

A SEPTENNIIUM OF ENGLISH CIVIL PROCEDURE, 1932-1939*

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In essaying to survey briefly such recent developments in the procedure of civil causes under the English Supreme Court Rules as would be of interest to the profession in America, we fix the year 1932 as the point of departure. For that year marked the emergence of the so-called "New Procedure"—an innovation which, under proper conditions, might have operated significantly to alter the complexion of the system at large, but which, for reasons presently to be noted, was disestablished after a life of some five years. Something, however, of its influence remained, as marked by certain changes in the ordinary procedure associated with the exit of the experimental system. Other changes there have been in the period under notice, some resulting from statute but most from amendments of the Rules. While, apart from the abolition of the New Procedure, these amendments of the Rules are not of any spectacular character, they nevertheless include measures which, along with the statutory changes, deserve attention on the part of students of procedural reform.

THE NEW PROCEDURE AND ITS ABOLITION

Introduced by amendment of the Rules in 1932, the New Procedure had its theatre in the King's Bench Division. Its purpose was that of expedition, which it sought to accomplish in the main by

(1) abridgement of the time ordinarily allowable for the taking of the preliminary procedural steps; (2) return of the summons for directions before the Judge instead of before the Master and consequent direct regulation by the former of the preparatory matters in the cause, * * *; (3) restriction of the right to trial by jury; and (4) enlargement in various particulars of the directive power of the Judge with relation to the particular cause.¹

* The present paper is concerned solely with the procedure under the Rules of the Supreme Court. In particular, it does not take into account the Matrimonial Causes Rules, 1937, or changes in County Court practice.

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1. Millar, *The "New Procedure" of the English Rules* (1932) 27 Ill. L. Rev. 363, 363-364. For the New Procedure generally, see the same article

But the new system was not available for all causes in the King's Bench Division. Certain were specifically withheld from its province, and a substantially untrammelled discretion was vested in the judge to exclude others. Subject to these limitations, its application, save in some slight measure, was left to the parties, either of whom was entitled to take steps, at the outset of the cause, to bring about this application.²

The operation of the New Procedure was the subject of consideration by the Royal Commission on the Despatch of Business at Common Law, which was appointed in 1934. From its report, under date of 20 January, 1936, it appears that the measure had met with much favor in London, where, in 1934, for example, 1,207 cases out of a total of 3,248 were dealt with under its terms, but that in the provinces it was of no moment. This difference was attributed to the fact that the new system incidentally gave the judge power to fix a date for the trial—a circumstance not of importance outside of London, since at the assizes an approximate date for trial would be given in any event.³

From the standpoint of procedural structure, by far the most significant feature of the New Procedure was its transfer of the hearing on summons for directions from the master to the judge. The underlying idea here was that, by the change, there would be an opportunity for the trial judge to become acquainted with the case in advance—as manifested by the provision that “the action shall, as far as possible, be tried by the Judge who heard the summons for directions” (O. 38 A, r. 9 (2))—and, furthermore, although the matter of appeals from the master to the judge has never loomed very large, there would be a complete obviation of such appeals in the cases affected. This practice had worked well in the Commercial Court where it had long been in force. Theoretically it had much to commend it, even when applied on the larger scale of the New Procedure, but its installation here signally failed to take into account considerations re-

and also Ball, *The New Procedure Rules 1932, Annotated and Explained* (1932); Davies, *The English New Procedure* (1933) 42 Yale L. J. 377; Armstrong, *English Law Reform and the New Rules of Procedure* (1933) 19 A. B. A. J. 77.

2. Millar, *supra* note 1, at 364-365.

3. *Report of the Royal Commission on the Despatch of Business at Common Law* (1936) 15, 16.

lating to the availability of judicial personnel. From 1910 to 1915 the King's Bench Division consisted of the Lord Chief Justice and seventeen puisne judges, which latter were reinforced by two additional judges in 1935. Upon the judicial force thus constituted demands were constantly made for other work than the regular civil business in London. Apart from the matter of holding the assizes on circuit, taking approximately one-third of the whole judicial time, and certain miscellaneous drafts upon that time, one judge was furnished to the Court of the Railway and Canal Commission, another to the Central Criminal Court, and three to the Court of Criminal Appeal. While the last mentioned assignments were not full-time ones, they nevertheless represented an element materially detracting from attention to civil business in the London lists.⁴ Assignment, therefore, of judges to hear New Procedure cases was a very different matter from the corresponding thing in the Commercial Court, where as a rule no more than one judge is sitting, and the business is not sufficient to engross the whole time of even one judge.⁵ Hence, as the situation developed, it was found that the maintenance of the New Procedure was distinctly detrimental to the other business of the Division, in causing this—and especially non-jury cases coming under the ordinary procedure—to fall into arrears. Said Mr. Justice Goddard, in a memorandum quoted in the Report of the Commission:

The disadvantage of the New Procedure is that its success is, I think, obtained at the expense of the non-jury list. Not only are two judges working at it every day, but to enable cases to be tried on the allotted days recourse is often had to other judges. * * * I have known as many as four courts on one day occupied with New Procedure cases. It seems to me an important question whether the success to which I have referred is not bought at too high a price. The languishing state of the ordinary non-juries is apparent, and is, I think, a source of resentment both to the Bar and to litigants.⁶

Then, too, even with this sacrifice of the interests of other business it was very far from being always the case that the

4. *Id.* at 13, 14. Under the terms of the Supreme Court of Judicature (Amendment) Act (1935) 25 Geo. V, c. 2, adding the two judges, vacancies occurring in the nineteen judicial positions referred to are not to be filled without consent of Parliament, so long as seventeen puisne judges are in office.

5. *Id.* at 16-17.

