ON THE DISTINCTION BETWEEN PROCEDURAL AND SUBSTANTIVE LAW

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INTRODUCTION

The legal system of Sweden—like the legal systems of many countries in continental Europe—is based on an outlook that distinguishes between procedural and substantive law and has therefore been characterized as dualistic. According to this outlook, private law constitutes the rules concerning the substantive content of legal relations. Aside from these are the rules regulating the forms in which such relations are granted legal protection, the law of civil procedure.

From the starting point just mentioned, the law of civil procedure can be looked upon in different ways. Either the law of procedure is regarded as a mere *formal procedure* to gain legal protection, or the legal process is considered to comprise also a specific element of *public* law, the procedural relationship, independent of the substantive matter of private law under litigation.

The modern debate sets out from Oskar Bülow's famous book *Die Lehre von den Processeinreden und die Processvoraussetzungen* (published at Giessen in 1868) in which the procedural relationship (*das Processrechtsverhältnis*) is introduced as a concept of capital importance for the law of civil procedure. For Bülow the prerequisites from which such a relationship originates are a main topic of study. The court's hearing and adjudication of these prerequisites—the procedural prerequisites (*die Processvoraussetzungen*)—are in his opinion to be carefully distinguished from its hearing and adjudication of the substantive issue under litigation.

From this general outlook the conclusion has been drawn that to a certain extent different rules must apply to the hearing and adjudication of the procedural prerequisites and of substantive issues. In spite of the fact that the theory of the procedural relationship has now been almost universally abandoned, the conclusions drawn from the theory are still very much valid law in Sweden as well as in many other countries. The Swedish Code of Judicial Procedure (*Rättegångsbalken,*

cited as *RB*) contains a special set of rules for the hearing and adjudication of matters of procedural hindrance (*rättegångshinder*)—the expression signifies that one or several of the procedural prerequisites are not present.[1] This set of rules is on the whole common to all kinds of procedural hindrance, e.g. forum rules, procedural capacity of a party, *res judicata* and *locus standi*. However, they differ in several respects from the rules for the hearing and adjudication of the substantive issue at litigation.

It might, of course, be appropriate to deal with matters of procedural hindrance and substantive issues in different ways, even though the theoretical starting point—the procedural relationship—is no longer used. On the other hand, it is not to be expected that such a rigid system will guarantee an appropriate result in all cases. Particularly when it is doubtful whether a circumstance is to be regarded as one of procedural hindrance or as one of substantive law, different rules would seem inappropriate from a practical point of view. The structure of the Swedish Code of Judicial Procedure, however, does not make it possible to create a set of rules for such cases which is tailor-made and comprises only the most suitable rules. By and large, one has either to accept a complete set of rules or reject it altogether.

The *locus standi* is one of the procedural prerequisites that are fraught with difficulties of this kind. To be sure, on the whole there is agreement on the point that *locus standi* is a prerequisite of civil procedure and that matters of *locus standi* must be considered according to the rules of procedural prerequisites. But, on the other hand, it is not equally clear what circumstances constitute deficient *locus standi*, and thus the problems mentioned above appear again.

In my dissertation[2] I have discussed a number of questions that originate from the distinction between procedural and substantive law. It was not my intention to treat such a vast subject exhaustively. What I undertook was a rather fragmen-

[1] On the meaning of the concept "procedural hindrance", see P. O. Ekelöf, "Definitions and concept formation in the law", in *Modality, Morality and Other Problems of Sense and Nonsense. Essays dedicated to Sören Halldén*, Stockholm 1973, pp. 57 ff.

[2] P. H. Lindblom, *Processhinder. Om skillnaden mellan formell och materiell rätt i civilprocessen, särskilt vid bristande talerätt* (Institutet för rättsvetenskaplig forskning LXXVI), Stockholm 1974.

tary inquiry in which I put the main stress on the historical background of Bülow's theory and on the practical inconveniencies it has entailed for the Swedish law of civil procedure. In what follows I shall try to restate the main results of my inquiry.

1. THE DISTINCTION BETWEEN PROCEDURAL AND SUBSTANTIVE LAW AS A BASIS FOR THE CLASSIFICATION OF OBJECTIONS IN CIVIL PROCEDURE

To some extent at least, a distinction between procedural law—matters of procedure in a wide sense—and substantive law has always been made. Suppose for instance that a claim is defective in two respects: it is brought before the wrong court and, furthermore, the claim has already been settled by the parties. It is obvious that the first defect is one of procedural law and the other is one of substantive law.

However, when it comes to suggesting precise criteria for what is procedural and what is substantive law, difficulties arise. From a Swedish point of view, it seems natural to hold that all the provisions of the *RB* are rules of procedural law, whereas the provisions of other statutes are rules of substantive law. Thus, if a claim meets all the requirements which are laid down in the *RB*, then one has to assume that it is irreproachable from a procedural point of view. However, this is obviously not the case. Rules of a more or less clearly discernible procedural nature are found outside the *RB*, too. In some instances these rules are brought together in a certain chapter in an enactment, e.g. chapter 20 of the Code on Parents and Children (1949) and chapter 15 of the Marriage Code (1920). In other cases they are interspersed—even almost hidden—in other statutes.

Nor is it a matter of course that all the institutions dealt with in the *RB* belong to procedural law. Thus in some countries the concept of legal force (*res judicata*)—or parts of it—is held to be one of substantive law and is accordingly treated as a concept of private law. Even the law of civil procedure as a whole is not necessarily to be regarded as a body of law aside from private law. It can equally well be viewed as a subdivision of private law.

Furthermore, the difference between procedural and substantive law cannot be attributed to the choice the lawgiver has to address his directives either to the judges or to the citizens. The penal code consists in general of rules addressed to the judges, but the penal provisions are rules of substantive law. A rule addressed to the citizens can in most cases be formulated as a rule addressed to the judges (and vice versa) without any change in the nature of the rule.

It should also be noted that procedural rules have an impact on substantive law. This statement applies not only to rules where the character of procedural or substantive law is doubtful but also to the body of procedural law as a whole. Thus, for instance, the chances of recovering on a claim are dependent on the efficacy of the legal process and indirectly on the rules for the proceedings.

Thus rules of procedural and substantive law interact in a complicated way. It is always possible to separate them in a rough and ready fashion, and in this paper terms such as procedural and substantive law will be used as well as terms based upon this distinction. Such ambiguities as may exist do not make the classification inapplicable.

The so-called classical or dualistic outlook, which puts a heavy stress on the distinction between procedural and substantive law, is—as I noted in the introduction—fundamental for recent writing on procedural law in Sweden as well as in many countries on the continent of Europe. It is also fundamental for the Swedish Code of Judicial Procedure. This is particularly obvious with regard to the distinction made between the concept of procedural hindrance and that of substantive law. The distinction between procedural objections and demurrers is also connected with this. If the defendant raises a procedural objection, in essence he is asking that the suit shall be stricken out, i.e. there is a procedural hindrance. A demurrer, on the other hand, refers to the factual circumstances. The defendant asks that a judgment should be rendered for the defendant on the merits of the case.

Since procedural hindrances do not have any common properties except their legal consequences, it is difficult to summarize what circumstances constitute such hindrance under Swedish law. The definition given in *RB* ch. 34, sec. 1, also refers to the legal consequences. Procedural hindrance is defined as "a hindrance to the processing of an action", or, in other

words, a ground for dismissal without a trial of the merits of case. It should be noted, however, that there are procedural objections which do not amount to pleas for a striking out. For instance, this is not the case with regard to an objection that the judge is disqualified or that the bench is not lawful—such objections would not lead to the dismissal of the case.

The indistinctness caused by the fact that the *RB* does not say what characterizes a procedural hindrance could be removed by an enumeration of all the circumstances that constitute grounds for dismissal without trial. Such an enumeration is not, however, to be found in the *RB*, a fact which is explained by the difficulty of making an even fairly complete enumeration.[3] The drafters of the Norwegian code of civil procedure intended to make a comprehensive enumeration, but the attempt had to be given up. In the German code of civil procedure (1877), certain procedural hindrances are enumerated in sec. 274, but this section is held to deal only with non-mandatory procedural hindrances and even so is not complete. In Swiss legislation, this kind of enumeration is to be found in the codes of civil procedure of some of the cantons, while it is missing in those of other cantons.

From what has already been said, it is evident that the dualistic view expressed in the structure of the *RB* is not an isolated Swedish phenomenon. As far as other Nordic countries are concerned, in Finland considerable importance is attributed to the distinction between procedural prerequisites and substantive law in spite of the fact that the legislation is based on an older standpoint. In Denmark and Norway the lawgiver

[3] The following list is not complete but may serve as guide:

I. Commencement of the action
1. 13:4 action initiated in the wrong way
2. 42:1, 2, 3, 4 defective summons application
3. 32:2 failure of a party to effect service
4. 13:1, 2 the prerequisites for a directive or a declaratory judgment not met
5. 13:3 amendments of the action

II. The court
1. the court lacks territorial competence
2. the court lacks functional competence
3. the court lacks subject-matter competence

III. The parties
1. the parties lack party-capacity
2. the parties lack procedural capacity
3. the parties lack *locus standi*

IV. The matter
1. *Res judicata*
2. *Lis pendens*

does not use the concept of procedural hindrance as in Sweden, but goes so to speak straight on to the rules on dismissal. However, this outlook is also based on the distinction between procedural hindrance and substantive law, and that distinction has been given considerable attention in legal writing.

