the court – but this is, exceptional cases apart, a mere administrative act – and it is then for him to serve it on the defendant. It is true that a copy of the writ is kept in the office of the court and it is true also that the defendant makes his acknowledgment of service to the court, but there is no requirement that the writ must contain more than an abbreviated statement of the plaintiff's claim,[9]

[5] N.c.p.c., arts. 54, 750; c.p.c., art. 163.
[6] C.p.c., art. 167.
[7] N.c.p.c., arts. 755, 756, 763 and 764.
[8] Formerly the writ contained a command in the name of the sovereign that the defendant 'appear' in the action at the suit of the plaintiff, and, although the sovereign's name no longer appears, the document still bears the royal arms. For changes under the C.P.R. to this and the following topic, see chap. 2, p. 54.
[9] The plaintiff's full statement of his claim – the first 'pleading' in the action – often accompanies the writ, but this is not mandatory: R.S.C., Ord. 6, r. 2; R.S.C., Ord. 18, r. 1; C.P.R., r. 7.4.

while the acknowledgment of service states only whether the defendant does or does not intend to contest the claim. At this stage, therefore, the court is informed of little more than the identity of the parties to the action. Subsequently, there must be an exchange of pleadings between the parties, but this does not require the formal involvement of the judge and, unless problems arise, the court will not even receive copies of the pleadings until the action is 'set down for trial' – that is, until the parties are ready for the trial at the end of which the final decision will be made.

The contents of the parties' documents[10]

In the modern English rules of pleading it is required that the parties state, in summary form, the facts on which they rely for the claim or defence as the case may be[11] and that the defendant makes it clear which of the plaintiff's allegations of fact he admits and which he denies.[12] The statement of claim must disclose a cause of action, which means that the facts alleged must, on the hypothesis that they are true, be such as to entitle the plaintiff to judgment in his favour, and a parallel rule applies to the defence: if this requirement is not met, the pleading may be struck out and judgment entered accordingly.[13] On the other hand, neither the rules or principles of law relied on[14] nor the evidence to be adduced in support of the allegations of fact are mentioned in the claim or the defence. A party may not, however, adduce evidence tending to prove a fact which has not been pleaded, nor may he seek to invoke a rule or principle of law which is not capable of application to the pleaded facts. The object of the pleadings is, therefore, first to determine the questions of fact on which the parties are in controversy and, secondly, to delimit the matters on which evidence may be adduced and to which legal reasoning may be addressed.

That English pleadings are restricted to the parties' allegations of fact contrasts with the position in Italian law. There it is required that, on pain of nullity, the *citazione* must state precisely the subject matter of the claim and it must also state the facts and the rules or principles

[10] Matters of form, including such matters as designation of the court in which the action is brought, will not be mentioned here.

[11] R.S.C., Ord. 18, r. 7; C.P.R., rr. 16.4, 16.5.

[12] R.S.C., Ord. 18, r. 13; C.P.R., r. 16.5.

[13] R.S.C., Ord. 18, r. 19(1)(a); C.P.R., r. 3.4. See *Williams and Humbert* v. *W. and H. Trade Marks* [1986] A.C. 368, for the position where an application to strike out raises complex questions of law.

[14] A point of law can sometimes be pleaded: R.S.C., Ord. 18, rr. 8, 11; C.P.R., r. 16, Practice Direction.

(*elementi*) of law on which the plaintiff relies. In addition it must indicate the specific modes of proof and, in particular, the documents, by which the plaintiff proposes to substantiate his allegations of fact.[15] As for the defence, the defendant must put forward the whole of his defence and counterclaim, if any, must state his position with regard to the facts alleged by the plaintiff, and must indicate the specific modes of proof and the documents by which he will substantiate his answer.[16]

French law seems to stand, on this matter, between the English and the Italian. It is a general rule of the new code of civil procedure that the parties have the obligation to allege the facts necessary to support their pretentions.[17] Only the contents of the *assignation*, however – not of the *conclusions en défense* – are specified in the code and then only in fairly general terms. Formal matters apart, the plaintiff must set out the object of his claim with an exposition of the grounds on which it is based.[18] In addition he must indicate the documents on which he will rely.[19]

Variation of the parties' documents

The Italian code of 1940, in its original form, placed severe limits on the possibilities for amendment or variation by the parties of the original documents put in by them. At the first hearing of the *trattazione*, which takes place very soon after the commencement of the proceedings, the party could clarify or modify his *citazione* or *comparsa di risposta*, as the case might be, could request modes of proof not already mentioned and could put forward additional documents. Thereafter, however, modification of either document was possible only with the leave of the *giudice istruttore*, such leave to be given only for grave cause: the purpose was to settle both the *thema decidendum* and the *thema probandum* at the earliest possible moment.[20]

This regime of preclusion was radically altered by the reforms of 1950.[21] While the prohibition of new claims remained in force in order to preserve the immutability of the subject matter of the action, amendments could be made up to the time when the *giudice istruttore* remitted

[15] C.p.c., art. 163. [16] *Ibid.*, art. 167. [17] N.c.p.c., art. 6.