6. *Id.* at 21.

judge who heard the summons was the judge who presided at the trial. Thus it appeared that at the Michaelmas sittings, 1934, in 83 cases out of 194, the trial judge was other than the judge who gave directions. And, at best, in the larger number of cases there appeared but slight gain from the transferred hearing. Says the Report before cited:

When cases are short and simple, there is no great scope for the exercise of judicial influence. At the present time in the New Procedure List the judge disposes of about ten summonses each day in 20 to 40 minutes. This does not suggest complication, and in fact the summonses in this list are generally common form and rarely involve much controversy between the parties.⁷

In the light of these and kindred considerations the Commission concluded that on the whole

the advantage of having had the summons for directions dealt with by the trial judge in that small proportion of cases which are neither settled nor tried by another judge does not justify what the Lord Chief Justice has called "the very serious inroad upon judicial time" involved.⁸

Accordingly the Commission recommended that "the summons for directions, except in the Commercial List, should be taken by the master."⁹ It also recommended, *inter alia*, that the minor rules of the New Procedure and of the ordinary procedure should be assimilated, that non-jury cases should be divided into two lists according to the estimated time of trial, and that the New Procedure List should be incorporated in the short non-jury list.¹⁰ As a result the Rule Committee, under date of 17 December, 1937, by revoking the Rule (O. 38 A) which had established the New Procedure and by various amendments—particularly a recasting of the Rule (O. 30) concerning the summons for directions—carried into effect the recommendations just mentioned as well as other recommendations of the Commission's Report.

JOINDER OF CLAIMS

Actions for the Recovery of Land. The freedom as to joinder of causes of action by the same plaintiff against the same defendant, existing from the outset of the Rules, has been since

7. *Id.* at 82.

8. *Id.* at 82.

9. *Id.* at 105.

10. *Id.* at 103.

1883 subject, as part of the slight restriction imposed, to the provision (somewhat enlarging the corresponding provision of 1875) that, unless by leave of court, no cause of action might be joined with one for the recovery of land

except claims in respect of mesne profits or arrears of rent or double value in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed [O. 18, r. 2].

An amendment of 1937 has now widened the field of this exception by adding to the money claims mentioned "claims for the payment of principal money or interest secured by or for any other relief in respect of a mortgage or charge of such land." This change conforms to certain alterations in 1936 and 1937 of O. 55, r. 5 A, as to proceedings on the part of mortgagees and mortgagors. It does not affect actions for foreclosure, in which possession of the land might always be recovered by the mortgagee, under proper circumstances, but does cover the case of a suit by the mortgagee for possession in which he seeks a judgment for the mortgage debt—a form of proceeding which seems to be frequently used.¹¹ In any case, the importance of the change is limited to dispensing with the need of judicial permission for the joinder.

Actions against Joint Tort-Feasors. Determination, on the part of the plaintiff, of the question of joinder in actions against joint tort-feasors has become materially affected by the reflex action of statutory change concerning the effect of a judgment against one of a number of such tort-feasors. So accustomed is the profession in almost all the American jurisdictions to the rule that the plaintiff may sue one or more, less than the whole number, of joint tort-feasors and recover judgment, without merging his claim against those not sued, that we are apt to forget that at common law the rule was otherwise, with the result that where suit had been prosecuted to judgment against those sued, this judgment accordingly might be pleaded as a bar to a later suit against the other or others. In departing from the old position the American courts have generally held that when the judgment has been satisfied, then and then only will it

11. See the form of order appropriate in such a case, *Annual Practice* (1940) 1844, no. 40.

be considered that a bar has arisen. The common law rule, recognizing the bar whether or not there has been satisfaction of the judgment, as definitely settled in the leading case of *Brinsmead v. Harrison*,¹² continued to be followed in England until 1935, when it was set aside by the Law Reform (Married Women and Tort-feasors) Act of that year.¹³ This declares that in case of damage arising from a tort,

judgment recovered against any tort-feasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage [Section 6 (1) (a)].

By way of regulating the ensuing situation, the act further provides that in case of a plurality of actions against joint tort-feasors, "the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given"; but costs are not to be awarded in any of the later actions, unless the court is of opinion that there was reasonable ground for bringing the action (Section 6 (1) (b)).

Some trenchings upon the common law principle denying the right of contribution among tort-feasors we already know in this country, as the result of legislation and judicial decision,¹⁴ but the act in question, for the purpose of complementing its scheme of recovery, goes to the full extent of establishing the opposite principle. It provides that any tort-feasor liable in respect of the damage in question "may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage" except where the former is under an obligation to indemnify the latter in that regard (Section 6 (1) (c)). The court is given wide power over the contribution proceeding. The amount recoverable as contribution is to be "such as may be found by the court just and equitable," having regard to the extent of the contributor's responsibility for the damage. It is also authorized to exempt any person from liability in this respect or to direct that the contribution to be recovered shall amount to a complete indemnity (Section 6 (2)).

12. (1871) L. R. 6 C. P. 584, aff'd (1872) L. R. 7 C. P. 547.

13. (1935) 25 & 26 Geo. V., c. 30.

14. 18 C. J. S., Contribution (1939) 14, sec. 11.

PLEADING

Except under the New Procedure¹⁵ and except also for the case of a special endorsement of the writ looking to summary judgment under Order 14, the Rules, prior to 1933, contained no general time-requirement for the delivery of the pleadings, the time being fixed by the master on the hearing of the summons for directions. In the year last mentioned, however, change was made in this regard. It was now provided that, except where the writ of summons was indorsed with or accompanied by a statement of claim under the summary judgment practice, the plaintiff was to deliver his statement of claim either with the writ or at any time not later than ten days (in the Chancery Division, twenty-one days) after the defendant's appearance (O. 20, r. 1).¹⁶ Similarly, the defense was to be delivered within fourteen days from the time limited for appearance or from the delivery of the statement of claim, whichever should be later (O. 21, r. 6). No extension of time was permissible in either case except by order, but in 1936 a further amendment provided for extension by consent in writing of the opposite party (O. 20, r. 1; O. 21, r. 6). But application in the meantime for summary judgment would take the defendant from without the fixed-time rule for the delivery of his defense, which then, if leave to defend were given, would be due within such period as the master might appoint.

