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THE ENGLISH NEW PROCEDURE

D. J. LLEWELYN DAVIES †

THE New Rules of Procedure, which were introduced in England in May, 1932, are an attempt to meet the criticism that English justice has become too expensive. Professor A. L. Goodhart in an article dealing with the part played by costs in English and American Procedure states that

“to describe these rules of procedure without mentioning costs is like describing the engine of a motor car without mentioning the fact that it runs on petrol.”¹

When trade is good and money is plentiful the price of the petrol may not be of much concern, but when there comes a period of financial stringency, it is more likely to receive attention. It is only natural, therefore, in view of the prevailing depression, to find that complaints about the high cost of litigation have become frequent and insistent during the past few years.

As a result of the representations made to it by its members, the London Chamber of Commerce appointed a Committee to examine and report on the matter. This report was adopted by the Council in April, 1930, and was then published and submitted for the consideration of business men, the Bench, and the legal profession.²

The Committee exonerated the members of both branches of the legal profession from the charge, which is frequently made against them, that they made undue profits out of litigation.³ This conclusion derives support from the fact that the average lawyer does not as a rule succeed in amassing a larger fortune than the average doctor or accountant, and also from the fact that most legal firms regard litigation as less remunerative and more troublesome than other branches of their work, such as conveyancing or the administration of estates.

“So far as our experience goes,” the Committee state, “impartial critics of the cost of litigation acquit Barristers and Solicitors of making excessive incomes as compared to other professional men.”

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1. Goodhart, *Costs* (1929) 38 YALE L. J. 849.

2. Memorandum on the Expense of Litigation: London Chamber of Commerce. London E. C. 4.

3. For an account of the organization of the legal profession in England see JENKS, *THE BOOK OF ENGLISH LAW* 78.

At the same time, the Committee believed that civil justice had become far too costly, but in their opinion it was the system and the procedure which was responsible for this.

"Under the present procedure," their Report states, "even where all concerned act reasonably and where there is no attempt on either side to cause delay, if the present procedure remains unaltered, we do not see how the cost of litigation can be materially reduced." They submitted that, "the irresistible inference to be drawn is that the average litigant, especially if he be a business man, would be satisfied with a much simpler and cheaper procedure than at present exists in England."

In consequence of this and similar requests, the Lord Chancellor called upon the Rule Committee to consider what remedies were possible, and after deliberations extending over several months, the New Procedure Rules were promulgated and came into operation on the 24th of May, 1932.⁴ They were accompanied by a very useful Memorandum explaining their purpose and operation.⁵

Before considering the procedure under the New Rules it is necessary to note the scope of their operation. They extend only to actions assigned to the King's Bench Division,⁶ and not to all such actions, for the following are excluded:

- (1) Actions for libel, slander, malicious prosecution, false imprisonment, seduction, or breach of promise.
- (2) Actions involving fraud.⁷

In these actions the disputing parties are not likely to show any willingness to co-operate in securing a speedy trial, and the facts are generally difficult to determine. These cases have therefore not been brought within the scope of the New Rules.

Moreover, an action does not go to the New Procedure List merely because it does not fall within the excepted classes, for either the Solicitor for the Plaintiff, or the Solicitor for the Defendant must

4. The power to make rules governing the procedure of the Supreme Court is vested in the Rule Committee which consists of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, together with four other Judges and four representatives of the legal profession, appointed by the Lord Chancellor. The New Rules stand as Order XXXVIII A of the Rules of the Supreme Court.

5. Memorandum accompanying S. R. & O., 1932. No. 252.

6. The assignment of business among the three Divisions of the Supreme Court is now governed by the Judicature Act, of 1925, §§ 56 and 57. All causes and matters, civil and criminal, which before 1873 would have been within the exclusive cognizance of the Common Law Courts, are assigned to the King's Bench Division.