In most countries in continental Europe, too, attention is paid to the difference between procedural hindrance and substantive law. Thus, as I mentioned in the introduction, this outlook was first expressed in Oskar Bülow's famous book *Die Lehre von den Processeinreden und die Processvoraussetzungen.* Bülow's outlook did not, however, gain immediate adherence from the legislator, and even today the distinction discussed here has had a greater impact on Swedish than on German law. In German legal writing, however, the distinction is regarded as crucial.

The outlook described so far is, of course, not the only one possible. As I shall discuss in greater detail in section 3, the distinction between formal and substantive law did not play as important a role in the classical Roman law of legal procedure as it does in modern law. Procedural and substantive law were in a natural way connected in a system of forms of actions, as in old common law. In a book by Cappelletti and Perillo on the Italian law of civil procedure, this connection is described in the following way:

> In both Rome and England, substantive law was created through procedural expedients; the administrators of the law became lawgivers. Proceeding from formulae or forms of actions, they created new actions, new defences, and procedural fictions for concrete grievances deemed worthy of redress. The modern Italian system, like other civil-law systems, reflects an opposite approach; rights of action follow from, rather than create, substantive law. The Italian Constitution, by stating that "everyone may proceed at law for the protection of his rights and legitimate interests" (art. 24), indicates that a right of action in modern Italy presupposes a pre-existing substantive right or legitimate interest.
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> Because Roman lawyers, like common-law lawyers, "viewed the law mainly from the standpoint of actions" there was "no complete isolation of private substantive law from procedural law".[4]

However, the difference between the two points of view

[4] M. Cappelletti and J. Perillo, *Civil Procedure in Italy,* The Hague 1965, pp. 30 f.

should not be exaggerated. From a realistic standpoint with regard to the concept of legal rights, Cappelletti's and Perillo's statements seem too sharp. That which distinguishes a legal right from a legitimate interest is precisely the right of action. The expression "pre-existing right or legitimate interest" should not be taken literally with regard even to those legal systems which, like that of Sweden, have evolved furthest away from the Roman one. In my view, this is a matter of expression rather than a matter of legal realities.

Thus a monistic view on the relation between procedural and substantive law does not require the outlook of Roman law. The tendency to differentiate between procedural and substantive law, however, seems to have grown stronger with the diminishing importance of the system of actions (*actiones*). In those countries where the heritage of the system of writs (*actiones*) has remained viable—viz. England and, above all, the U.S.A.—the distinction between procedural and substantive law is not stressed as strongly as in the countries mentioned before. Officially, the system of writs (*actiones*) has long ago been abandoned, but the older point of view still exerts an obvious influence. Although it is possible in English law to notice a trend towards a *rapprochement* with the continental outlook,[5] one can hardly speak of a reception of this outlook as formulated by Bülow.

2. THE HISTORICAL BACKGROUND AND BÜLOW'S VIEW

In order to understand the importance of Bülow's book, it is necessary to describe in some detail how these problems were treated in early law. As far as Roman law is concerned, I shall return to this in section 3.

The old Germanic civil procedure consisted of three stages, the first of which concerned the duty of the defendant to reply to the charge. At this stage he could, according to our way of looking at things, use arguments of a formal as well as of a substantive nature, e.g. that the court lacked competence, that

[5] S. Strömholm, *Torts in the Conflict of Laws. A Comparative Study (Acta Instituti Upsaliensis Iurisprudentia Comparativae* III), Stockholm 1961, pp. 91 ff.

the plaintiff had brought charges against the wrong person, and that there was no legal ground for the suit.

This stage of the Germanic civil procedure may be regarded as the prototype for the hearing of what later was called "prozesshindernde Einreden" ("objections constituting a bar to trial"). It should be noted here that this term has not been used unambiguously in legal writing and in the *travaux préparatoires* of legislation. In general the term denotes that kind of objection which—possibly by means of stay of proceedings—prevents the hearing of the circumstances of the case until the objection has been decided upon. But the term has also been used to denote an objection which only can prevent the court from delivering a judgment on the merits of the action. In both cases, the effect of the objection can be limited with regard to hearing or adjudication until the court has decided on the objection—possibly by means of a separate order. The effect can also be extended until the separate order has been appealed or the time for petitioning has expired.

It should also be stressed that at times the concept of "prozesshindernde Einreden" has also denoted some of what we call substantive issues. The concepts "Prozesseinrede" and "prozesshindernde Einreden" must be distinguished. The distinction between procedural and substantive law is not significant with regard to the definition of the "prozesshindernde Einreden".

The distinction between procedural and substantive law does not seem to have had any significance for the classification of objections in Canon law either. Instead a classification of objections into two categories, dilatory and peremptory, was used. All dilatory objections, but only certain peremptory objections, had to be made and decided upon at the outset of the litigation. An objection that the claim was *res judicata* was one of those peremptory objections which had to be made at the outset of the litigation. The concepts dilatory and peremptory occur in various historical contexts and they have been defined in various ways. In general it can be said that what distinguishes a dilatory objection is that it can only be raised during a certain period of time, e.g. the claim is not due or the plaintiff is a minor and consequently does not possess procedural capacity. A peremptory objection—e.g. the defendant insists that the claim is based on fraud or that the suit is *res judicata*—can in principle be raised at any time.

As in the case of the term "prozesshindernde Einreden", the distinction between dilatory and peremptory objections is not necessarily connected with the distinction between procedural and substantive law. On the other hand, "prozesshindernde Einreden" and dilatory objections often coincide, though this is not always the case.

The terms "dilatory" and "peremptory" were also used by the glossators, who seem to have noted the difference between procedural and substantive law. The latter distinction formed the basis for a classification of the dilatory objections into two categories. This systematization does not appear to have been connected with differences with regard to legal consequences. All kinds of dilatory objections were heard and decided in the same way and the burden of proof with regard to a dilatory deficiency was always on the defendant. Later writers on Roman law, too, held that dilatory objections should be treated in this way.

In the 16th century, two eminent French lawyers, Cujacius and Donellus, presented their theories on these matters, and these also became important for the development of the German law of civil procedure. According to Cujacius, it was a characteristic of a dilatory objection that it could only cause a postponement of the hearing of the claim and could not, like a peremptory objection, cause a dismissal of the suit. This is the meaning of Cujacius's view that a dilatory objection only refers to the hearing.

Donellus uses a common rule for all kinds of dilatory objections, but he notes particularly that some of those only refer to procedural deficiencies, i.e. to the litigation itself. Unlike Cujacius, Donellus claims that all dilatory objections should not only be raised but also be decided upon at the outset of the hearing. This was approximately the way in which the theory of "Prozesseinreden" was understood in German 17th-century legal writing. Thus almost all dilatory objections could prevent further hearing of the other matters at bar. In this way the defendant had the power to delay the adjudication of the suit almost indefinitely by making numerous dilatory objections one after the other. The abuse which followed led to the introduction of the "Eventualmaxim" according to which only a few kinds of dilatory objections could prevent further hearing and adjudication.

German legal writing of the 19th century is on the whole

based on the old foundations. The distinction between dilatory ("verzögliche") and peremptory ("zerstörliche") objections was still the prevailing principle of classification. Dilatory objections were used in order to defer payment without attacking the claim itself, whereas peremptory objections were aimed at the claim itself. Most procedural objections, as the term is used today, constitute a subdivision of the dilatory objections and do not occupy any particular position in relation to other kinds of objections—e.g. substantive objections—in this subdivision. On the other hand, the category of "prozesshindernde" objections was widened to include some *peremptory* substantive objections as well. These, however, could only prevent the hearing of the case if evidence in support of them could be produced at once. Furthermore, exceptions were made from the principle that all dilatory objections should be raised at the outset of the proceedings. When the objections were based on circumstances that had occurred or that the defendant had learned of later during the proceedings, they could be raised at this later stage also. Some deficiencies that invalidated the hearing could also constitute the grounds for objections during a later stage of the hearing, even where it would have been possible to raise the objections at an earlier stage.

At the time when Bülow's book was published there was no uniform code in Germany. The constituent states had their own codes and where no positive rule was to be found in these the *Gemeines Recht* was applied. With regard to the law of procedure, the *Gemeines Recht* mainly consisted of the law of procedure developed in 13th-century Italy, which was founded on the classical Roman law of procedure—the formulary process—as described in the *Corpus Juris Civilis*.

However, one may ask why Bülow focused his book to such an extent on the formulary process. Under Justinian law, this system of procedure had been replaced by the system of *cognitio extraordinaria*, which differed in several respects from the classical system. Apart from the fact that Bülow almost regards the formulary process as an expression of natural law, his great interest in the formulary process can be explained in another way as well. The views that Bülow attacked were—according to him—based in the last resort on misconceptions of the true formulary process. It should be added, as the reader will soon find, that Bülow regarded the structure of the formulary process as a model proving the correctness of his dogmatic premises.