Concurrently with the change of 1933, the matter of reply was re-regulated. Under the pre-existing rule, except in admiralty actions, a reply other than in answer to a counterclaim could be delivered only by order of court. Necessity for an order was now dispensed with, but the reply, if used, must be delivered within seven days from the delivery of the defense (O. 23, r. 1). Pleadings subsequent to reply, however, continue to depend upon order of court. Reply to counterclaim, as before, stands on its own basis: it is controlled by the provisions governing the delivery of the defense (O. 23, r. 2.).¹⁷

15. Under the New Procedure the statement of claim was to be delivered not later than seven days after appearance, the defense within seven days after delivery of the statement of claim or within four days after appearance, whichever period should last expire. O. 37 A, rr. 4, 5 (1).

16. Probate actions and admiralty actions *in rem* are here governed by special provisions. O. 20, rr. 2, 3.

17. See *Annual Practice* (1940) 426-427.

In 1936 a change also occurred in respect of the defensive pleading in actions to recover land. Previously a defendant in such an action who was in possession by himself or a tenant was not required to plead his title, unless his defense depended upon an equitable title or estate or he claimed relief upon any equitable ground against the title asserted by the plaintiff. It was enough for him to state his possession, under which allegation he might prove any defense other than those mentioned. This latitude, in some sort, was an inheritance from the procedure in the old action of ejectment and in keeping with the rule that the plaintiff must recover on the strength of his own title.¹⁸ It has now undergone a restriction in that the defense must be specially pleaded not only where it is of the equitable character indicated, but also where the defendant "is in possession by virtue of a lease or tenancy granted by the plaintiff or his predecessor in title" (O. 21, r. 21). Apparently the consideration here operating was that in this case it is only fair that the plaintiff should be specifically apprised of the title claimed by the defendant.

Related closely to the matter of pleading is a development occurring in 1936 in the matter of patent actions. An amendment then made to the special provisions as to directions in these actions (O. 53 A, r. 21 A (2)) included the authorization of directions

for the delivery of statements signed by counsel setting out all the contentions whether of fact or law (including contentions as to the construction of the specification or other documents) upon which the parties respectively intend to rely.

These statements are not pleadings, but operate by way of amplification and supplementation of the pleadings. It is significant, however, that, apparently for the first time in the English system, they enable the parties to put on paper in a preparatory writing, an express statement of the legal theories on which they respectively intend to proceed.

SUMMONS FOR DIRECTIONS

During the New Procedure régime, the master, it will be understood, continued to hear the summons for directions in other

18. See observations of Brett, L. J., in *Lyell v. Kennedy* (C. A. 1882) 20 Ch. D. 484, 490.

than New Procedure matters and thus in the greater number of cases. But before the change of 1933 in the time for delivery of pleadings, the plaintiff in general was required to take out summons for directions at any time after appearance and before any fresh step in the action other than an application for injunction or receiver or for judgment in default of pleading. Thus, except when the writ was specially indorsed in contemplation of summary judgment, the summons for directions was taken out in advance of any pleadings, the time for which, if pleadings were determined upon, was then appointed by the master on the hearing of the summons. The establishment by general rule of a fixed time for the delivery of the pleadings compelled concurrent amendment of the requirement as to summons for directions, which the plaintiff¹⁹ was now to take out "within seven days from the time when the pleadings shall be deemed to be closed" (O. 30, r. 1 (a)). With the abolition, however, of the New Procedure in December, 1937, came a re-statement of the provisions in reference to the powers exercisable on this hearing. Under this re-statement (O. 30, r. 2) the authority of the master²⁰ on the hearing in question extends to the following matters:²¹

19. In admiralty actions, actions in which directions have been given on application for summary judgment, actions pending on application for transfer to the Commercial List or transferred thereto, actions for infringement of a patent or any proceeding commenced by originating summons, there is no such duty laid upon the plaintiff, but either party is at liberty to take out summons for directions. O. 30, r. 1 (c).

20. This authority, according to the general scheme of the Rules, is conferred in terms of its bestowal upon "the court or a judge." The King's Bench masters have all the powers of a judge sitting in chambers, with certain specified exceptions, as have also the registrars in the Probate, Divorce, and Admiralty Division. O. 54, r. 12. The Chancery masters stand on a different basis. "In theory every order made in Chambers in the C. D. is the order of the judge, but the Masters in that Division are his representatives, and every application in Chambers comes before them in the first instance. The judge gives directions to these officials (O. 55, r. 15) as to the particular matters which are to be referred to him in person, and the rules also except certain matters from their jurisdiction (O. 51, r. 1b, O. 55, rr. 10a, 15, 15a, 35a)." *Annual Practice* (1940) 2202. Express power is given to the judges of the Chancery Division, subject to the Rules, to "order what matters shall be heard and investigated by their masters, either with or without their direction, during their progress." O. 55, r. 15. So far as he deals with the summons for directions, the Chancery master, unlike the King's Bench master, is thus exercising an authority in effect delegated to him by the judges.

Apart from the matter of summons for directions, it should be noted that, by amendment in 1937 of O. 54, in accordance with certain recommendations of the Royal Commission, the authority of the master has been

(a) In accordance with the former practice, he may make all proper orders in relation to discovery and inspection of documents, interrogatories, inspections of real or personal property, and admissions of fact or of documents.

(b) He may direct the place and mode of trial, including the determination whether there shall be trial by jury. This in itself is not a new power, but for the King's Bench Division the master's authority in this respect is now added to, *inter alia*, by the provision (O. 36, r. 1 A (1)) that his order is to contain an estimate of the length of the trial, is to assign the case to the appropriate list, and may direct that application be made to the judge in charge of the list to fix a day for the trial.

(c) He may order that "any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the trial" on reasonable conditions. But no order of the kind is to be made where it appears "that any party reasonably desires the production of a witness for cross-examination, and that such witness can be produced." It is also open to the master to "order that any witness whose attendance in court ought for some sufficient reason to be dispensed with, be examined before a commissioner or examiner." These provisions were formerly a part of the evidence Rules (O. 37, r. 1), the power in question being conferred on the court or a judge to be exercised "at any time," but they are now specifically incorporated in the Rules governing the summons for directions.