7. Under Rule 2 (2) if the Plaintiff alleges fraud he cannot bring his action under the New Rules, and if the action has been commenced under the New Rules and fraud is subsequently alleged against any party, that party may ask to have it transferred to the ordinary list under Rule 10.

certify that the action is one to which the New Rules apply and "that it is not by reason of its complexity or otherwise unsuitable" for the procedure prescribed under Order XXXVIII. The object of this is to prevent the New Procedure List being clogged with cases which are likely to prove too unwieldy for the new method of trial; and the responsibility for making this decision rests upon the Solicitors who have been concerned with the case before proceedings have been commenced, and who, therefore, are in a position to know whether the issues involved are likely to prove simple or complicated. Should it afterwards happen that the action has turned out to be more unwieldy than was expected, the Judge is given the power to correct this initial mistake by ordering the action to be transferred to the Ordinary List.

Since recourse to the New Procedure is thus made optional, it follows that the success of the experiment must necessarily depend on the attitude adopted towards it by the legal profession. The number of actions which have already been brought under the New Rules show that Solicitors have not refrained from advising their clients of the advantages of a New Procedure action.

PROCEDURE UNDER THE NEW RULES

The Memorandum which accompanied the New Rules recalls that the existing procedure had been criticized, both as regards

"the preparation of the case for trial, and the mode of trial when the issues have been determined."

The New Procedure, which is based very largely on the analogy of the practice of the Commercial Court, introduces important changes with respect to both these matters.⁸

Preliminary Proceedings

The cardinal principle underlying modern English civil procedure is that the parties are entitled to ascertain with precision before

8. The Commercial Court was set up in 1894 by Resolution of the Judges to meet the dissatisfaction of business men with the delay and expense involved in the ordinary procedure. Commercial cases are transferred to the Commercial List and this is taken by a Judge of the King's Bench Division who is especially familiar with Commercial Law. The practice of the Court is regulated by a Memorandum of the Judges. As these rules have not been under statutory authority, but merely in the exercise of the power possessed by the Judges to regulate the procedure of their own Courts, it has been declared that the Commercial Judge has now power to dispense with the strict rules of evidence. *Baerleim v. Chartered Mercantile Bank*, [1895] 2 Ch. 488, 491. For a fuller account of the Commercial Court see *ENCYCLOPEDIA OF THE LAWS OF ENGLAND*, Vol. III, 119.

the action comes on for trial, the matters on which they differ, and those on which they are agreed. Under the ordinary procedure this is apt to prove a lengthy and expensive business. The Plaintiff, having served his writ, must take out a Summons for Directions, whereupon the Master will direct how the action is to be conducted through its various stages. He will order the Plaintiff to deliver his Statement of Claim with full particulars within so many days, and the Defendant to deliver his Defense within so many days after the Plaintiff has delivered his Statement of Claim. If a Reply is permitted the time within which it is to be made will be similarly prescribed. The Master will also make the necessary orders for the production and inspection of documents. Frequently, a party will not be satisfied with the information supplied by his opponent, and there will result applications for further particulars, further discovery of documents, and possibly for leave to administer interrogatories. All this may necessitate numerous appearances before the Master with the possibility of appeals from him to the Judge in Chambers, and this, in addition to delaying the trial of the action, results in considerable expense to the litigant, especially as these interlocutory proceedings are frequently attended by Counsel.

Under the New Rules the object is to bring the action before the Judge at its very commencement so that he can make such directions as are needed to secure its early trial with the least possible expense. The Plaintiff must first serve his writ, to which the Defendant must enter an appearance within eight days. The Plaintiff may if he likes, deliver his Statement of Claim along with the writ, and in any case he must do so within seven days of the Defendant's entry of appearance. The Defendant must then deliver his Defense within four days after his entry of appearance or within seven days of the delivery by the Plaintiff of his Statement of Claim. The Plaintiff has another seven days if he is to deliver a Reply. It will be noticed that up to this stage there will have been no interlocutory proceedings.