[18] N.c.p.c., art. 56, 2° as amended by decree no. 98–231 of 28 December 1998: 'L'objet de la demande avec un exposé des moyens en fait et en droit.' The amendment, adding the words 'en fait et en droit', confirms what was previously assumed from the fact that the *assignation* operates as the '*conclusions*' of the plaintiff. There is probably no obligation to cite specific legal texts: Solus and Perrot, no. 140.

[19] N.c.p.c., art. 56, al. 2.

[20] F. Carpi, V. Colesanti and M. Taruffo, *Commentaria breve al Codice di Procedura Civile*, 2nd edn (1988) *sub* art. 183 at point I. For the changes introduced in 1990, see the same authors' *Appendice di Aggorniamento* to the earlier work (1991).

[21] C.p.c., arts. 183 and 184 in their versions of 1950.

the case to the full court for decision.[22] Now, however, as part of a reform aimed primarily at the reduction of procedural delays,[23] the old rule of preclusion has been restored in a form that seems even more severe than the original. At the first hearing of the *trattazione*, amendment is still possible, but now only with the leave of the judge.[24] Thereafter no amendments are allowed.[25]

In France, under the new code of civil procedure, the juge de la mise en état has wide powers to control the development of the action, including the provision of time limits for the performance of the various procedural acts by the parties,[26] but the parties' conclusions themselves are communicated directly by one party to the other, copies being supplied to the office of the court.[27] There appears to be no formal limit to the number of *conclusions*, subject to the control of the judge in the individual case, and the law specifically permits the making of 'demandes incidentes' – additional claims, counterclaims and demands for intervention.[28] Every *demande incidente* must, like the original *assignation*, set out the pretentions of the party making it, together with a statement of their grounds, and must indicate any documents relied on. Furthermore, a substantial, as distinct from a purely procedural, defence, can be proposed at any stage.[29] On the other hand, an additional demand or a counterclaim is not admissible unless sufficiently connected to the original pretentions of the party making it[30] and, as a general rule, once the *instruction* is at an end no further conclusions or documents in support can be admitted.[31]

Under the modern English rules the number of pleadings is limited.

[22] Article 183 conferred a wide freedom to amend at the first hearing of *trattazione*; article 184 allowed for subsequent amendments. Since the coming into force of the reforms of 1990 (below, n. 23), it is only in certain specified cases that the court of first instance is collegiate. Ordinarily the judge appointed as *giudice istruttore* acts also as a single judge to decide the case: Ordinamento giudiziario, art. 48, as amended.

[23] The reform was introduced by law no. 353 of 26 November 1990, and brought into force in 1995. See, in addition to Carpi *et al.*, *Appendice di Aggiornamento*, Fazzalari, 'La Giustizia Civile in Italia' in E. Fazzalari (ed.), *La Giustizia Civile nei Paesi Communitari*, Vol. II (1996), p. 73 at p. 75 (English edition (1998), p. 239 at p. 241).

[24] C.p.c., art. 183, 4.

[25] The former c.p.c., art. 184, no longer exists and a new article 184 deals with a different subject matter. See Carpi *et al.*, *Appendice di Aggorniamento*, *sub* art. 183 at point IV. The parties can, however, clarify ('precisare') their claims or defences without leave, which raises the delicate distinction between clarification and amendment. See, e.g. G. Tarzia, *Lineamenti del nuovo Processo di Cognizione* (1991), pp. 89–91.

[26] N.c.p.c., arts. 763 and 764.

[27] *Ibid.*, art. 753. [28] *Ibid.*, art. 63. [29] *Ibid.*, art. 72.

[30] *Ibid.*, art. 70. It is a question for the judge in each case whether the connection is sufficient.

[31] *Ibid.*, art. 783.