What has just been said explains why Bülow's book—like most other German writing on legal procedure from the 17th century up to the promulgation of the *Zivilprozessordnung* in 1877—was so strongly influenced by Roman law and in particular by the classical Roman system of procedure, the formulary process. New constructions of the classical works were presented not only in the field of legal history but also as arguments *de lege lata*.

Bülow maintains that the first part of the formulary process —the hearing *in jure*—concerned procedural matters only. The second part of the procedure—the hearing *apud judicem* —was devoted exclusively to substantive questions of law.[6] According to Bülow, this principle of division into two parts is "von einer universellen Bedeutung", it is "so tief im Wesen des Prozesses begründet, dass *jedes* Prozess-system zu demselben hingedrängt wird . . .".[7]

Bülow's account develops into an attack upon the doctrine of procedural objections that was predominant at the time his book was published. The supporters of this doctrine set out from the assumption that in Roman law some dilatory *exceptiones* (i.e. an objection inserted into the formula) concerned formal deficiencies in the plaintiff's action. In the formulary process, however, objections in the form of *exceptiones* were decided upon in the second part of the proceedings (*apud judicem*). Thus the notion that an *exceptio* could be of a procedural nature was contrary to Bülow's idea of the principle of division of the proceedings into two parts.

Because of his view that the first part of the proceedings was devoted only to procedural matters, it was natural for Bülow to regard only the second part of the proceedings as proper litigation. The object of the proceedings *in jure* was to establish whether there existed a procedural relationship, a counterpart in procedural law to the legal relations in private

[6] See, e.g., O. Bülow, pp. 8 and 289.

[7] See O. Bülow, *op. cit.*, p. 295; see also p. 289: "Die Zweitheilung des römischen Civilgerichtsverfahrens beruht auf einem innerlichen, qualitativen Unterschiede des processualischen Verhandlungsstoffes. Sie gründet sich auf den Gegensatz, in welchen die eine desselben, der *Thatbestand des Processverhältnisses*, zu der anderen, dem *Thatbestand des materiellen Streitverhältnisses*, tritt. *Die erstere Hälfte, die Processvoraussetzungen, bildete den ausschliesslichen Gegenstand des in iure vor sich gehenden Vorbereitungsverfahrens und wurde hier ohne jede Ausnahme vollständig und endgültig absolvirt.* Für das Hauptverfahren in judicio, blieb bloss die Verhandlung und Entscheidung über das materielle Streitverhältnis übrig".

law, but with the parties and the court as subjects. If any of the prerequisites for the procedural relationship—"Prozessvoraussetzungen"—were missing, the formula was denied and litigation in the real sense never came about.

Thus the concepts of procedural relationship and procedural prerequisites were introduced by Bülow on the basis of his notions of the Roman formulary process. These notions became the starting point of his strongly dogmatic views on the law of procedure. The distinction between procedural and substantive law had a fundamental impact here, and the distinction was —according to him—consistently expressed in the structure of the formulary process. It does not seem to have occurred to Bülow that there might be difficulties in making the distinction in this field; in the preface of his book he claims to have made ". . . eine beständige Grenzregulierung zwischen Privatrecht und Civilprocessrecht".[8]

As I mentioned in the introduction, the doctrine of the procedural relationship is no longer prevalent, whereas Bülow's views on the importance of the distinction between procedural and substantive law are still practically very important. I shall discuss this further in section 5. In section 3 I shall discuss whether the distinction between procedural and substantive law actually was practically important in the formulary process, i.e. whether the doctrine of the "Prozessvoraussetzungen" is based on historical facts, as Bülow thought.

3. WAS THE DISTINCTION BETWEEN PROCEDURAL AND SUBSTANTIVE LAW IMPORTANT IN THE FORMULARY PROCESS?

In what follows I shall not attempt to scrutinize the truth of Bülow's arguments by confronting them with source materials. Rather I shall confront Bülow's basic outlook with the knowledge of the formulary process that has been provided by later research in legal history.

First of all it should be noted that Bülow's principle of division of the proceedings into two parts does not seem to have been applied in the formulary process, at any rate not to the

[8] *Op. cit.*, the introduction, p. VI.

extent Bülow maintains.[9] The division of competence between *praetor* and *judex* cannot be connected with the distinction between procedural and substantive law. Matters of both kinds were heard and adjudicated in the proceedings *in jure* as well as *apud judicem* and they led to the same kinds of decisions—*denegatio actionis* and *sententia*. In many cases it seems that the *praetor* could choose whether to decide upon a question himself or to refer it to adjudication *apud judicem* in the form of an *exceptio*. He seems to have had this freedom of choice with regard to procedural as well as substantive matters.

Presumably, however, formal matters were usually decided upon *in jure*. This is explained by the fact that in many cases such a method was advantageous from a practical point of view. But it cannot be regarded as an indication of a conscious ambition to decide upon such questions as a matter of principle at this stage of the proceedings. Nor does the division of the proceedings into two parts seem to be due to the distinction between dilatory and peremptory objections. It was not until the period of Justinian that this distinction became important.

Even if the distinction between procedural and substantive law was not, as Bülow maintained, the basis for the division of the proceedings, the distinction may have been important in other respects in the formulary process. Let us consider some of the consequences of this distinction in Swedish law of procedure of today in order to see whether there are parallels to be found in the formulary process.

As I shall discuss further in section 6, it is assumed in Swedish legal writing that a dismissal of a suit has a more limited effect with regard to *res judicata* than has a judgment on the merits of the case. The distinction between procedural and substantive law is held to be significant with regard to *res judicata*. This does not seem to have been the case in the formulary process. Instead the significant point was whether the decision was made *in jure* or *apud judicem*. On the whole there is general agreement that a *denegatio actionis* did not prevent the plaintiff from renewing the action in a later trial even if the deficiencies constituting the grounds for dismissal remained.[1] Thus it cannot be taken for granted that the

[9] P. H. Lindblom, *op. cit.*, pp. 43 ff.

[1] L. Wenger, *Institutionen des römischen Zivilprocessrechts*, Munich 1925,

question would be decided in the same way as in the former litigation even if the plaintiff renewed the action immediately after the dismissal and before the same *praetor* who ruled the first *denegatio.*[2] However, the *praetor* was presumably affected by his own or his colleagues' earlier decision, even if he was not bound by it.

A *denegatio actionis* could, as noted earlier, be founded on substantive as well as on procedural deficiencies in the action. In neither case did the matter become *res judicata.*[3] Consequently the distinction between procedural and substantive law was immaterial for the effect of the *denegatio* with regard to *res judicata*.

In classical Roman procedure, the end of the proceedings *in jure* was the moment of *litis contestatio*, the juncture when the matter became *res judicata*. When the *litis contestatio* had occurred, the plaintiff was held to have used or "consumed" his *actio*. If he brought a new action, this could either be denegated by the *praetor* or be dismissed by the *judex* on the basis of an *exceptio rei judicatae*. The decision made after the *litis contestatio*—i.e. *sententia*—thus became final, although the effect of *res judicata* was not tied to the *sententia* itself. And since the "consumption" had taken place already before the proceedings *apud iudicem* had started, the extent of the *res judicata* effect could not depend on whether the objection constituting the basis for a dismissal was procedural or substantive.[4]

It may seem surprising that even a plaintiff who had lost the case on formal grounds would be forever barred from renewing his action for relief in the courts.[5] The distinction between peremptory and dilatory objections was immaterial in this respect also. A plaintiff whose action was dismissed before the *judex* because the claim was not yet due consequently had no possibility of renewing the action when the claim had become due.[6]

p. 99 and footnote 1, R. Schott, *Das Gewähren des Rechtsschutzes im römischen Civilprozess,* Jena 1903, pp. 127 ff., and D. Liebs, "Die Klagekonsumption des römischen Rechts", *Zeitschrift der Savignystiftung für Rechtsgeschichte, romanistische Abteilung,* vol. 68, pp. 169 ff. (1969).

[2] O. Bülow, p. 282, and L. Wenger, *ibid.*

[3] J. Goldschmidt, *Der Prozess als Rechtslage,* Berlin 1925, p. 60.

[4] See M. Kaser, *Das römische Zivilprozessrecht. Handbuch der Altertumswissenschaften* X : 3 : 4, Munich 1966, p. 292.

[5] Cf. section 5 below concerning formal peremptory deficiencies under Swedish law.

[6] Not until Justinian law did the legal force of a judgment become lim-

Such an order was feasible, however, because of the devices for control of the proceedings that the plaintiff had in the formulary process. The *litis contestatio* could not be brought about without the consent of the parties. If the defendant had petitioned to have an *exceptio* inserted in the formula and the *praetor* had consented, the plaintiff could either refuse his consent to the formula and thereby force the *praetor* to denegate the action, or he could consent to such an *exceptio*. In the first case the plaintiff could bring a new action on the same claim, in the latter he could not. If the *exceptio* was temporary or remediable in some other way, there were of course particular reasons for the plaintiff to consider the consequences of continuing the proceedings to a *sententia*. If he thought the *exceptio* would be upheld *apud judicem*, it would be safer to force a *denegatio* and bring a new action when the deficiencies had been remedied. When the plaintiff thought that the objection was strong, he could prevent the suit from becoming *res judicata* by refusing his consent to the *litis contestatio*.