Then comes a most important stage in a New Procedure action. Within four days of the delivery of the Defence the Plaintiff must take out a Summons for Directions, and this will be heard by one of the Judges taking the New Procedure List. Under the ordinary procedure Summonses for Directions are heard by a Master, but in view of the very wide powers given to the Court at this stage it is obviously desirable that the case should come before the Judge, and the intention is, that so far as possible, the Summons shall be dealt with by the Judge who will later try the case. In this way, as the Memorandum states,

“the parties may rely upon his decision not causing prejudice to either side, and upon his discretion to remedy any unforeseen omission that it revealed at the trial.”

In hearing these Summonses the Judge sits in Court as Chambers, and the proceedings are private, but in view of the importance of the public and the profession understanding the working of the New Rules, the Lord Chief Justice has issued a notice permitting members of the legal profession to be present at these hearings.⁹ There is no appeal against the rulings of the Judge except with his leave or with the leave of the Court of Appeal.

This practice of bringing the case before the Judge at an early stage is based on the analogy of the practice of the Commercial Court, but the powers conferred upon a New Procedure Judge are considerably wider than those possessed by the Judge in charge of the Commercial List.

As regards the preparation of the action before trial, the Judge may in his discretion order either party to supply further particulars where he has omitted to do so in his Statement of Claim, Defence, or Reply as the case may be. Under the ordinary procedure the remedy is to apply to the Master for an Order for further particulars, but under the New Rules it is left to the Judge to correct any omission in this respect when hearing the Summons for Directions, and he may penalise the party responsible for the default by making him pay any additional costs which he has occasioned.

Under the same Rule the Judge may also make

“such order for discovery and inspection of documents, or with regard to admissions of fact and of documents; as he may think necessary or desirable having regard to the issues raised in the pleadings.”

In this way it is usually possible to complete the preparatory stages of a New Procedure action much more expeditiously than under the ordinary Rules, and thereby to save a considerable amount of preliminary expense.

Trial of a New Procedure Action

In addition to the foregoing powers to deal with the preliminary proceedings, there is also vested in the Judge a wide authority to give directions concerning the actual trial which is to follow. It

9. Under Rule 13 the Judges taking the New Procedure List were permitted to delegate to a Master the power to deal with any interlocutory proceedings if unable to do so themselves, and in pursuance of this rule, it has been ordered that *ex parte* applications may be dealt with by a Master.

has been frequently remarked that trials are becoming too long, and the explanatory Memorandum declares that if they are to be less costly, they must be made shorter. Two factors which tend to protract the hearing of a case are, (1) the strictness of the English Law of Evidence, and (2) the presence of a jury. The New Procedure contains provisions relating to both these matters.

Evidence

The London Chamber of Commerce regarded the strict requirements of the English Law of Evidence as the main cause of the excessive cost of litigation. It is true that under the existing Rules the Master on the hearing of a Summons for Directions has power "to order that evidence of any particular fact shall be given by a statement on oath of information and belief, or by the production of documents or entries in books, or copies of documents or entries or otherwise," as he may direct, but this power has been very little exercised.¹⁰ The result is that usually, unless the parties are able to agree, every document and fact must be proved by the personal attendance of the parties and the witnesses in Court.

Under the New Rules, the Judge, when hearing the Summons for Directions, may order that any particular fact may be proved by affidavit, or that the affidavit of any witness may be read at the trial on such conditions as he may think reasonable. He may also direct that any witness, whose attendance in Court ought to be dispensed with for some sufficient reason, be examined before a Commissioner or Examiner; but if the Judge thinks that a party reasonably desires to have an opportunity to cross-examine a witness in Court, he is entitled to have him produced, but he may have to bear the expense.