The plaintiff may answer the defence with a reply,[32] but no further pleadings are possible without the leave of the court, which is rarely given. On the other hand the possibilities for the amendment of the pleadings are extensive. Until the pleadings are 'closed',[33] either party may amend his pleading once without leave. Thereafter, at any stage of the proceedings, the court may grant leave to amend.[34] Nevertheless, there can at no stage be an amendment without leave if the effect is to add or substitute a new 'cause of action'[35] – a rule that is equivalent to, but less draconian than, the prohibition in other systems of new demands. The result is, in effect, that though English law has no equivalent to the giudice istruttore or juge de la mise en état,[36] the court still has control over the amendment of pleadings, a control which it exercises primarily with a view to ensuring that the real questions in controversy between the parties will ultimately be determined.

The power of the court to allow amendments at any stage is unfettered, but the later the application for leave the more reluctant the judge will be to grant it. For this there are two principal reasons. In the first place, though consequential amendments by the other party will be allowed, a late amendment to the pleadings may create serious difficulties for him. In the second place, late amendments tend, in any case, to delay the progress of the proceedings and to add to their cost.

The concept of fact-finding

The first thing to be said under this head is that, whatever is meant by a 'fact', and whatever system of procedure is envisaged, fact-finding is the business of the judge, or of the jury if there is one. It is not the business of the parties. It may be – it is – for the parties to *allege* facts; it may be, to a greater or lesser extent, that a party must prove the facts that he alleges or lose his case because he carries the burden of proof, but this

[32] Seldom used except as a defence to a counterclaim.

[33] The pleadings are deemed to be closed fourteen days after the service of the reply or the defence, as the case may be: R.S.C., Ord. 18, r. 20. Under the C.P.R., once a statement of case has been served it may be amended only with the permission of the court unless all other parties consent: C.P.R., r. 17.1.

[34] R.S.C., Ord. 20; C.P.R., rr. 17.1, 17.3. The party seeking leave to amend must propose a specific amendment; his opponent has the opportunity to object and may make consequential amendments.

[35] A new cause of action can in any event be allowed only if it arises out of the same facts as those originally relied on: R.S.C., Ord. 20, r. 5 (5); C.P.R., r. 17.4(2).

[36] Until the introduction of the C.P.R., the judge who deals, for example, with an application for leave to amend during the preparatory stage would ordinarily play no part in the actual decision of the case. Now, with the advent of case management, it is more likely, but by no means necessary, that the 'procedural judge' will also be the trial judge.

means no more than that he must furnish the judge with the materials – the evidence or proofs – on which the judge will base his findings of fact. The parties do not find the facts.

What, then, are facts?

No one doubts that, at a theoretical level, distinctions exist between, first, facts, secondly evidence or proofs and, thirdly, law. In England, for the purposes of the pleadings, these distinctions are purportedly maintained, however difficult in practice that may be, but, as has been seen for France and Italy, this is not necessarily the case elsewhere.[37] In Germany, where the parties are not obliged to plead law, they nevertheless commonly do so, 'because a combination of factual and legal argument is more likely to persuade the court as to the merits of the case'.[38]

The significance of this for present purposes is that there is no need in continental procedures to get unduly fussed about the distinctions. It is certainly not the case that the parties are relieved of the obligation to allege facts. On the contrary, the French code, for example, provides that 'the parties must allege the facts on which their claims or defences are founded',[39] and this, like the English insistence that the parties plead the material facts, demonstrates what is a fact, as distinct from evidence or proof. The point is simple in principle, if not in practice. A rule of law – any rule of law – must take as its premise a fact or a complex of facts. If it does not then it cannot be applied, because it has no point of reference outside itself. The word 'fact', in the present context, means, and means only, that which is envisaged more or less explicitly by a rule or principle of law.[40]

Sometimes, where the rule of law in question is both simple and simply stated, the fact to which it refers may actually be visible or tangible, in which case it can relatively easily be found or found not to exist in a given case. Usually, however, the existence of a fact can be revealed only by the prior revelation of other visible or tangible phenomena – the 'underlying' facts – followed by the application of some kind of reasoning process and, as often as not, a value judgment. In his reasoning, and in his formation of a value judgment, the judge may be assisted by the arguments and submissions of counsel, but the reasoning and the value judgment are, necessarily, for the judge alone. To enquire about fact-finding is, therefore, to enquire about the way in

[37] Above, p. 208. [38] Gottwald, 'Fact-finding', p. 68.

[39] N.c.p.c., art. 6. 'A l'appui de leurs prétentions, les parties ont la charge d'alléguer les faits propres à les fonder.'