(d) He may, similarly, "order that evidence of any particular fact or facts, to be specified in the order, shall be given at the trial by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise" as he may direct. Except for the words "at the trial," this provision had been previously in force,

enlarged in various particulars as to *ex parte* applications, including addition of the power to grant leave to effect service out of the jurisdiction. See Ball, *The New Rules of Procedure, December 17, 1937* (1938) 8.

21. It is now expressly declared that directions may be given not only on the hearing of the summons but "at any later time before judgment." O. 30, r. 2 (1), amendment of 23 December, 1938. And the Rules are further explicit to the effect that the powers mentioned in paragraphs (a), (c), (d), (e), (g), and (h), of our text (in addition to that of paragraph (f), which is the subject of a special Rule (O. 37.A)) may be exercised by the judge at the trial. O. 37, r. 1.

For the special provisions as to directions in patent cases, see O. 53 A, r. 21 A.

dating from 1894. It was then construed, however, by reference to the statute—the Judicature Act of 1894—on the authority of which it rested, to relate (apart from proceedings to distribute a fund or property) only to evidence on the hearing of the summons for directions and not to evidence at the trial.²² In view of the wider rule-making authority obtaining under the Consolidated Judicature Act of 1925,²³ the new Rule has made the provision in terms apply to evidence at the trial. In this, as regards documentary statements, it seems to have anticipated in some sort the innovating measures in that respect prescribed by the Evidence Act of 1938.²⁴

(e) He may “order that no more than a specified number of expert witnesses may be called.” This was taken over from the New Procedure Rules (O. 38 A, r. 8 (1) (h)), previously to which the Rules were silent on the point.²⁵

(f) He may appoint the court expert provided for by a Rule adopted in 1934.²⁶ This Rule (O. 37 A, r. 1), in conferring the power to appoint upon the court or a judge apparently vested this power in the King’s Bench master as well as the Admiralty registrar,²⁷ but the appointment is now by the new version of the Rule under discussion expressly lodged within the ambit of the summons for directions.

(g) He may “record any consent of the parties either wholly excluding their right of appeal or limiting it to the Court of Appeal or limiting it to questions of law only.” Here, again, the New Procedure has been levied upon (O. 38 A, r. 8 (2) (k)).

(h) He may “make such order as may be just with respect to pleadings and particulars”—a power which in substance he has exercised from the outset of the Rules.

(i) As authorized by a further amendment, made in 1938, envisaging the situation consequent upon the legislation of 1935²⁸ in reference to joint tort-feasors, he may to a certain extent deal

22. *Rainbow v. Kittoe* (Ch. D. 1916) 140 L. T. Jo. 412.

23. (1925) 15 & 16 Geo. V, c. 49.

24. See *infra*, page 539.

25. Under the prior practice, limitation to two experts on a side, unless special circumstances otherwise required, was the rule established by Tomlin, J., for his own court. *Graigola Merthyr Co. v. Swansea Corp.* (1927) W. N. 30.

26. See *infra*, page 538.

27. *Annual Practice* (1940) 696.

28. See *supra*, page 530.

with the matter of contribution. That is to say, when a plurality of tort-feasors are sued together and one claims contribution in the same proceeding from the other or others, the master may order that a written offer of contribution be treated for the purposes of the claim as a notice of payment into court. This means that with the making of such an order, if the claimant does not accept the offer but insists on pursuing the claim, he does so at his peril with respect to the important matter of costs.²⁹

(j) And, finally, the master may "revoke or vary any such order." Before the adoption of this provision it appears to have been the case that the master's power to revoke or vary an order after it had been drawn up was limited to the case of an order fixing the place and mode of trial.³⁰

It should be added that the time after which a defendant may apply to the judge for dismissal of the action on account of the plaintiff's failure to take out a summons for directions was, in 1933, conformably to the changes then made in the rules of pleading, altered from "fourteen days from the entry of the defendant's appearance" to "seven days from the time when the pleadings shall be deemed to be closed" (O. 30, r. 8).

SUMMARY JUDGMENT

In 1933, the then existing scope of the summary judgment practice which—apart from claims for specific performance, here admitted in 1927—was confined to certain enumerated cases of liquidated money demands, claims for possession by landlord against tenant and claims for the recovery of specific chattels, became widened in important measure. Besides the common law actions already included, it was now made applicable to

all other actions in the King's Bench Division (except actions for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage, and actions in which fraud is alleged by the plaintiff) [O. 3, r. 6 (4); O. 14, r. 1].

The application in the case of specific performance is dealt with by the Chancery Division (O. 14 A), as it is also in the case of a claim "for the possession of any property forming a security

29. See on this point as to payment into court, Odgers, *Pleading and Practice* (11th ed. 1934) 226.

30. *Annual Practice* (1940) 500.

for the payment of money" (O. 3, r. 6 (3 A); O. 5, r. 5 A), which was a further addition to the category of summary judgment cases made in 1937.

JURY TRIAL

Before the New Procedure Rules there was an absolute right to jury trial in all "pure common law actions."³¹ By these Rules it was materially cut down, inasmuch as they left it to the judge's discretion to grant or withhold such a trial. But, as the new system did not apply to actions for libel, slander, malicious prosecution, or breach of promise of marriage, the right remained unaffected in these cases as well as in cases where the parties had not elected for the application. In 1933, however, Parliament intervened and by the Administration of Justice (Miscellaneous Provisions) Act of that year³² established the rule for the King's Bench Division generally that trial by jury should rest in the discretion of the court, with certain specified exceptions resembling the cases excluded from the New Procedure. That is to say, under the act, the action was to be ordered tried by jury, on the application of either party if

the court or a judge is satisfied that (a) a charge of fraud against that party; or (b) a claim in respect of libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage, is in issue * * * unless the court or judge is of opinion that the trial thereof requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury [Section 6 (1)].