A feature of modern trials, which adds greatly to their costliness, is the tendency to call as many expert witnesses as possible on both sides whenever any technical point is involved. The London Chamber of Commerce went so far as to recommend that no expert witnesses should be allowed except where large sums of money are at stake, but that in all cases involving technical knowledge, an Assessor should sit with the Judge to advise him. The New Rules do not impose any such rigid restriction, but power is given to the Judge to order that no more than a specified number of expert witnesses may be called. Thus in street accident cases brought under the New Procedure, the parties are frequently limited to one medical witness

10. Order XXX, Rule 7.

each. Moreover, the Judge may order that any question involving expert knowledge shall be referred to a special referee for inquiry and report, and if this report is not accepted by the parties, it may be treated as information furnished to the Court, and will be given such weight as the Court shall think fit in determining any question of difference between the expert witnesses.

Trial without a Jury

It is commonly admitted that a trial before a jury generally takes longer than a trial before a Judge alone. Moreover, there is always the danger that a new trial may be necessary either because there has been a misdirection by the Judge, or because the jury have disregarded his instructions.

The tendency therefore has been to dispense with juries in civil cases. The right to demand that an action be tried by a jury was severely restricted during and after the War,¹¹ and under the Judicature Act, 1925, the Rule Committee is given the power to make rules prescribing whether a trial is to be with or without a jury. The effect of the existing Rules is that a party may generally demand a jury in a pure Common Law action.¹² Actually, however, in the vast majority of cases the trial takes place without a jury.

In a New Procedure Action the question whether or not there shall be a jury is left entirely to the discretion of the Judge. When an action involves difficult questions of fact, he will naturally welcome the assistance of "the twelve good men and true," but in a great number of cases the questions are such that he will be fully able to answer them himself without any such assistance. Thus Macnaghten, J. when taking the New List is reported to have stated that in street accident cases he was prepared to grant a jury where the amount of damages had to be assessed, but that it was better that the trial should be without a jury where the issue was one of negligence only.¹³

Fixing Date of Trial

One of the most frequent complaints about the existing system is that it cannot be ascertained in advance exactly when a case is going to be tried. When an action has been set down for trial, it is placed in the Cause List, and will then have to await its turn. As its time approaches, it will appear in the Weekly Cause List,

11. The Juries Act, 1918, § 1, and the Administration of Justice Act, 1920, § 2.

12. Order XXXVI, Rule 6.

13. Law Times, July 30, 1932.

and finally in the Daily Cause List. There is no certainty, however, that the case will come up on any particular day, for the earlier cases may take longer than had been anticipated, with the result that the parties and their witnesses may have to hold themselves in readiness for the trial for several days. This was a matter to which the London Chamber of Commerce attached great importance.

"Uncertainty of date of hearing and waiting about," they state, "is one of the greatest discouragements preventing persons from bringing their disputes to Court, and it is a great cause of expense."

It has always been recognised that one of the greatest advantages of proceeding in the Commercial Court is that the date of trial is fixed beforehand. A New Procedure action confers the same advantage, for under Rule 9 of the New Order the Judge is empowered to fix a date for the trial, and it is declared that the action shall, as far as possible, be tried on that day.

APPEALS

The foregoing provisions relate only to the preparation of the case and its trial. There is still the question of appeal. In England a party who is unsuccessful in the High Court may appeal to the Court of Appeal, and from there again to the House of Lords. When the judicial system was reorganized by the Judicature Act, 1873, the intention was that the decision of the Court of Appeal should be final; but before the Act came into operation, there was a change of government, and an amending Act was passed in 1875 which restored the appellate jurisdiction of the House of Lords. No student of English law can fail to recognise the extent to which the Law Lords have contributed to the scientific development of the system during the last fifty years, but the right to bring a second appeal is an expensive luxury, and in the hands of a powerful opponent, such as a government department, or a wealthy corporation, it may become an instrument of great oppression. For the thought, that if he starts the action, there may be no stopping it until it reaches the House of Lords, may well cause a prospective litigant to conclude that the game is hardly worth the candle.