[40] This understanding of a 'fact' is more fully explained in chap. 10, p. 201.

which the judge performs this essential part of his function and about the role of the parties in enabling him to perform it.

The process of fact-finding

Free evaluation

It comes as something of a surprise to common lawyers of today when they discover for the first time that the law of some continental countries actually contains explicit provision to the effect that the judge must evaluate the proofs in accordance with his own appreciation of them.[41] What else can he or should he do? What sense is there in having a judge, the *raison d'être* of whose office is the exercise of judgment, if he is not to exercise that judgment in the assessment of the evidence?

It probably comes as still more of a surprise when the common lawyer finds that the rule of free evaluation is actually qualified. Yet the Italian rule reads, in approximate translation, 'the judge must evaluate the proofs in accordance with his own prudent appreciation of them *except where the law provides to the contrary*'.[42] In France, where there is no explicit provision for free evaluation, it is accepted by the authors that the system is 'mixed'.[43] It is in part a system of 'legal proof', which means that particular modes of proof have particular value or weight attached to them, and in part a system of moral or rational proof where free evaluation is the rule.

The common lawyer may have heard of ancient rules such as the rule that the evidence of one man is to be preferred to that of two women, but that kind of thing is likely to appeal to him as so far in the past that its interest is purely antiquarian. Even so, his surprise at the continental approach to free evaluation should be tempered by his recollection that, until recently, the system of legal proof remained in effect for contracts as much part of everyday life as are contracts for the sale of land,[44] and even now is not entirely eliminated.[45] He should also remember that the common law has a law of evidence – a branch of law

[41] E.g. Germany, ZPO §286, Gottwald, 'Fact-finding', p. 77; Italy, c.p.c., art. 116, M. Serio, 'Fact-Finding: An Italian Perspective', in Carey Miller, p. 123 at p. 126.

[42] C.p.c., art. 116 (emphasis added). See also, e.g. Netherlands, c.p.c., art. 179(2), Punt, 'Fact-finding: A Dutch Perspective', in Carey Miller, p. 109 at p. 117.

[43] E.g. J. Ghestin and G. Goubeaux, *Traité de droit civil*, 4th edn, Vol. I (1994), nos. 629–32.

[44] Law of Property Act 1925, s. 40, according to which written evidence was necessary to the enforceability of such contracts. The rule is now superseded by the Law of Property (Miscellaneous Provisions) Act 1989, s. 2, which requires an actual written agreement.

[45] The Statute of Frauds 1677, s. 4 is still part of the law.

whose nature and purpose continental lawyers have some difficulty in understanding.[46]

The law of evidence consists mainly of exclusionary rules and exceptions to them. Today the scope of the exclusionary rules is much reduced by comparison with the past so far as civil cases are concerned,[47] and this is largely, if not entirely, due to the virtual disappearance of the civil jury. Nevertheless, it is broadly true that the rationale of the exclusions is the idea that some kinds of evidence – hearsay, for example – cannot safely be left to a jury. In other words, so long as we have a law of evidence we allow the jury or, now, the judge alone, to take account only of what the law considers it safe to let them know. To complicate the situation further by attributing special weight to certain kinds of evidence would be not only unnecessary but, in general, absurd.[48]

The continental approach is different. There are no exclusionary rules such as those of the law of evidence but there is recognition of the existence of a number of different modes of proof, to some of which specific weight is attributed while others are left to the free evaluation of the judge. So, for example, any so-called 'authentic' or public act, such as a notarial act or deed, provides conclusive proof of certain matters unless it is displaced by a special procedure attacking its validity,[49] and even a private writing may be conclusive unless it is disavowed by the party whose signature it bears.[50]

Naturally, the oral testimony of witnesses is included within the recognised modes of proof,[51] but such testimony does not enjoy pride of place as it does in the common law system, nor is it taken in the common law manner by examination and cross-examination at a trial: witnesses are usually examined by the judge at a special hearing specified for the purpose. What is more, oral testimony is traditionally regarded

[46] It is not unimportant to note that continental rules about proof, as distinct from rules about the administration of the modes of proof, are usually found in the civil code, not in the code of civil procedure.

[47] In particular the Civil Evidence Act 1995.

[48] Even so, the law does, sometimes, attach specific weight to certain kinds of evidence, e.g. Civil Evidence Act 1968, ss. 11 and 13: the former provides for a reversal of the burden of proof in certain cases; the latter creates an irrebuttable presumption. The Civil Evidence Act 1995, s. 4 (2), indicates a number of factors to which regard may be had in estimating the weight to be given to hearsay evidence, but this is only a guide.