In the formulary process, the distinction between procedural and substantive law was of little consequence for the principle that a judgment may not be predicated upon circumstances other than those raised by a party in support of his position. Procedural deficiencies as well as certain substantive deficiencies in the action might be considered by the court on its own motion and this would in both cases lead either to a *denegatio* or to a dismissal by a *sententia*. Here it should be added that the distinction between peremptory and dilatory objections also does not seem to have had any significance for the possibilities of the court to consider various circumstances on its own motion.

According to Swedish law, it is a prerequisite for a judgment on the merits that there shall exist no procedural deficiencies, or in other words that the procedural prerequisites shall be present.[7] In this way an order is established with regard to which issues should be decided first, and from this order it follows that the court should start with the hearing of the for-

ited in time when the dismissal was based on a dilatory objection. It became possible to bring a new action when a certain time had elapsed after the defect had been cured. A precondition for the right to bring a new action was the plaintiff's reimbursing the defendant's costs for the first trial.

[7] See also *infra*, section 5.

mal issues. A hearing on the substantive issue will be pointless if it later turns out that the suit has to be dismissed without reaching a judgment on the merits. This is the case regardless of whether the substantive grounds of the claim are solid or not. The action has to be dismissed without the court's going into the merits of the case. Was there a similar sequence in the classical Roman process?

From Bülow's principle of dividing the trial into two parts it follows that such an order was applied in the formulary process also. It has already been mentioned that Bülow's views are not borne out by the results of recent research in legal history. One is not allowed to assume that there existed any particular sequence for the hearing *in jure* with regard to procedural and substantive matters—as noted earlier, both kinds could be heard and decided in the proceedings *in jure* as well as *apud judicem*. A *denegatio* could also be based on substantive grounds. And in the same way as the hearing of the substantive issue was unnecessary if it later turned out that there was a procedural deficiency, the hearing of the formal issue was unnecessary if it turned out that there was a substantive deficiency. If the objection first raised was overruled, the hearing must continue regardless of whether the objection was one of a procedural or a substantive nature. And if the objection first raised was sustained, the court could dismiss the suit without deciding upon a second objection.

Let us assume hypothetically that the decisions of the *praetor* were valid only under certain formal conditions. Even if this was the case, it would not necessarily mean that it would always be expedient to start by hearing and deciding on the formal matters. If the substantive objection was heard first, then the decision would be a *denegatio* provided the objection was sustained. Probably neither of the parties would have any interest in trying to prove that the ruling of the *praetor* was wrong because the action was formally defective. And if the substantive objection was overruled, there remained the possibility of a *denegatio* provided the formal objection was sustained.

Under these circumstances there is reason to suppose that the *praetor*, when several objections were made, could choose between them and decide on the objection that seemed strongest and easiest to decide on. The distinction between procedural and substantive law does not seem to have had any sig-

nificant influence on the sequence in which the *praetor* decided on the objections.

With regard to proceedings *apud judicem* there was, on the other hand, a mandatory sequence which, however, differs from that of contemporary law. Since the *judex* had to apply the formula in the proceedings,[8] the question of *intentio* was regularly heard before possible *exceptiones*. An *exceptio* could, contrary to what Bülow thought, be based on procedural as well as on substantive grounds. Thus it could happen that a formal objection was heard as the last one in the proceedings *apud judicem* also. To the extent that procedural objections were raised during this part of the proceedings, this may even have been regularly the case.[9]

The distinction between procedural and substantive law has left no trace on the rules concerning the right of appeal in the formulary process. In the beginning there was no right to appeal either from a *sententia* or from a *denegatio*. When *appelatio* was finally introduced, a *sententia* became subject to review regardless of whether it was based on procedural or substantial law. Thus there was no differentiation as between decisions of a procedural or a substantive nature.

Was, then, the distinction between procedural and substantive law used at all in the formulary process? The outline of Gaius's well-known work *Institutiones* seems to indicate that this was the case. Perhaps one might say that Books I–III concern substantive law, whereas Book IV deals almost exclusively with procedural law.[1] But with regard to the rest of the Roman sources there is no trace of a conscious distinction between these categories.

Although the Roman writers made very thorough classifications—according to Bülow perhaps too thorough[2]—of various objections (peremptory/dilatory, *in rem/in personam*, etc.), the

[8] L. Wenger, *op. cit.*, p. 140.

[9] I do not take into consideration those cases where a *praescriptio* was contained in the formula. On this, see P. H. Lindblom, *op cit.*, pp. 54 ff.

[1] But see H. J. Wolff, "Prozessrechtliches und materiell-rechtliches Denken in rechtsgeschichtlicher Beleuchtung", *L'Europa e il diritto romano Studi in memoria die Paulo Koschaker*, vol. II, Milan 1954, p. 425. It should also be noted that in some quarters Gaius is held not to be a classicist. If this is correct, the plan of the *Institutiones* does not indicate that the distinction between procedural and substantive law was used at the time of the formulary process.

[2] O. Bülow, p. 239.

distinction between procedural and substantive objections does not seem to have interested them. This is, according to Bülow, incompatible with the doctrine of procedural objections which he meant to attack.[3] However, the lack of interest in this distinction seems to be even more troublesome for a supporter of Bülow's own doctrines. For if, like Bülow, one only regards the proceedings *apud judicem* as a trial in its proper sense and consequently maintains that procedural objections were not raised at all at this stage of the proceedings, this cannot explain the Roman writers' lack of interest in the distinction. For these writers mainly deal with the proceedings *in jure,*[4] where the distinction—according to Bülow—was crucial.

Thus it would seem that the distinction between procedural and substantive law was not clear to the Roman jurists at the time of the formulary process. The distinction was first noted in late Roman law and finally—as a result of Bülow's book—became extremely important during the later part of the 19th century. The Roman formulary process—contrary to what Bülow maintained—appears to serve as an example of the fact that a legal system with *a monistic concept of the relation between procedural and substantive law* not only is possible, but has actually existed.

The publication of Bülow's book marks the beginning of an endeavour to emancipate procedural law from private law, an endeavour that has continued ever since. The effort has been concentrated on attempts to draw a clear dividing line between procedural and private law.[5] Bülow's book can be said to open the so-called constructive period in procedural legal science. The "Begriffsjurisprudenz" had already become extremely important in writings on private law. With Wetzell (1st ed. 1854) this way of thinking was introduced to some extent in procedural legal science also. But Bülow created the concepts—the procedural relationship and the procedural prerequisites—necessary for a complete reception of this way of thinking. Bülow is, primarily because of this, considered the founder of procedural legal science.

[3] *Ibid.*

[4] The hearing *apud iudicem* is only treated superficially in the Roman sources. M. Kaser, *op. cit.*, p. 272.

[5] W. Simshäuser, *Zur Entwicklung des Verhältnisses von materiellem Recht und Prozessrecht seit Savigny. Eine Untersuchung am Beispiel rechtsfremder Klagen,* Bielefeld 1965, p. 39.

4. SWEDISH LEGISLATION BEFORE AND AFTER BÜLOW

In many cases a distinction, such as that between procedural and substantive law, is used only in order to simplify the account of a complicated matter and to facilitate the memorizing of data. Having regard to the multitude of objections a defendant can raise against an action, there is obviously a need for systematization. The classification of various circumstances into procedural prerequisites and matters of substantive law—as well as the distinction between procedural objections and substantive objections based on this classification—seems to serve such a purpose well.

A systematization may, however, also be the result of an ambition to contribute to a "more correct" comprehension of a certain field of law. It may also have repercussions on the law itself in that field. As I noted in the introduction, this is the case with respect to the distinction between procedural and substantive law in the modern Swedish law of procedure. Is it possible to trace a direct influence from Bülow in this matter, or has the distinction between procedural and substantive law traditionally been regarded as important when classifying the objections of the defendant?

To all appearances the distinction was sometimes used in legal writing of an earlier date, but it was not considered to be so practically important as it is today. In a well-known treatise by Nehrman (1751) on Swedish procedural law according to the codification of 1734, a distinction between procedural and substantive matters was made, but Nehrman also noted that it is impossible to draw a clear line of demarcation between them.[6] A century later the same thing is noted by Schrevelius, who, like Nehrman, attaches greater significance to the distinction between dilatory and peremptory objections and between objections that constitute a "prozesshindernde Einrede" and objections that do not.[7]

The reasoning of these (and other) earlier Swedish legal writers should, of course, be looked upon in relation to the code of procedure in force from 1734 to 1948, when it was re-

[6] D. Nehrman, *Inledning till Then Swenska Processum Civilem*, 2nd ed. Stockholm 1751, pp. 389 and 391.

[7] F. Schrevelius, *Lärobok i Sveriges allmänna nu gällande civilprocess*, Lund 1853, the introduction and pp. 198 ff.

placed by the present code. Under the code of 1734, almost all kinds of objections were treated in the same way. The distinction between procedural and substantive law appears to have had no significance. There were, however, special rules with regard to objections referring to the competence of the court and objections stating that the defendant was not the only person liable. These objections constituted a "prozesshindernde Einrede" (see page 118) to the extent that the proceedings had to be stayed pending appeals from the decisions on these objections.