Thus, apart from this limited category of excepted cases, the question of jury trial or not was made a matter to be determined by the master on the hearing of the summons for directions. Obviously the discretion of the master here covered that very considerable item of judicial business, actions for damages arising from motor car accidents, commonly referred to in England as "running-down cases." And what may strike an American lawyer as curious is the fact, learned by the writer, on a visit to the London courts in 1938, that in cases of this character, it was oftenest the defendant who applied for jury trial, being induced

31. Ball, *The New Procedure Rules 1932, Annotated and Explained* (1932) 16.

32. (1933) 23 & 24 Geo. V, c. 36.

thereto by the disposition of the judges to give larger awards of damages than would ordinarily a jury.

A further change has since come about in consequence of the War. By the Administration of Justice (Emergency Provisions) Act of 1939,³³ the discretion of the court, in the present matter, has been extended to all civil cases under the provision that there is to be no trial by jury "unless the court or a judge is of the opinion that the question ought to be tried with a jury" (Section 8 (1)). The same act, as to civil cases, has provided that, "it shall not be necessary for the jury to consist of more than seven persons" (Section 7 (1)). Moreover, it has raised the upward limit of age for jury service from sixty to sixty-five years (Section 7 (3)). These provisions, it will be understood, are for the duration of the emergency only, being subject to termination by Order in Council (Section 11 (2)).

EVIDENCE

The Court Expert. A new Rule adopted in 1934 (O. 37 A) dealt with the matter of expert evidence. It provides that

in any case which is to be tried without a jury involving any question for an expert witness, the Court or a Judge may in his discretion at any time on the application of any party appoint an independent expert (to be called "the Court expert") to inquire and report on any question of fact or of opinion not involving questions of law or construction (hereinafter called the "issue for the expert") [O. 37 A, r. 1].

The report, which is to be made in writing, is to be treated as information furnished the court and given such weight as the court thinks fit (Ibid., r. 2). Any party within fourteen days after receipt of a copy of the report is to be at liberty to apply for leave to cross-examine the expert on his report, and such cross-examination may be ordered to take place either at the trial, or before an examiner prior to the trial (Ibid., r. 3). The selection of the expert and the settlement of the questions to be submitted to him, are, in the absence of agreement of the parties, to be by the court (Ibid., r. 4). Provision is made for experiments or tests by the expert (Ibid., r. 5). On reasonable notice, either party, at the trial, is to be at liberty to call not more than

33. (1939) 2 & 3 Geo. VI, c. 78.

one expert witness, provision being made for two or more in exceptional cases (Ibid., r. 8). Where more than one expert issue arises, more than one court expert may be appointed to report on the respective issues (Ibid., r. 9). The term "expert" as here used is to include "scientific persons, medical men, engineers, accountants, actuaries, architects, surveyors and other specially skilled persons whose opinions on any question relevant to the issues involved would be received by the Court" (Ibid., r. 11).

This provision establishes an important check upon the evils of biased expert testimony, familiar enough to us here in America. And it is interesting to note that in the provision for a written report there is a decided approach to the Continental systems wherein the expert does not fall into the category of witnesses, but is looked upon as a distinct means of proof. The reservation, however, of the right of the parties to cross-examine the court expert and of each to call at least one expert witness of his own choosing, operates to preserve every legitimate advantage attaching to the orthodox Anglo-American mode of proceeding.

Notice to Admit Documents. The Rules, from the beginning, have enabled either party to call upon the other to admit the genuineness of a given document. This measure, indeed, goes back to the Hilary Rules of 1834.³⁴ But, until 1937, the only penalty attendant upon unreasonable failure to admit, whether occurring by disregard of the call or by express refusal to admit, was the imposition of costs, that is to say, the expense of proving the document. Now, by one of the amendments of the year last mentioned, made pursuant to a recommendation contained in the report of the Royal Commission, it is provided that in the event of a failure to give notice of non-admission within six days from the date of the notice to admit, the offending party "shall be deemed to have admitted the document, unless the Court or a Judge otherwise orders" (O. 32, r. 2).

Changes under the Evidence Act, 1938. Some highly important reforms in the law of evidence have resulted from the Evidence Act of 1938³⁵ In the first place, the act has enlarged

34. Reg. Gen. Hil. T. 4 Will. IV, reg. 20, 1 Chitty, *Pleading* (11th Am. ed. 1851) 735.

35. (1938) 1 & 2 Geo. VI, c. 28.

the field of exceptions to the hearsay rule with respect to documentary statements. It provides that "in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact," subject to two principal conditions. The first of these is that the declarant either "had personal knowledge of the matters dealt with by the statement," or "where the document in question is or forms part of a record, purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters." The second condition is that the declarant shall be called as a witness. But satisfaction of this second condition is excused if the declarant "is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success" (Section 1 (1)). Moreover, even if the declarant is available, the court is given power to admit the statement without requiring his attendance, where undue delay or expense would otherwise be caused. And, present the same consideration, the court is empowered to permit a copy, properly certified, to be used in place of the original document (Section 1 (2)).

Further provisions guard against abuse of the evidentiary right thus accorded. The statement is not to be admitted if made "at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish (Section 1 (3)). Along with this negative provision, is the positive one that to be made by a party within the meaning of the statute, it must appear that the document or its material part was "written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible" (Section 1 (4)). And, finally, the court, in case of trial by jury, is given the wide discretionary power to reject the statement, notwithstanding satisfaction otherwise of the conditions of admissibility, "if for any reason it appears to be inex-

pedient in the interests of justice that the statement should be admitted" (Section 1 (5)).