[49] E.g. French code civil (hereafter 'French c.c.'), art. 1319; Italian codice civile (hereafter 'Italian c.c.'), art. 2700.

[50] E.g. French c.c., arts. 1322–4; Italian c.c., art. 2702.

[51] French c.c., art. 1341–8; Italian c.c., arts. 2721–6. As a rule, a special order from the court is required before oral testimony can be taken and, even so, such testimony is not always permissible. Other 'modes of proof' include presumptions, admissions and even a 'decisory oath': French c.c., arts. 1349–69; Italian c.c., arts. 2727–39.

as untrustworthy because it comes into existence only after the dispute between the parties has arisen and, indeed, after the litigation has itself come into existence. Preference is given to modes of proof, such as deeds and other forms of writing, that existed before the dispute arose – *preuve préconstituée*.

Other modes of information

In the common law something is either admissible as evidence or else it is not; and if it is not admissible as evidence then the judge is not allowed to know about it.[52] On the continent it is generally maintained that the case is to be decided on the basis of the proofs offered by the parties. This is made explicit in the Italian code,[53] and while the French code does empower the judge to order, *ex officio*, any lawful means of proof,[54] that power is not supposed to be exercised so as to relieve a party of his obligation to provide the proofs necessary in support of his pretentions.[55] On the face of things, therefore, '*ex officio* proof-taking' is excluded. Nevertheless, the continental judge may acquire information in the course of the proceedings by methods which are not considered to involve the taking of evidence or proofs and which may, therefore, and do, depend on his own rather than on party initiative. Two important examples, and one hybrid, must be mentioned.

Examination of the parties

It is a general principle in continental countries that the parties to litigation may not give evidence: they are not competent witnesses.[56] They may, nevertheless, be interrogated by the judge on his own initiative. Originally such interrogation had as its only purpose the clarification by the party of his actual claim or defence as the case might be, but it is now common that the judge may examine the parties on the facts of the case. French law, for example, allows the judge to invite the parties to provide such explanations of fact as he considers necessary for his decision[57] and, by separate and more elaborate provision, also allows him to order the personal appearance of the parties for interrogation.[58]

[52] For the use by the judge of knowledge he has acquired independently of the proceedings on which he is engaged, see chap. 13.
[53] C.p.c., art. 115; Serio, 'Fact-finding', p. 126.
[54] N.c.p.c., arts. 10 and 143. [55] *Ibid.*, arts. 9 and 146.
[56] Since 1988, in the Netherlands, the parties – if natural persons – may themselves be heard as witnesses. Even so, a party's statement concerning facts on which he has the burden of proof cannot itself constitute proof in his favour: at best it may supplement incomplete proof from other sources: Punt, 'Fact-finding', p. 117.
[57] N.c.p.c., art. 8. [58] *Ibid.*, arts. 184–98.

Italian law provides that, at a preliminary hearing, the judge may seek necessary clarification from the parties of the facts alleged,[59] and in addition he may order their personal appearance 'in order that he may freely interrogate them about the facts of the case'.[60]

The use of these procedures does not form part of the proof-taking process: neither the answers of the parties nor their behaviour in response to the judge's interrogation amount to evidence or proof.[61] In reality, however, they are clearly capable of having an effect on the ultimate decision, if only by influencing the judge in the exercise of his power of free evaluation.[62] In France it is actually provided that the judge can draw any conclusions from the parties' answers, or their refusal to answer, and also that he may treat them as equivalent to a 'beginning of written proof'.[63] This has the potentially important consequence of allowing the use of oral testimony where such testimony would not otherwise be admitted.

Experts[64]

Where the assistance of experts in a particular art or science is required in litigation, such assistance is provided, in the common law procedure, by expert witnesses, called by the parties and examined and cross-examined by them in much the same way as are other witnesses. Continental systems, on the other hand, provide for the appointment of an expert by the judge, and the judge will himself instruct the expert on the questions on which he is to report. The status of such a court-appointed expert is not entirely clear, but there is at least agreement that the expert is not a witness, not even a witness called by the judge rather than by a party. In Germany he is considered an 'assistant' to the judge;[65] for Italy it is said that the expert's job is 'fiduciary' in the sense that he acts on the judge's instructions, answers his questions and reports directly to him;[66] for Greece it is said that the role of the expert is not a judicial one – the judge has resort on his own initiative to the expert to supplement his own understanding when that is inadequate.[67] In France the expert is 'auxiliaire de la justice'.[68]