It is interesting to note that, in the proposals for amending the code of procedure made during the latter part of the 19th century, the lawgiver continued to take an interest in the question of what objections would constitute a "prozesshindernde Einrede" in the way indicated above. At the same time, no practical consequences were expressly connected with the distinction between procedural and substantive law. During this period, Bülow's views were introduced in Swedish legal writing, mainly through a book by Wrede published in 1884.[8] After this it appears that the importance of the distinction between procedural and substantive law was taken for granted. This view also had an impact on the construction of the code of procedure before any amendments had been contemplated. The somewhat unclear heading of the chapter on the hearing of objections in the old code of procedure was formulated in such a way as to make the whole chapter apply only to procedural objections! And when proposals for replacing the old statute by a new one were put forward in 1926 and 1938, the distinction between procedural prerequisites and substantive matters had become natural even to the lawgiver. The new statute was to a great extent built on this classification without any particular explanation. The view that the distinction between procedural and substantive law could serve as a practically useful ground for classification of objections had, so to say, sneaked into the law through the anachronistic views of legal writing on the content of the old law. Undoubtedly Bülow's book of 1868 had a decisive impact on this. Now let us see what consequences Bülow's views have had for the Swedish law of procedure of today.

[8] R. A. Wrede, *Processinvändningarna enligt finsk allmän civilprocessrätt*, Helsinki 1884.

5. SOME DIFFERENCES IN THE HEARING OF OBJECTIONS REGARDING PROCEDURAL HINDRANCE AND OBJECTIONS REGARDING SUBSTANTIVE CIRCUMSTANCES

According to ch. 34, sec. 1 (2), of the Swedish Code of Procedure,[9] the court has to take notice of procedural hindrances on its own motion, when there are no provisions to the contrary. Virtually all procedural hindrances are mandatory, only certain rules of competence are waivable. Most of the circumstances that constitute the basis for a procedural objection thus entail a dismissal *ex officio* and the fact that a procedural objection was made by the defendant is insignificant except that it serves as information to the court and gives the defendant the right to a separate order (ch. 34, sec. 3). The possibilities for the court to take notice of substantive circumstances are, on the other hand, limited in several ways, primarily by the provision (ch. 17, sec. 3) that in cases amenable to out-of-court settlement the judgment may not be based upon circumstances not alleged by a party as the foundation of his cause. With regard to facts of law, however, the same rule applies as to procedural hindrances—an objection with regard to facts of law does not have to be raised in order for the court to base its judgment on them.

Well in line with the court's having to take notice on its own motion of mandatory procedural hindrances are its powers—even duties in some cases—to call for evidence in addition to the evidence claimed by the parties. The corresponding powers with regard to substantive circumstances are, however, limited (ch. 35, sec. 6).

In general, the duty of the court to take notice of mandatory procedural hindrances is not limited to any particular stage of the proceedings (ch. 59, sec. 1). To be sure, according to ch. 42, sec. 7, at the outset of the preparatory proceedings the defendant must immediately state any procedural objections that he wishes to urge. But as the objection *per se* does not have any legal significance with regard to the question whether the

[9] The Swedish Code of Procedure has been published in an English translation. See Bruzelius–Ginsburg, *The Swedish Code of Judicial Procedure*, South Hackensack (N.J.) and London 1968. (It should, however, be noted that the code was amended in 1971.) R. Ginsburg and A. Bruzelius, *Civil Procedure in Sweden*, The Hague 1965, is a general survey of the Swedish law of civil procedure.

case should be dismissed, this provision cannot prevent the defendant from calling the court's attention to a procedural hindrance even at the very end of the proceedings. The defendant, too, can at a late stage of the proceedings bring in new evidence which sheds new light on a procedural objection already raised. The only sanctions that the code of procedure offers against such careless pleading in conflict with ch. 42, sec. 7, are the obligation according to ch. 18, sec. 6, to compensate the plaintiff for his additional expenses caused by the defendant's behaviour and—in extraordinary cases—the penal provisions in ch. 9. In this respect there is a considerable divergence from the provisions concerning substantive circumstances, according to which—apart from the sanctions just mentioned—one also has to consider the provisions of ch. 13, sec. 3, ch. 43, sec. 10, ch. 52, sec. 25, and ch. 55, sec. 13, all of which limit the possibilities for the parties to amend their original claims or allegations of circumstances in support of their claims and to bring in new evidence.

If the court has made a judgment on the merits in spite of a procedural hindrance, the judgment must be vacated for grave procedural errors on the limited appeal of the defendant (ch. 59, sec. 1, cf., on the other hand, ch. 10, sec. 19) and the defendant does not have to give any reasons for his not having raised a procedural objection or produced any evidence in the matter. The possibilities of being granted relief for a substantive defect in the judgment are limited according to ch. 58, sec. 1 (2), which provides that the party has to present a valid excuse for failing to claim the circumstance or evidence in court.

According to ch. 34, sec. 1, matters of procedural hindrance should be heard and decided if possible before the hearing on the substantive issues. If it turns out that the suit should be dismissed because of a procedural hindrance, it is unnecessary to consider the substantive issue. This partly explains many of the provisions concerning the hearing and consideration of procedural hindrances. Thus, the code of procedure contains generous provisions for separate preparatory proceedings and a separate main hearing as well as separate orders and appeals (ch. 12, sec. 4 (2), sec. 20; ch. 50, sec. 13; ch. 34, sec. 3; ch. 49, sec. 3) with regard to procedural hindrances.

By regarding a deficiency as a matter of procedural hindrance it is, according to the provisions just mentioned, pos-

sible to avoid the hearing and adjudication of the rest of the case, regardless of whether the prerequisites for a separate judgment or a judgment on a threshold matter are present. This state of affairs—which already existed before the new code of procedure—was probably a primary reason for classifying a circumstance as one of procedural hindrance, if practical considerations were considered important. The importance of the distinction between procedural hindrances and substantive circumstances in this respect, however, has been very much reduced through an amendment of ch. 17, sec. 5(2), in 1971. This provision now makes it possible to separate the substantive issues to a much greater extent than earlier. Consequently, if the classification of circumstances has to a certain extent been influenced by differences prevailing earlier, there are today ample reasons for investigating what complex of rules is most appropriate for a particular factual circumstance. The old classification can be unsuitable in other respects.

With regard to the possibilities of bringing the litigation to a speedy end, certain differences remain, even after the amendment of 1971, between the rules for hearing and adjudication of procedural hindrances and substantive circumstances. The court must decide on a procedural hindrance "as soon as reason therefor arises" (ch. 34, sec. 1). The claim may be dismissed already when the court receives the summons application (ch. 42, sec. 4 (2)). And, contrary to the rules concerning the substantive issue, there are no limitations on the court in deciding on a procedural hindrance already during the preparatory proceedings (ch. 42, sec. 4 (2); ch. 42, sec. 16; cf. ch. 42, sec. 18). The differences in this respect, however, are not as great as they appear. The provision (ch. 42, sec. 20 (2 and 3)) on the so-called "little main hearing" makes it possible in certain cases to deliver a judgment on the merits immediately after an oral preparatory proceeding.

If the matter of a procedural hindrance does not arise until during the main hearing, or for that matter if a special main hearing has been arranged, the judgment will primarily be based on the evidence and circumstances presented during that hearing (ch. 17, secs. 2 and 12). But, as already indicated, the principles of orality and immediacy are not applied to the same extent to matters of procedure as to substantive matters. An appeal on a procedural matter (limited appeal) can be disposed of, too, without a main hearing to a greater extent than an

appeal on the merits (ch. 50, sec. 21; ch. 51, sec. 10; ch. 55, sec. 12; ch. 56, secs. 8 and 12), although the differences in this respect will probably diminish in consequence of the 1971 amendments of ch. 50, sec. 21 (2 and 3), and ch. 55, sec. 12. There is no main hearing on a limited appeal, but the court may order a hearing that closely resembles the oral appeal proceedings.

If one—or both—of the parties fail to appear at a special hearing for the disposition of a procedural issue, the court may nevertheless consider and decide upon the issue according to ch. 44, sec. 7, and consequently also dismiss the claim of the plaintiff. If the hearing concerns the merits and both of the parties fail to appear, the case must be stricken out (ch. 44, secs. 1 and 4 (1)), whereas a default judgment may be entered if only one of the parties appears.

In a lower court a dismissal may be ordered by a single judge, whereas a single judge constitutes the bench only to the extent provided in ch. 42, secs. 18 and 20 (cf. ch. 1, secs. 4 and 11). In a court of appeal and in the Supreme Court the same quorum rules apply in both cases (ch. 2, sec. 4 (1), and ch. 3, sec. 4). It is mandatory for the court to vote separately upon procedural issues (ch. 16, sec. 2 (1)), but this does not apply to substantive issues.