The suggestion has again been revived that one appeal is generally sufficient, and that some severe restriction should be imposed on the right of the parties to drag one another from Court to Court.¹⁴

14. Lord Tomlin, one of the Lords of Appeal in Ordinary has recently declared that "the multiplicity of opportunities for appeal was a matter which required consideration," and he advocated a two-tier system—a Court of first

Any such proposal would require legislation, and therefore it did not fall within the competence of the Rule Committee. But while the New Rules could not curtail the right of appeal, they do enable the Judge to discourage unnecessary appeals by empowering him

“to 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.” “This power,” says the accompanying Memorandum, “will enable the Judge to present the possibility of reaching finality to the parties, and if they do not reach an agreement on the point, at least they will have no justification for expressing surprise or discontent if their case passes upwards from Court to Court.”

Whether this clause is likely to have any considerable affect is very doubtful, for having started his action, a litigant may well be unwilling to deny himself in advance the right to fight it out to the very end. A similar provision obtains in the Commercial Court, but it is believed that it is the exception rather than the rule for parties to agree to accept it.

CONCLUSIONS

The Lord Chancellor, in speaking recently of the problem of law reform, said:

“the real remedy for the present discontents was to reform the practice and procedure of the law with a view to greater expedition and economy.”¹⁵

To what extent have the New Rules provided this remedy? That they have shortened the preliminary proceedings, and simplified the trial is already apparent. The Lord Chief Justice has given as an example of the expedition with which an action can be disposed of under the New Procedure, the case of a man who came from East Africa in March, and returned with the award in his pocket in October, although he only commenced proceedings in July.¹⁶

The most obvious effect of the New Rules has been to provide a much speedier method for dealing with a case than existed under

instance and a Court of Appeal. Address to the Chartered Institute of Patent Agents, reported in the Times Nov. 26, 1932.

It may be noted that in a criminal case, there is no right to appeal to the House of Lords from the Court of Criminal Appeal except where the Attorney General gives his certificate that the case involves a point of law of public interest.

15. Lord Sankey in his Speech at the Lord Mayor's Banquet reported in the Times, 10 Nov. 1932.

16. Lord Hewart responding on behalf of the Judges at the Lord Mayor's Banquet, *ibid.*

the ordinary procedure.¹⁷ This in itself is a great convenience and should normally result in a saving of expenditure. On the other hand many of the items which contribute to swell the expense of litigation are not affected by the New Rules. Interlocutory proceedings and the mode of trial are only two among several factors which enter into the problem. Very often the commencement of an action has been preceded by a lengthy correspondence between the Solicitors acting for the respective parties, and a considerable amount of expense may have been incurred before the issue of the writ. There is also the question of Counsel's fees, which are apt to form a very substantial portion of the total costs. It is true that there is always available a sufficient number of competent Barristers, who would be willing to accept the brief at a moderate fee, but the tendency is to engage fashionable Counsel wherever possible. This is a factor which influences costs generally, and has certainly helped to create the impression of the average layman that a law suit is an extravagant luxury.

Again, while the rigid division of the legal profession in England into two branches, Barristers and Solicitors, is not without its advantages in that it leads to a high degree of specialization, it necessarily results in a certain duplication of work, and in addition to the Barrister's fee, the client must pay the Solicitor's charges for instructing him, for preparing the brief, and for consultations.

The New Procedure cannot do everything, but it is an important step towards providing a more satisfactory method of obtaining legal redress. To hope for cheaper justice without having first reformed the procedure whereby it is administered, would be as useless as it would have been to hope for cheaper conveyances without any previous attempt to simplify conveyancing.

17. The right to obtain summary judgment under Order XIV has not been affected by the New Rules; and Swift, J. has intimated that if the Plaintiff thinks that the Defendant has no defence and that he is entitled to summary judgment, it is better for him not to bring his action as a New Procedure Action, for if it turns out subsequently that he is not entitled to summary judgment, the Master will then in a suitable case transfer the action to the New Procedure List.