[59] C.p.c., art. 183 as amended.
[60] C.p.c., art. 117. For Germany, see Gottwald,'Fact-finding', p. 78.
[61] In Germany, it appears, they are deemed to be part of the written 'pleadings': Gottwald, 'Fact-finding', p. 78.
[62] *Ibid.*
[63] 'Commencement de preuve par écrit': n.c.p.c., art. 198.
[64] This subject is treated more fully below, chap. 12.
[65] Gottwald, 'Fact-finding', p. 78. [66] Serio, 'Fact-finding', p. 129.
[67] C. D. Magliveras, 'Fact-finding: A Greek Perspective', in Carey Miller, p. 87 at p. 92.
[68] Solus and Perrot, nos. 898 and 908–11. The grounds on which an expert can be challenged are the same as those applicable to judges: n.c.p.c., art. 234.

As a matter of principle, the continental judge is not bound by the expert's report, however difficult in practice it may be for him to disregard it. That, however, is not the present point, which is, rather, its converse. The expert's report is not 'evidence', and the procedure by which it is obtained may not even be regarded as part of the proof-taking process. Nevertheless, the expert's report unquestionably provides material that the judge will take into account in the performance of his fact-finding function.

Witness testimony

The taking of witness testimony is, of course, included in the recognised modes of proof. The subject nevertheless calls for mention here since, on the continent, it is for the judge, not the parties, to question the witnesses[69] and, secondly, the testimony heard is not necessarily restricted to that given by witnesses whom the parties wish to be heard or to matters that the parties wish to be drawn to the attention of the court.

In Italy, the judge's right to question the witnesses does not, it is true, give him any significant power since the parties, in their request for oral testimony, must set out the facts on which they wish a given witness to testify[70] and the judge's questions may be directed only to those facts.[71] On the other hand, the judge may, at the request of a party or of his own motion, call upon a person to testify if a witness has, in the course of his testimony, indicated that that person has knowledge of the facts.[72] The judge may also call any person named by a party as a witness but not previously heard, either because the judge had previously excluded that person's testimony as superfluous or because the parties had agreed that he need not be heard. In addition, the judge may recall for further examination a witness who has already been examined, if this is necessary to clarify that witness's testimony or to correct irregularities.[73]

In France the judge's powers are more extensive. First, although it is normally for a party to request an order for the hearing of witnesses, in

[69] The advocates may be allowed to question a witness after the judicial interrogation has ended. In Germany they are invited to do so, but under the control of the court: Gottwald, 'Fact-finding', p. 76. In Italy and France, on the other hand, they may only propose to the judge that certain questions be put to a witness and it is then for the judge to decide whether the question should be put or not: c.p.c., art. 253; n.c.p.c., art. 214, al. 2; Solus and Perrot, no. 879.

[70] C.p.c., art. 244; Serio, 'Fact-finding', p. 126.

[71] In questioning the witness the judge may, however, refer to the claim as a whole for the purposes of clarification: c.p.c., art. 253.

[72] C.p.c., art. 257.

[73] *Ibid.* The judge's power to exclude superfluous testimony is contained in article 245.

which case it is for that party to state the facts he seeks to prove[74] and to indicate the witnesses to be heard,[75] it is open to the judge to make such an order *ex officio*.[76] If he does so, the statement of facts to be proved and the designation of the witnesses is, at least in the first instance, for him.[77] Secondly, in his examination of a witness the judge is not restricted to the facts previously admitted to proof but may question the witness in relation to any facts of which proof is legally admissible.[78] Thirdly, the judge may, at the request of a party or of his own motion, call for examination, and examine, any person whose testimony would, as it appears to him, be useful to the revelation of the truth.[79]

The role of the parties and the role of the judge

Even where a procedure openly purports to be inquisitorial, it is not the case that the judge takes his magnifying glass and looks for the facts as if he were Sherlock Holmes. To say that a procedure is inquisitorial is to say little more than that the judge's role may extend beyond the actual finding of the facts to that of playing a more or less active part in revealing the underlying facts on which the findings of fact will be based. The extent to which an inquisitorial judge actually makes enquiries may, however, vary not only from one system of procedure to another but from one kind of case to another within a single system. In French administrative law, for example, the judge will be inclined to intervene more actively in the 'recours pour excès de pouvoir' than in the 'recours de pleine juridiction'. In the former the plaintiff seeks the annulment of an administrative decision or order of which he may have had no knowledge before publication: such a plaintiff might be in an impossible position if he carried the burden of proving its illegality. In the latter, on the other hand, he claims compensation for damage that he has suffered as the result of a wrongful act for which the administration is responsible: there will have been dealings such as negotiations for a settlement

[74] N.c.p.c., art. 222, al. 1. It is, however, ultimately for the judge to decide what facts shall be open to proof: *ibid.*, al. 2.