According to ch. 17, sec. 1, the final decision by a court upon the merits of a case is—at least in ordinary civil cases—a judgment. Any other decision on an action—e.g. a procedural objection—is an order. This is important for, among other things, the form and the content of the decision. Thus the statutory requirements for the content of a judgment (ch. 17, sec. 7) are mitigated with regard to orders of dismissal (ch. 17, sec. 12)—for instance, an order need state the reasoning in support of it only "if the nature of the matter so requires".

Furthermore, different forms of appeal are used against judgments and orders. This means, apart from the differencies in the proceedings already mentioned, that the time assigned for the submission of a petition is different. As has already been noted, the distinction between procedural hindrance and substantive issues is also important with regard to the choice of extraordinary remedies, whereby the differences between relief for substantive defects and relief for grave procedural errors also constitute practical consequences of this distinction.

A mandatory procedural hindrance is, of course, not ame-

nable to out-of-court settlement between the parties, and a promise not to appeal from a final decision is not considered binding.

Much more could be said about the practical consequences of the distinction between procedural hindrances and substantive issues. One could, for example, discuss such topics as when a judgment should be set aside and when the case should be returned to the lower court for retrial, what differences exist with regard to the details of the rules of appeal, the extent to which the grounds for relief for a substantive defect in the judgment apply to final decisions, etc. However, these matters cannot be dealt with in this paper. Instead, I shall try to give an example of the practically important rule that matters of procedural hindrance are to be considered and adjudicated before the substantive issues.

Suppose that it is obvious that a payment claim is unfounded —the plaintiff has perhaps actually admitted a factual circumstance which implies this. There is, however, another disputed circumstance which necessitates extensive evidence and decisions on complicated legal questions. If this other circumstance can be classified as one of substantive law, the suit can be dismissed on the merits because of the first circumstance alone. It might even be possible completely to avoid a hearing on the second circumstance. But if the second circumstance is one of procedural hindrance, it will have to be heard and decided before a dismissal on the merits can take place. A judgment on the merits presupposes that all procedural prerequisites are present. The absolute precedence of the procedural prerequisites before the substantive issue may thus in certain cases lead to disadvantages from the viewpoint of procedural economy.

The present arrangement—that a dismissal on the merits must not take place in a case like this—can, of course, be justified in some other cases, e.g. when the disputed matter concerns the procedural capacity of the plaintiff. The reason why the claim seems ill-founded may be that the plaintiff is unable to protect his own interests. If that seems doubtful, it justifies an inquiry even if such an inquiry seems wasteful from the viewpoint of procedural economy.[1] But in other cases the

[1] However, one could also maintain that it is particularly important to bring the trial to a rapid end when the procedural capacity of the plaintiff is

sanctity of the court seems to be the only reason for a general rule that the procedural prerequisites must be present when a judgment on the merits is rendered. There are reasons *de lege ferenda* for not regarding the court's failure to consider a procedural hindrance as a grave procedural error when the claim is patently ill-founded.

So far, I have discussed some practical consequences of the distinction between procedural prerequisites and substantive circumstances according to Swedish law. It should be noted, however, that the differences do not need to be as great in the individual case as may at first sight appear. In the first place there is, as has already been noted, room for a certain amount of discretionary application within each set of rules. An example of this is that, particularly after the 1971 amendments, the courts have such a freedom of choice with regard to the hearing of a regular or a limited appeal that the question whether to regard an objection as a procedural one or as one penetrating into the subject matter does not need to be of any significant importance for the hearing in the court of appeal or in the Supreme Court.

The possibility of making analogies between the two sets of rules is also likely to mitigate the differences with regard to the practical effect of the distinction between procedural prerequisites and substantive circumstances. In what cases are there reasons for using this possibility?

This is a far-reaching question, and here I can only sketch an outline of the answer. Suppose, for instance, that the decision on a procedural hindrance presupposes that the court considers several factual circumstances. The defendant may have alleged several grounds for the plaintiff's not having procedural capacity. In accordance with what has been said above, there are ample opportunities for a separate hearing on the procedural issue as well as a separate order and a separate appeal. Then the question arises whether the words "procedural issue" and "objection based on an alleged procedural hindrance" (ch. 42, secs. 13 and 20; ch. 50, sec. 13; ch. 34, sec. 3; ch. 49, sec. 3) may be construed to include not only the question of procedural hindrance in a wide sense but also

doubtful, e.g. when the costs for the trial are equal to or exceed the claim. The economic interests of the plaintiff are best taken care of by the court if the court strikes out the action as soon as possible.

each of the separate grounds that the defendant has alleged in support of his objection. It could possibly be maintained—at any rate since the 1971 amendments of ch. 17, sec. 5 (2)—that in accordance with the principles underlying this provision (and other connected provisions) the court should be allowed to undertake a separate hearing, and to make a separate decision, etc., on a particular procedural hindrance even when the procedural hindrance is connected with a substantive issue. An analogous application of the rules of substantive circumstances should also be possible with regard to ch. 16, sec. 2 (voting rules).

The defendant's right to a judgment on the merits (ch. 13, sec. 5 (1)) is also important in this context. Suppose that a defendant, inconvenienced for the second time with a suit on the same issue, has raised the objection that the case is *res judicata*, and the court after a long and costly hearing prepares an order that action should be stricken out. The plaintiff, who happens to be a notorious doctrinaire, then withdraws his claim, obviously intending to renew it later. The reasons underlying the defendant's right of judgment according to ch. 13, sec. 5, are also present in this situation although the defendant does not request a judgment on the merits. If orders of dismissal are to be considered binding for the court in a subsequent trial, there are reasons for a "right of order of dismissal" corresponding with the provisions in ch. 13, sec. 5, in a case like this.

An analogy might also be justified in case of a promise not to appeal from the judgment according to ch. 49, sec. 1 (3). According to its wording this provision applies only to judgments on actions amenable to out-of-court settlement, but it is hard to find any good reasons for not allowing the provision to apply also to orders of dismissal, at any rate when the promise not to appeal was given after the order was given.

6. THE BINDING FORCE OF AN ORDER TO STRIKE OUT THE ACTION

In section 5, I have given an account of the differences with regard to the rules for hearing and adjudication necessitated —directly or indirectly—by the system of rules of the Swedish

code of judicial procedure. I have also tried to sketch how the practical inconveniences of the distinction between procedural and substantive law in certain cases can be mitigated by making analogies between the two systems of rules applicable to substantive and procedural issues respectively.

However, it seems to be taken for granted in some instances that the distinction between procedural and substantive law must entail practical consequences even when the code does not explicitly provide for such differences. An example of this is the doctrine—of German as well as of Swedish law—that there are differences with regard to the binding force of judgments on the merits and orders not going into the merits. An order of dismissal, i.e. an order to strike out the action, is commonly held to have a more limited binding force than a dismissal on the merits.[2]

In my dissertation I have tried to prove that this doctrine may be questioned not only as a matter of policy considerations but also from the point of view of the law as it stands today. It would be going too far to discuss this here in detail. However, it should be noted that the *RB* does not provide a clear answer to the question whether an order of dismissal has legal force. In ch. 17, sec. 11, provisions are given for the legal force of judgments (i.e. on the merits) and in ch. 17, sec. 12, where provisions are given with regard to the applicability of the rules for judgment to final orders, no reference is made to ch. 17, sec. 11. Thus the tenor of ch. 17 of the *RB* seemingly leads to the conclusion that orders of dismissal lack legal force.

This is the case, however, if only ch. 17 is taken into consideration. For ch. 58, sec. 10, and ch. 59, sec. 4, provide that the provisions for relief for substantive defects and grave procedural errors shall apply *mutatis mutandis* to final orders. And since in most cases there should not be any need for extraordinary remedies against decisions that lack legal force, we have here an indication that the lawgiver has ascribed legal force to orders of dismissal as well. This is confirmed by the *travaux préparatoires* of ch. 58, sec. 10,[3] and there is also case law indicating that orders of dismissal do have legal force.

The reasons for ascribing legal force to dismissals on the merits also apply to orders of dismissal. The *res judicata* ef-

[2] P. H. Lindblom, *op. cit.*, pp. 116 ff., cf. B. Rimmelspacher, *Zur Prüfung von Amts wegen im Zivilprozess*, Göttingen 1966, pp. 99 ff.
[3] *Nytt juridiskt arkiv*, part two, 1944, p. 737.

fect of a judgment gives security, and the need for security is also present when a suit is dismissed. This is particularly the case when a procedural hindrance is peremptory and/or the issue demands a great deal of evidence and raises complicated legal questions. Suppose, for instance, that a suit has been dismissed on the grounds of *res judicata* after a lengthy hearing of this kind. It would be contrary to the reasons underlying the provisions in ch. 17, sec. 11, to permit the question of legal force to be raised in a new trial. But also when a dilatory procedural hindrance—i.e. one limited in time—has been the ground for a dismissal, a *res judicata* effect might be sensible for reasons of security. The defendant should not be bothered with a new suit on the same procedural hindrance until the relevant *facta supervenientia* have occurred.