The extent of the inroad thus made upon the pre-existing law of evidence will be better appreciated when we consider that England since the 1600s has not followed the shop-book rule,³⁶ and that the rule as to entries in the regular course of business, made by a person since deceased, has been much narrower than generally in America, especially in its insistence upon a duty to record on the part of the declarant.³⁷ The inadmissibility in his own favor of the party's entries, resulting from the absence of the shop-book rule, had been mitigated in some measure, first, by the fact that in chancery proceedings the courts "for many years acted upon the principle of admitting shop-books in evidence where accounts had been required to be taken and vouchers had been lost";³⁸ and, secondly, by a provision of the Rules, based upon a section of the Chancery Practice Amendment Act of 1852,³⁹ permitting the court, in taking an account, to direct that the books of account "shall be taken as *prima facie* evidence of the truth of the matters therein contained" (O. 33, r. 3). Another provision of the rules (which we have referred to in connection with the summons for directions)⁴⁰ concerning evidence of particular facts "by production of documents or entries in books, or by copies of documents or entries" was at one time thought to relate to evidence at the trial,⁴¹ but was later held to have no such application,⁴² and without such application it remained until its amendment in 1937. Whatever the precise effect of the amendment, now obviously an academic question, it could not have been aught but a negligible factor in the brief interim preceding the legislation under discussion. Apart, therefore, from the case of taking accounts and one or two statutory authorizations in special cases,⁴³ the only evidentiary advantage

36. For the history, see 5 Wigmore, *Evidence* (3d ed. 1940) sec. 1518; 1 Taylor, *Evidence* (10th ed. 1906) secs. 709, 710.

37. See 5 Wigmore, *Evidence* (3d ed. 1940) sec. 1524; Chamberlayne, *Trial Evidence* (2d ed. 1936) sec. 878; 1 Taylor, *Evidence* (12th ed. 1931) sec. 708.

38. Taylor, *op. cit. supra* note 37, at sec. 711.

39. (1852) 15 & 16 Vict. c. 86, sec. 54; *Annual Practice* (1940) 569.

40. See *supra*, page 534.

41. Taylor, *op. cit. supra* note 36, at sec. 711, note 1 to p. 504.

42. *Rainbow v. Kittoe* (Ch. D. 1916) 140 L. T. Jo. 412.

43. Bankers' Books Evidence Act (1879) 42 Vict. c. 11, sec. 3; Children Act (1908) 8 Edw. VII, c. 67, sec. 124.

of such entries, compensating for the lack of a rule like that of the American shop-book doctrine, seems to have been their use as memoranda to refresh recollection,⁴⁴ or, in accordance with what appears to have been a fairly common practice,⁴⁵ their admission pursuant to agreement of the parties. Under these circumstances the sweeping nature of the present reform is readily apparent.

The second departure made by the act in question relates to the matter of attesting witnesses. It is provided that an instrument required by law to be attested, other than a will or other testamentary document "may, instead of being proved by an attesting witness, be proved in the manner in which it might be proved if no attesting witness were alive" (Section 3). This obviously permits recourse to the handwriting of the attesting witness to prove execution even though the attesting witness is available for call to the witness-stand. Since enactments of 1854 and 1865⁴⁶ it has been the rule in England that resort to attestation is necessary only when the document was required by law to be attested, and it is to this class of cases that the present provision is directed.

In the third place, the statute lightens the duty of proof in the case of ancient deeds. It cuts down from thirty years to twenty the time necessary for accrual of the presumption of due execution (Section 4).

And, finally, the act clarifies the powers of the Rule Committee with respect to rules in relation to affidavit evidence. So far, as previously seen, the Rule on this subject has not gone to the extent of denying the right of cross-examination if the affiant is available. But the act envisages even this, by declaring that the Judicature Act of 1925 authorizes

the making of rules of court providing for orders being made at any stage of any proceedings directing that specified facts may be proved at the trial by affidavit, with or without the attendance of the deponent for cross-examination, notwithstanding that a party desires his attendance for cross-examination and that he can be produced for that purpose [Section 5].

The power thus to dispense with cross-examination has been

44. Taylor, *op. cit.* supra note 37, at sec. 709.

45. Stone, *The Evidence Act 1938* (1938) 85 L. Jo. 424.

46. Common Law Procedure Act (1854) 17 & 18 Vict. c. 125, sec. 26; Criminal Evidence Act (1865) 28 & 29 Vict. c. 18, sec. 7.

viewed with misgiving. While the bill was under consideration a contributor to the *Law Times*, referring to the proposed change as "a very serious departure from established usage," expressed the "hope that Parliament will take serious thought before allowing it to be made."⁴⁷ And after the passage of the act we find a correspondent of the same journal saying:

Those of us who have been wondering how sect. 5 of the Act was ever allowed to pass either House of Parliament are still hoping (possibly, against hope) that the Rule Committee may refrain from exercising the power conferred upon them. It appears to me that the proposal strikes at the very foundation of the law of evidence which has prevailed in this country from time immemorial.⁴⁸

We think that most of their American brethren would be disposed to concur on this point.

MANDAMUS, PROHIBITION, CERTIORARI,
AND QUO WARRANTO

By statutory enactment of 1938 (Administration of Justice (Miscellaneous Provisions) Act)⁴⁹ it is declared that "the prerogative writs of mandamus, prohibition and certiorari shall no longer be issued by the High Court" (Section 7 (1)). The jurisdiction before exercised by means of these writs was now to be exercised by means of "an order requiring the act to be done, or prohibiting or removing the proceedings or matter, as the case may be" (Section 7 (2)). It is further provided that "the said orders shall be called respectively an order of mandamus, an order of prohibition and an order of certiorari" (Section 7 (3)), and that "no return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to any right of appeal therefrom" (Section 7 (4)). The same statute abolishes informations in the nature of quo warranto. Where such an information would

47. (1938) 185 L. T. Jo. 242.

48. (1938) 186 L. T. Jo. 38. On this point, the view of the Royal Commission stopped short of the authorization here in question. "The opposite party," it was said, "should not have an absolute right to require the production of the deponent for cross-examination, but when the subject matter of the affidavit is important and seriously disputed, or it is desirable to compel a witness to submit himself to cross-examination, leave would no doubt in practice be granted in proper cases." *Report of the Royal Commission on the Despatch of Business at Common Law* (1936) 79.

49. (1938) 1 & 2 Geo. VI, c. 63.

have lain, the remedy was now to be afforded by writ of injunction and a declaration, if need be, that the office is vacant (Section 9).