[75] *Ibid.*, art. 223, al. 1. Opposing parties may bring evidence in rebuttal without further order (art. 204) and must designate the witnesses they wish to be called: art. 223, al. 2.

[76] *Ibid.*, arts. 10 and 143.

[77] *Ibid.*, art. 224, al. 2. If the judge is unaware of the exact identity of the witnesses he wishes to be heard, he may call for the assistance of the parties: Solus and Perrot, no. 861.

[78] N.c.p.c., art. 213; Solus and Perrot, no. 881.

[79] '. . . toute personne dont l'audience lui paraît utile à la manifestation de la vérité': n.c.p.c., art. 218. Solus and Perrot, no. 882.

before action brought, and accordingly there is less reason for the judge to pursue enquiries himself.[80]

As a general rule, continental civil procedure – civil procedure as distinct, for instance, from administrative procedure – is not considered to be 'inquisitorial'. Though it has been described as 'accusatorial',[81] this does not mean that it is adversarial in the common law sense.[82] Both subscribe to the dispositive principle, and though the common law does so implicitly rather than explicitly, the adversary system can be explained as an exaggerated application of the principle: because the parties choose to litigate in the first place, they must be free to decide not only what will be the subject matter of the litigation but also the basis on which it will be conducted and, in particular, on what evidence the issues of fact will be resolved.[83]

It is improbable that the common law arrived at the adversary procedure as a result of the application of this or any other principle. It is more likely that it is, or was, the inevitable consequence of adoption of trial by jury.[84] In continental systems, on the other hand, where there is no trial in the common law sense, the 'evidence' is introduced at various times during the preparatory stage,[85] and a judge is normally assigned to the case from its inception to take charge, amongst other matters, of the *instruction*.[86] Sometimes that judge, alone, will ultimately decide the case, but even where the final decision is for a collegiate court he will be a member of the panel.[87] One member of the court is thus in a position to take note of the 'evidence' as it comes in, and there is no such obstacle as exists in common law procedure to his active participation in the preparation of the case for decision. He may, for example, appreciate from the reading of a document that another document is also relevant, in which case there is no practical reason why he should not call for its

[80] E.g. Debbasch, no. 542.

[81] E.g. R. Morel, *Traité de Procédure Civile*, 2nd edn (1949), no. 425. In France, at least, it has become less accusatorial than it was. See, e.g. J. A. Jolowicz, 'The Woolf Report and the Adversary System' (1996) 15 C.J.Q. 198, 201–9.

[82] Above, chap. 9, p. 176.

[83] Above, chap. 9, p. 177. For a convenient, if now somewhat dated, theoretical discussion of the dispositive principle, see M. Millar, 'Formative Principles of Civil Procedure' in *History*, pp. 14 *et seq*.

[84] Chap. 18, p. 373.

[85] The modern tendency in some countries is to try to 'concentrate' the taking of 'evidence'. See Gottwald, 'Fact-finding', p. 72.

[86] E.g. Italian c.p.c., art. 168 *bis*, as amended; French n.c.p.c., arts. 762 and 763. In France, if the President of the Tribunal considers that the case can be decided on the basis only of the materials supplied by the parties in their initial claims and defences, he may send the case immediately for decision: n.c.p.c., arts. 760 and 761.

[87] This was not always so in the past. Under the Italian code of 1865, for example, the judge who received the 'evidence' was not necessarily a member of the collegiate court that would decide. This was altered by the code of 1942. See c.p.c., art. 174.

production. If there is a legal obstacle to his doing so, it will be because of adherence to the dispositive principle.[88]

The extent to which the judge actually plays an active role in relation to the facts during the preparatory stage varies from one country to another and it is not always clear, at least to an outside observer, what is the precise intention of the relevant legislation. This is the case, for example, for French law, where the code provides that the parties must prove the facts necessary to the success of their claims or defences,[89] that a 'mesure d'instruction' may not be ordered unless the party alleging a fact lacks the means of proving it and that a *mesure d'instruction* cannot be ordered to cure a party's own failure in the matter of proof.[90] But the code also provides that the judge may order, *ex officio*, any *mesure d'instruction* and may do so at any time if he lacks sufficient material for his decision.[91]