It is out of the question to deny legal force to all orders of dismissal on the ground that the need for security in some instances is less important than in the case of a judgment on the merits. In this respect there is also agreement in legal writing that, at any rate in some instances, orders of dismissal have legal force. And it would be contrary to clear precedents to deny the legal force of dismissals made on the basis of dilatory objections. Most precedents on this matter concern dilatory procedural hindrances. It should also be noted that dismissals based on dilatory deficiencies have legal force in so far as the decision of the court goes into the merits, regardless of the time limitation which is a consequence of the curable nature of the deficiency. Thus the concept of legal force seems to be able to create security with regard to orders of dismissals also. Supposing it is uncertain whether a claim is to be dismissed on the merits or on procedural grounds, it would be unimportant to the defendant which decision the court makes, if only he could be sure that the decisions will stand.

The other arguments that are commonly given in support of the concept of legal force are also applicable to orders of dismissal. If orders of dismissal are denied legal force, there is a risk of careless pleading with subsequent unnecessary costs for the parties as well as for the Treasury. And the argument that the concept of legal force helps in maintaining public confidence in the administration of justice and in the authority of the courts is just as valid with regard to dismissals on procedural grounds as it is to dismissals on the merits, even if this argument is not very weighty.

There is, however, a difference with regard to procedural economy. Since matters of procedural hindrance are to be heard and decided first, the time and cost spent on adjudication is generally less than for a dismissal on the merits. Most matters of procedural hindrance are in effect so uncomplicated that it would be quicker to decide upon the procedural hindrance anew than to hear the argument on the *res judicata* matter. But these are precisely the cases where the matter of *res judicata* is uncomplicated, too. It can, of course, also happen that a matter of procedural hindrance is more complicated than the average substantive issue. The usual reasoning with regard to the purpose of the law thus indicates that orders of dismissals, too, should have legal force. An additional reason is that on the whole it is possible to apply the rules concerning the legal force of judgments to orders of dismissals as well without any particular complications. This is the case with regard to the prerequisite that the substantive issue must be identical in the two trials, the time limitation on legal force, the prejudicial effect of the judgment and its legal force in substance.

But does the correspondence between orders of dismissal and dismissals on the merits also apply to the rule on the preclusion of circumstances not alleged by a party as the foundation of his cause? The answer is yes. In neither case are the other possible grounds for an order of dismissal precluded. In spite of the fact that every judgment *per se* presupposes that all procedural prerequisites are present, a dismissal on the merits does not prevent a dismissal in trial no. 2 on the basis of another procedural hindrance than *res judicata*. For the *res judicata* is not among the procedural hindrances that are to be heard and decided first when several procedural objections have been raised. In such a case, according to Swedish law, the court has first to hear and decide on the procedural prerequisites, the object of which is to secure a correct and efficient hearing. Elsewhere a dismissal is to be based on the ground that is easiest to decide upon. If the action has been dismissed on the merits in trial no. 1 and the plaintiff renews the action, a dismissal may be based on other procedural hindrances than *res judicata*, e.g. wrong forum or lack of procedural capacity. And if a dismissal on the basis of a procedural hindrance has been made in trial no. 1, the claim may be dismissed on the basis of another procedural hindrance in trial no. 2, provided that the latter procedural hindrance

does not come after the first one in the prescribed sequence of hearing.

With regard to the preclusion of substantive objections, too, there is complete correspondence between dismissals on the merits and orders of dismissal. In both cases all substantive objections are precluded, provided the deficiency on which the decision was based has not been remedied by *facta supervenientia*. In addition to this, an order of dismissal as well as a dismissal on the merits precludes any alternative circumstances that the plaintiff can allege as the foundation of his cause. A dismissal on the merits and an order of dismissal are thus equivalent with regard to the preclusionary effects. The fact that the opposite is assumed in legal writing seems to be due to the fact that orders of dismissal are based on dilatory deficiencies more often than are dismissals on the merits. Consequently it is more often possible to bring a new action after a dismissal on the basis of a dilatory procedural hindrance than after a dismissal on the merits. But this is a matter of difference in quantity rather than in quality.

The main principle that the same rules apply to orders of dismissal and dismissals on the merits is, however, not without exceptions. With regard to the limits of *res judicata* concerning persons, there are reasons for supposing that there are differences in some instances. According to the theory for the effects of *res judicata* on a third party (which does not take part in the litigation) presented by Ekelöf as early as 1937, a judgment is *res judicata* for a third party, too, in so far as he is bound by the disposal of the claim by either party. To the extent that a dismissal on the merits constitutes *res judicata* according to this theory, there seem to be no objections against a corresponding *res judicata* effect of an order of dismissal, and this applies also to a dismissal based on a mandatory procedural hindrance. However, notwithstanding Ekelöf's theory a dismissal on the merits is in some instances *res judicata* for a third party, e.g. in birth-status cases and in criminal cases. It would be unfortunate to ascribe legal force to orders of dismissal to the same extent as to dismissals on the merits in such cases. For the *locus standi* is one of the procedural prerequisites that are heard last among other procedural hindrances and it is consequently impossible to know whether the parties have had *locus standi* in a suit that has been dismissed on other procedural grounds. Furthermore, an order of

dismissal for want of *locus standi* cannot as a rule be vacated on the grounds of grave procedural error. For this reason an order of dismissal should not have legal force with regard to a third party in cases where a dismissal on the merits has legal force, notwithstanding Ekelöf's theory of the *res judicata* effect of a judgment on a third party.

7. LOCUS STANDI

An examination of the procedural prerequisite *locus standi* elucidates the practical and theoretical problems related to the distinction between procedural hindrances and substantive matters. In modern Swedish law of procedure, the concept "locus standi", "standing to litigate", (*talerätt* or *saklegitimation*) means a person's capacity to litigate on a given issue. If either of the parties lacks *locus standi*, the court must on its own motion dismiss the suit.

There are no provisions on *locus standi* in the *RB* and consequently there is no precise definition of this procedural prerequisite. Though there are provisions on *locus standi* in other statutes,[4] it is not always clear whether such provisions in effect constitute rules on *locus standi* in a procedural sense or whether they are rules of substantive law. The problem is further complicated by the fact that there is no fixed terminology in this field. Thus the term "locus standi" (*talerätt*) is not always used in the same sense in legal writing on private law as in legal writing on procedural law. The usage of the courts also varies.

Difficulties arise already in distinguishing *locus standi* from other procedural prerequisites. For instance, the distinction is not always clear between *locus standi* and the prerequisites for a declaratory judgment according to *RB* ch. 13, sec. 2, as well as between *locus standi* and the subject-matter competence of the court. These problems are not very significant, since on the whole there are common rules for all procedural hindrances. It is, however, more difficult and also more important to distinguish *locus standi* from the substantive matter in litigation. All the practical consequences discussed above will then follow from the classification.

[4] See, e.g., the Swedish Companies Act, 1944, sec. 138.

In old legal writing and lawmaking in Sweden procedural and substantive matters were not kept apart in the same way as today. By the end of the 19th century it seems that in Swedish legal writing—influenced by the works of Bethman-Hollweg—the concept of *locus standi* was considered identical with the parties' being subjects of the legal relationship under litigation. Because of—among other things—the difficulties in distinguishing between the subjective and the objective aspects of a legal relationship, it was held that the matter of *locus standi* should be regarded as a part of the substantive issue. This view was prevalent until 1915, when the Swedish scholar Kallenberg—influenced by the distinction between "Prozessführungsrecht" and "Sachlegitimation" made by his German colleague Hellwig—suggested that the term *locus standi* should be used only to signify the procedural question whether a party had capacity to litigate on a given substantive legal relationship. This question was not to be confused with the question whether the parties in the litigation were subjects of the legal relationship.

Kallenberg's suggestion was immediately adopted almost *in toto*. In Swedish legal writing on procedural law the term *locus standi* still signifies the capacity of a party to litigate concerning a given issue.[5] In legal writing on private law, however, the term is sometimes used to indicate which are the beneficiaries of a legal relationship, without taking a stand on the question whether a deficiency in this respect is to lead to an order of dismissal or a dismissal on the merits in a litigation.

In my view, the difficulties in distinguishing between the two meanings of *locus standi* just mentioned are not merely incidental. Even when *locus standi* is an independent procedural prerequisite, it is still connected with the parties' being subjects of the legal relationship under litigation. However, the common view is that this is a matter of two different concepts.

In support of the view that it is possible to distinguish *locus standi* in the procedural sense from the question of the parties' being subjects of the legal relationship under litigation, it has been argued that sometimes a person who is undeniably a subject of a legal relationship has no standing to litigate and that someone else has the corresponding right. Then the term "*locus standi* to appear in another person's legal position"

[5] P. O. Ekelöf, *Rättegång II*, 3rd ed. Stockholm 1970, p. 52.

is used, which means the same thing as the German term "Prozess-standschaft". However, in these cases there is a close correspondence between the extra-procedural rights of the parties to dispose of the issue and their *locus standi*. They are subjects of the legal relationship under litigation—the claim concerns their rights.

Thus *locus standi* is connected with one or several questions which are usually regarded as belonging to the substantive issue of a suit. In accordance with the principle that a formal classification of a rule is justified only when the purpose of the rule is promoted by the classification, one should ask what rational reasons there are for classifying a particular circumstance as a matter of *locus standi*.