The simplification thus effected is understandable, but it would seem to an outsider that the statute leaves the matter of mandamus in a not altogether satisfactory condition. For there has been, in addition to the prerogative remedy, an action for mandamus which was first recognized by the Common Law Procedure Act of 1854,⁵⁰ and which, under the existing Rules, is identified as any action in which the plaintiff claims "a mandamus to compel the defendant to fulfill any duty in the fulfillment of which the plaintiff is personally interested." The writ of mandamus has had here no place: the "mandamus shall be by judgment or order, which shall have the same effect as a writ of mandamus formerly had" (O. 53, rr. 1, 4). While this variety of mandamus was apparently instituted as ancillary to another action, "and for the purpose of enforcing the private right in respect of which the private litigation had arisen,"⁵¹ the view has been expressed that it may be claimed as an independent matter.⁵² The course of decision does not seem to disclose any clear-cut determination of the sphere of this remedy as against that afforded by the prerogative writ.⁵³ Since under the statute there is no more distinctive name now attached to the former prerogative remedy than that of application for an order of mandamus, this substantial fusion of nomenclature can only tend further to obscure the line of distinction. The Rules which have been adopted under the authority of the new act (O. 59, as amended in 1938, r. 3 *et seq.*) add nothing by way of aid in the differentiation of the two remedies.

APPEAL

Two important changes relating to appellate jurisdiction were introduced by the Administration of Justice (Appeals) Act of

50. (1854) 17 & 18 Vict. c. 25, sec. 68.

51. Day, J., in *Baxter v. London County Council* (1890) 63 L. T. R. 767, 771.

52. *Fotherby v. Metropolitan Ry.* (1866) L. R. 2 C. P. 188.

53. See the cases cited in *Annual Practice* (1940) 976 and 9 Halsbury, *Laws of England* (2d ed. 1933) 776-778, *s. v.* Crown Practice; and especially (in addition to the two cases last cited) *Bush v. Bevan* (1862) 32 L. J. Exch. 54; *Regina v. Lambourn Valley Ry.* (1888) 22 Q. B. D. 463; *Regina v. London & N. W. Ry.* [1894] 2 Q. B. 512; *Smith v. Chorley District Council* [1897] 1 Q. B. 532; *Davies v. Gas Light & Coke Co. (C. A.)* [1909] 1 Ch. 708.

1934.⁵⁴ The first is to append the universal requirement of leave in the case of appeals from the Court of Appeal to the House of Lords, without prejudice to existing restrictions on such appeals. The leave may be granted either by the Court or by the House, which latter is authorized to provide for the appointment of a Committee to act upon petitions for the leave (Section 1). The second change is to provide that appeals from the County Court (with some statutory exceptions including bankruptcy matters) shall go directly to the Court of Appeal, instead of being taken initially to a Divisional Court of the High Court (Section 2). Previously the direct appeal had been available only in a few special cases.

EXECUTION ETC.

Existence of war conditions has dictated in the Courts (Emergency Powers) Act of 1939⁵⁵ a series of provisions (Section 1) applicable to the enforcement of judgments and other executory titles. Thus by the general rule judgments and orders for the payment of money may not be enforced by execution or otherwise without leave of court. So far as purely civil matters are concerned exceptions are recognized in the case of (a) judgments for the recovery of damages for tort; (b) judgments or orders for the recovery of debts under contracts made after the commencement of the act; and (c) judgments or orders for the payment of costs only. Similarly, leave is required in respect of other enumerated proceedings for the realization of a plaintiff's money demand, including the levy of a distress and, subject to certain exceptions, proceedings for foreclosure or for sale in lieu of foreclosure. The like requirement of leave is attached to the enforcement of judgments or orders for recovery of possession of land in default of the payment of rent, or for the recovery of possession by a mortgagee on account of default in payment of money, except (in both cases) where the contract involved is one made after the commencement of the act. The step thus taken, terminable on the passing of the emergency as declared by Order in Council, has its precedent in legislation enacted during the War of 1914-1918.⁵⁶

54. (1934) 24 & 25 Geo. V, c. 40.

55. (1939) 2 & 3 Geo. VI, c. 67.

56. (1914) 4 & 5 Geo. V, c. 78.

CONCLUSION

For the American student of procedural reform the high lights of the development surveyed are the disappearance of the New Procedure, the broadened scope of the summary judgment, the provision for a court expert, the increased effectiveness of the notice to admit documents, and the changes made by the Evidence Act of 1938 with respect to the admissibility of documentary entries. By way of conclusion a word may be in order concerning these steps as related to American efforts in a similar direction.

As regards the abolition of the New Procedure, the interest which the terminated experiment principally had for the profession on this side of the Atlantic lay in its transference of the hearing on summons for directions from the master to the judge. In America the assignment of this function to the master had been looked upon as an especially advanced feature of the English system, and the departure led us to wonder whether, after all, we had not overrated this feature. At the time, the present writer took occasion to say of the experiment that "American lawyers will watch its progress with more than ordinary interest, for upon its outcome may depend in considerable measure the trend of future procedural reform in the United States."⁵⁷ Unfortunately the failure of the experiment has proved nothing in one way or another as to the relative value of the preliminary hearing before the judge as against that same hearing before the master. For, as has been seen, the new system failed, not because of any intrinsic reason, but simply for lack of a sufficient number of judges to operate it without prejudice to other business of the King's Bench Division. The particular outcome, therefore, has bearing upon the matter of the American pre-trial hearing, so widely the subject of discussion today, only to the extent of warning us that while such a hearing is unquestionably calculated to save the time of the court as a whole, care must be taken in its establishment, at least in the case of metropolitan tribunals, to see that the internal economy of the court is so adjusted to its administration as not thereby to impede other judicial business. To some extent such a hearing may be committed to masters or commissioners, but the general con-

57. Millar, *The "New Procedure" of the English Rules* (1932) 27 Ill. L. Rev. 378.

stitutional situation is such as to confine these officers to ministerial functions and thus to prevent them from exercising, on their own account, any such judicial powers as are vested in the King's Bench masters. As a result, the pre-trial hearing in America, where it has been established, is usually a matter for the judge, and the same system is likely to attend its future adoptions—a circumstance which renders decidedly pertinent the warning afforded by the English experiment. But, in this same matter of pre-trial hearing, the recast version of the master's authority on the summons for directions, accompanying the supersession of the New Procedure, may profitably be studied with reference to the regulation of the hearing and the powers to be exercised in its conduct.