As a general rule, initiative in relation to 'evidence' remains with the parties, who proceed by way of request for an appropriate order from the judge when they wish a particular *mesure d'instruction* to be employed: the judge's role is to satisfy himself that it really is necessary that he should accede to the request.[92] It is nevertheless clear to common law eyes that the judge's role in continental procedures generally can be far more significant in the preparation for fact-finding than under the common law. It is for the judge to examine the witnesses, if any,[93] it is for the judge to decide whether to summon the parties for interrogation,[94] and it is the judge who acts to obtain the assistance of an expert when required.[95] Not all these activities are, however, regarded by continental lawyers as the taking of 'evidence',[96] and a common lawyer who is confronted by the statement of a continental lawyer that the judge's role in the taking of evidence is muted must bear this in mind.

Even in the adversary procedure of the common law it is, in reality, impossible that the judge should rely wholly and exclusively on the

[88] So, for example, in France, although the judge may compel a party to produce a document, he may only do so at the request of the other party: n.c.p.c., art. 11, al. 2. See J. A. Jolowicz, 'La production forcée des pièces: Droits français et anglais', in P. Théry (ed.), *Nouveaux Juges, Nouveaux Pouvoirs? Mélanges en l'honneur de Roger Perrot* (1996), p. 167. In practice the pressures of a heavy case-load may seriously inhibit the exercise by the judge of the powers with which the law endows him. See Serio, 'Fact-finding', p. 125.

[89] N.c.p.c., art. 9.

[90] *Ibid.*, art. 146.

[91] *Ibid.*, arts. 10, 143, 144.

[92] See Gottwald, 'Fact-finding', p. 73; Punt, 'Fact-finding', pp. 114–15 and Serio, 'Fact-finding', p. 124. Article 147 of the French n.c.p.c. requires that the judge should limit the *mesures d'instruction* to those necessary for the disposal of the litigation and that he should order the simplest and the least costly which are capable of meeting the need.

[93] Above, p. 217.

[94] Above, p. 215.

[95] Above, p. 216.

[96] Above, p. 215.

evidence presented by the parties for his finding of the facts. Both the reasoning and the value judgments required must be those of the judge himself, and he cannot fail to rely on his own knowledge and experience.[97] He may also, of course, take judicial notice of notorious facts, a concept which, today, seems to extend to whatever the judge himself regards as a matter of common knowledge.[98] The one thing which he cannot do is to initiate an enquiry of his own motion.[99]

In practice, no doubt, the production of the underlying facts is the business of the parties. So, though the judge examines the witnesses, there will ordinarily be no witnesses other than those nominated by the parties;[100] though, in some countries he may call for documents not produced by either party, and though the judge may order a *mesure d'instruction* of his own motion, it nevertheless appears that the judge's interventions are, as a general rule, more likely to be negative than positive. The judge will refuse a request for proof-taking submitted by a party if he considers it unnecessary but, if only by reason of pressure of work, he is unlikely in practice to take much of an initiative himself. On the other hand – and this must be stressed for the purposes of comparison with the common law – continental procedure enables the judge to take much more of an initiative than his common law counterpart: at least so far as the written law is concerned, continental procedure retains less of the original concept of civil litigation as a forensic duel between two opponents who would otherwise resort to physical violence than does the adversary procedure of the common law.

[97] Above, p. 212. See also below, chap. 13, p. 256.

[98] It is a long way from taking judicial notice of the fact that 'rain falls from time to time' to taking judicial notice of the facts that 'the life of a criminal is an unhappy one' (*Burns* v. *Edman* ([1970] 2 Q.B. 541, 546, *per* Crichton J.) or that 'the community charge legislation has aroused strong feelings and that political protests of one sort or another have been widespread' (*R.* v. *Leicester City Justices, ex parte Barrow* [1991] 2 Q.B. 260, 282–3, *per* Lord Donaldson M.R.).

[99] An English judge can, however, proceed of his own motion to a view of the *locus in quo*, even against the expressed wishes of the parties: *Tito* v. *Waddell* [1975] 1 W.L.R. 1303, 1306, *per* Megarry J. See also *Salsbury* v. *Woodland* [1970] 1 Q.B. 324. For the more generous French equivalent, see n.c.p.c., arts. 179–83. Note the French insistence on the presence of the parties or, at least, their notification.

[100] Note the restrictions on the powers of the Italian judge, above, p. 217.