In the Swedish debate on this matter the predominant argument is that *locus standi* must be considered a procedural prerequisite in order to obviate a judgment that would be binding for a third party in conflict with the rights of disposal of the parties in an out-of-court settlement. The following statement by Ekelöf may serve as an example:

> However, one could imagine that someone set about litigating on a right he actually thinks belongs to someone else. One example is a creditor C., who is worried because his debtor D.1 is not looking after his business properly and not collecting his debts. C. brings a suit against one of D.1's debtors, D.2, requesting the court to order D.2 to pay his debt to D.1. If such a suit was to be permitted, the judgment must also be binding on D.1 for reasons of D.2's security. But since under private law D.1 has a complete right to dispose of his property, there is no reason why C. should be permitted to litigate on his behalf in this way considering, also, the risk that C. will lose the case and consequently D.1 his claim. The only way to protect D.1 against this is for the court to dismiss the case because of C.'s lack of *locus standi*.[6]

Ekelöf's view seems to be based on the opinion that the defendant D.2 should not have to litigate twice on his debt. If the case is not dismissed on the grounds of procedural hindrance, the judgment must be binding on the third party, D.1, notwithstanding Ekelöf's own theory of the *res judicata* effect of a judgment with regard to a third party. Thus, despite Ekelöf's theory the ultimate reason for the rule of *locus*

[6] P. O. Ekelöf, *op. cit.*, pp. 70 f. (my translation).

standi is to avoid the *res judicata* effect of a judgment against a third party.

I do not think that Ekelöf's argument is persuasive. The starting point of Ekelöf is obviously that the court has to decide whether D.2 is liable to pay D.1, if C.'s claim is not dismissed. In my view it is not necessary to look upon the matter in this way. In Ekelöf's example the plaintiff's action may be said to be defective because the circumstances alleged by C. do not give him any right at all to collect D.2's debt and thus do not have the legal significance alleged by C. This is a matter of law and, since the parties normally do not dispose of the law, the claim according to this view must be dismissed on the merits by the court on its own motion in accordance with the principle *iura novit curia*. Such a judgment cannot, of course, prevent D.1 from bringing a new action. The fact that C. does not have a "substantive right" does not prevent D.1 from having such a right. In this way, too, it is possible to reach the result that the decision in the litigation between C. and D.2 does not bind D.1.

Consequently it seems that the necessity of a decision on the *locus standi* cannot be the reason for classifying the matter of C.'s right to collect a claim as one of procedural hindrance. Let us, however, for a moment suppose that the court does not have to dismiss the claim on its own motion but that the matter of D.2's liability is examined by the court. It would seem that a judgment for C. cannot harm D.1. This cannot be a reason for classifying the matter as one of procedural hindrance. And it is hard to understand why, as Ekelöf claims, a dismissal on the merits "must also be binding on D.1 for reasons of D.2's security". Such a *res judicata* effect is contrary to Ekelöf's own theory of the effects of *res judicata* with regard to persons, as Ekelöf himself realizes. The parties in the litigation cannot bind D.1 in a corresponding way by means of a contract. This theory has established a balance between the powers of the parties to dispose of the matters in litigation or in out-of-court settlements, which should not be upset.

It is true, however, that D.2 might be inconvenienced with a new action if the first one was to be allowed and that the new litigation would seem pointless and undesirable from D.2's point of view. But the risk of pointless and undesirable lawsuits exists in quite a few other cases, too, without being re-

garded as a reason for classifying the matter as one of procedural hindrance, e.g., if the claim is patently unfounded or if the claim is founded on a rule unknown in Swedish law. Or suppose that the creditor C., having transferred his claim against D.1 who is unwilling to pay, after the transfer summons D.1 to pay. Although it is obvious that C. no longer owns the claim, his action is not to be dismissed on formal grounds but is to be dismissed on the merits. The fact that D.1 may expect a new suit on his debt does not influence the choice between a judgment and a dismissal. I can see no reason to show any special consideration for the defendant in the particular case mentioned by Ekelöf.

To systematize a matter as one of procedural hindrance only out of consideration for the defendant hardly seems justified, except in the case of the matter of the procedural capacity of the defendant. And a dismissal is hardly, as mentioned, justifiable merely out of consideration for a third party. However, one may object that a procedural classification may be justified for other reasons, e.g. to ensure that the court hears and decides the matter on its own motion or to make possible an application of the generous rules for separate hearing and adjudication which the law offers in connection with procedural hindrances. But in our example the court also has to act on its own motion when the matter is systematized as one of substantive law, and the possibilities for a separate decision, etc., have since 1971 been equally good in the two cases.[7] Consequently there are no gains from the viewpoint of procedural economy. Possibly one could argue that *RB* ch. 42, secs. 4 and 16, make it possible to conclude the litigation more quickly if the matter is systematized as one of procedural hindrance. But this difference is to a great extent eliminated by the possibility of a "little main hearing" according to *RB* ch. 42, sec. 20 (2). In my opinion the system of rules should not be made more complex by a classification of a part of the issue as a matter of procedural hindrance unless there are very good reasons for it. This does not seem to be the case with the example discussed here. It should also be added that the classification of a matter as one of procedural law may, as has already been mentioned, be disadvantageous from the viewpoint of procedural economy. Suppose that, apart from a procedural deficiency, there is also a

[7] See *supra*, p. 133.

substantive deficiency in the action of the plaintiff. When the substantive issue is the easiest one to decide on, the classification of the first issue as one of procedural law is disadvantageous from the viewpoint of procedural economy, since matters of procedural hindrance have to be decided first according to Swedish law.

Thus in legal writing certain circumstances are classified as matters of *locus standi* even where there are no rational reasons for such a classification. This can partly be explained by the fact that the statement by Ekelöf quoted above was made before the 1971 amendments of the *RB*. In addition to this it seems that Ekelöf has not noted the possibility of a dismissal on the merits by the court on its own motion in accordance with the principle *iura novit curia*—unless of course the defendant has not consented to the claim. Therefore there is reason to suppose that in the future the courts will be more restrictive in ordering a case to be dismissed for want of *locus standi*.[8]

8. SUMMARY AND POLICY CONSIDERATIONS

In this paper I have discussed the difference between procedural prerequisites and substantive circumstances, the historical and dogmatic background of the distinction, and its practical consequences according to the law of today. Among other things, I have noted that the distinction lacks the *historical* foundation Bülow thought it had, that the *dogmatic* point of departure of the concept of procedural prerequisites has been commonly abandoned, but that in spite of this the distinction has a considerable *practical* impact on many legal systems, particularly that of Sweden.

Furthermore, I have noted that the Swedish *RB* does not offer a tailor-made complex of rules for each individual matter, but that one has to accept as a whole one or the other of the two existing systems. With regard to some provisions there may, however, be reasons for an analogous application across the border between the two systems. And with regard to certain very important questions the distinction seems to be insignificant. In any case the *RB* does not force us to apply differ-

[8] 1973 N.J.A., p. 1, is possibly a step in this direction.

ences, e.g. with regard to *res judicata* or burden of proof. In addition, the division into procedural and substantive matters sometimes entails considerable disadvantages, for example because of the rules on a mandatory sequence for the hearing of matters of procedural hindrance and substantive matters.

As the concept of procedural hindrance cannot be defined with reference to common properties of the circumstances constituting a procedural hindrance, the choice between the two systems of rules should in certain cases be made on the basis of what seems most expedient in the particular case. This, however, does not mean that it is to be recommended to let the same kind of circumstance have different legal consequences from one time to another. Of course, a certain amount of generalization is desirable for the purpose of bringing about uniformity and predictability. These arguments have considerably more weight than the short-term advantages gained from doing what seems expedient in every individual case.

The questions that arise in connection with *locus standi* are well suited to shed light on the practical and theoretical problems connected with the distinction between procedural and substantive law. An examination of the rules of *locus standi* shows that the classification of certain circumstances as matters of procedural hindrance is not justified. In many cases the intended effect can be achieved also within the framework of substantive law, e.g. by a dismissal on the merits in accordance with the rule *iura novit curia*, or by the limited effect of *res judicata* with regard to time and person and by the increased possibilities of separate hearing and decision granted by the 1971 amendment of *RB* ch. 17, sec. 5 (2). In this way it is possible even under present law to avoid some of the disadvantages connected with the systematization discussed here. And there is an additional method of amending the law—assuming that the legislator is not willing to revise the *RB*—namely to prescribe that certain circumstances should be investigated by the court on its own motion even in certain litigations concerning issues amenable to out-of-court settlement. If the need for the court's hearing and deciding the matter on its own motion was the only reason for applying a classification of certain circumstances as procedural hindrances, this possibility should present an interesting alternative to the present order. By enlarging the category of substantive matters one would avoid the rigorous sequence otherwise forced upon us by the *RB* when

there are (alleged) deficiencies in the claim of the plaintiff with regard to procedural law as well as to substantive law.

Well in line with the results reached so far is the suggestion that in the future the concept of procedural hindrance will give way to a more flexible system without the disadvantages that have resulted for Swedish law from the distinction between procedural and substantive law. Such a thoroughgoing amendment of the law, however, presupposes further inquiries, whereas the purpose of this paper is only to serve as a contribution to the debate on the way towards such a reform.