With respect to the summary judgment the trend exhibited is in harmony with that prevailing in America. For the most part the scope of the summary judgment where recognized with us remains narrower than under the English provisions, but occasionally embraces cases not coming within the latter. "Thus in New York and Wisconsin, although the proceeding does not lie in any case of tort demands, it is available in the case of a suit to foreclose a lien or mortgage, or a suit to compel an accounting under a written contract."⁵⁸ But the new Federal Rules have gone far beyond the English system in making the scope universal, that is to say, in permitting motion for summary judgment to be made by any party "seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment."⁵⁹ Moreover, while the English Rules, as regards the defendant, still confine the application to the case of a counterclaim, Michigan and Wisconsin, as well as the Federal Rules, enable the defendant to apply for summary judgment as a purely defensive measure.

In the institution of the "court expert" as a means of minimizing the evils attendant upon the usually partisan attitude of experts called by the parties, the Rules have followed the same general direction already taken by a number of statutes in the United States.⁶⁰ The reform is one cogently advocated by Pro-

58. Millar, *Notabilia of American Civil Procedure, 1887-1937* (1937) 50 Harv. L. Rev. 1017, 1055.

59. Rule 56, Rules of Civil Procedure for the District Courts of the United States.

60. See 2 Wigmore, *Evidence* (3d ed. 1940) sec. 563.

fessor Wigmore, with whose suggestions⁶¹ as to its regulation, it is interesting to observe, the English provisions rather closely coincide. With us, "legislative progress in the adoption of this type of measure has been slow. But it is inevitably the way of the future."⁶² A powerful aid in the desired progress is the draft act of the National Commissioners on Uniform State Laws adopted in 1937, and approved the following year by the appropriate Committee of the American Bar Association.⁶³ This, while differing from the provisions of the English Rules not only in detail, but also in scope and principle, offers equally effective means of placing expert testimony upon a proper basis.

The change effected in the case of the notice to admit documents, that is to say, attachment of the penalty of constructive admission for ignoring the notice, in lieu of the imposition of costs, is sufficiently conservative, judged by American standards. The step in question, although marking a distinct advance, had been anticipated in certain of the American jurisdictions, namely, Massachusetts (1917)⁶⁴ and Wisconsin (1931).⁶⁵ Moreover, the English change is restricted to the case of documents and does not apply to a notice to admit specific facts, whose sanction for the case of failure to give notice of non-admission remains on the former basis, while in Massachusetts and Wisconsin the constructive admission worked by failure to heed the notice applies both in the case of documents and of specific facts. It is further to be remarked that the provision in like latitude has entered into the new Federal Rules.⁶⁶

As for the greatly widened admissibility in evidence of documentary entries resulting from the Evidence Act of 1938, this to a certain extent has its American parallel in the model statute recommended by a committee of the Commonwealth Fund in 1927⁶⁷ and which, with or without some variations, had already

61. 1 Wigmore, *Evidence* (2d ed. 1923) 969, sec. 563.

62. *Id.* at 970.

63. 2 Wigmore, *Evidence* (3d ed. 1940) sec. 563, where the text of the draft is set out.

64. 8 Mass. Ann. Laws (1933) c. 231, sec. 69.

65. Wis. Stats. (1937) sec. 327.22.

66. Rule 36 (a), Rules of Civil Procedure for the District Courts of the United States.

67. "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was

been enacted in a number of American jurisdictions,⁶⁸ when in 1936, unmodified in substance, it was adopted by Congress for the federal courts.⁶⁹ The American measure is addressed obviously to a narrower category of entries than is the English statute, that is to say, to entries made in the regular course of business. But within this category, except in point of the discretion conceded to the English court to admit copies in lieu of the original document, it offers freer play. For, demanding only that it should appear that the entry was made in the regular course of business and that it was the regular course of business to make such entry at the relevant time, it wholly dispenses with personal knowledge on the part of the entrant as a condition of admissibility, contains no counterpart of the English alternative requirement that the entry form part of a continuous record and be made under a specific duty to record, and does not insist that there be any recognition in writing of the entrant's responsibility for the accuracy of the entry. It is clear, therefore, that the American statute is more adapted than is the English to meeting the need of harmonizing the law of evidence with modern business methods. But both go far toward this end. In America, it is clear, the constant pressure of this need is bound to bring about enactment of legislation of the kind in increasing degree.

Viewing our own situation in the light of the developments surveyed we find no occasion for pessimism. Here and there, indeed, we have in some respects advanced even farther toward simplification and expedition than has the English system. While in some quarters the existing order of things is still regarded with too much complacency, the events of these last years, and

made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind." Morgan and others, *The Law of Evidence* (1927) 63.

68. 5 Wigmore, *Evidence* (3d ed. 1940) sec. 1520; Chamberlayne, *Trial Evidence* (2d ed. 1936) sec. 894. See also the proposed statute of the Commissioners on Uniform State Laws patterned upon that of the Commonwealth Fund, but containing the requirement that the entry be testified to by the person who made it or supervised its making. Wigmore, *loc. cit.*

69. Act of June 30, 1936, 49 Stat. 1561, c. 640, 28 U. S. C. A. sec. 695.

particularly the adoption of the Federal Rules of 1938, betoken marked progress. To a very considerable extent the conditions of jury trial remain unsatisfactory, as do also what may be called the "administrative circumjacentcies"⁷⁰ of procedure, but even here there are reassuring signs. On the whole, especially with the powerful influence proceeding from the new Federal Rules, we have every reason to count upon an accelerated march to improvement throughout the American jurisdictions.

70. Millar, *The Old Régime and the New in Civil Procedure* (1937) 14 N. Y. U. L. Q. Rev. 1 and 197, 224.