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ON paper the program of the London meeting of the American Bar Association last year was not a crowded one. No busy morning sessions hurried the members away from their hotels; at noon there was a leisurely opportunity for comfortable luncheons; and the drowsy summer afternoon was far advanced before the real business of the day began. But the printed program only marked the high points of the meeting. All through the week, by day and by night, there was London to be seen,—the Abbey, the Tower, the Thames,—palaces, parks and galleries, and the thousand historic spots which are perhaps more interesting to the American than to the native Englishman. But chiefly there was the legal quarter of London, guarded from encroaching commerce by centuries of vigilance, and occupied by the halls, libraries, and chambers of the Inns of Court, inclosing those quiet gardens, velvet lawns and shady walks, through which the roar of the traffic along Holborn and the Strand only faintly echoed. In the midst of the medieval seclusion of these ancient citadels of the English bar, stood the massive pile of the Royal Courts of Justice, under whose Gothic entrance arch passed hundreds of American lawyers in a constant stream which flowed through the great central court and along the vaulted corridors and into every court-room where the king's judges sat in their wigs and robes administering the laws of England. These courts, and the Old Bailey

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not far away, cast their enchantment over every visitor, luring him back day after day, in a restless search for the secret of their success. How did they operate so quickly, quietly, and effectively? There was no evidence of hurry, of driving pressure, of anxiety to make every moment count. On the contrary, cases often seemed to proceed with a rather slow dignity. And yet it was clear that the English court reached its verdicts and judgments far more directly, more simply and more rapidly than an American court. Why should it be so? A week was too short to supply the answer.

The following suggestions, in explanation of the mysterious efficiency of English justice, are the result of a more extended opportunity for observation enjoyed during the next six months after the close of the memorable London meeting.

In seeking the causes for the immense success enjoyed by the present English legal system, it will be convenient to recall the three major divisions of the procedural field. The first relates to the preparation and docketing of cases for trial, the second to the trial itself, and the third to the proceedings for review. These are in fact the three stages through which most of our litigation actually or potentially passes. These different stages, under the old practice in England, and quite largely under the present practice in the United States, were regarded as quite separate matters for procedural regulation, and the rules in relation to one were drawn with scant reference to the others.

Under the present English practice this theory has been completely abandoned, and a closely coordinated scheme, covering the entire field of litigation, has been worked out. English ingenuity perceived the enormous advantages which could be derived from a preliminary segregation of cases for specialized treatment and from a greatly extended use of discovery and disclosure before trial. Changes of a very radical nature, introduced into this preparatory stage of litigation, produced changes hardly less notable in the theory and practice of the trial itself, and the trial was further modified in a marked degree by the requirements of a novel and highly practical theory of review, which made the appellate court an integral part of a simplified and economical mechanism for judicial administration. Without

going into the details of the rules, I shall endeavor to present what seem to be the essential principles upon which the English system is based, treating it under the three heads of preparation, trial, and review.

I. Preparatory Work

That large body of English procedural law which deals with the preliminary preparation, inspection, and arrangement of cases, performs two major functions. It first provides a mechanism for the early segregation and prompt decision of those classes of cases which require either no formal trial or a restricted trial of a specialized kind, and, second, it subjects the remaining cases, which must be tried in due course, to a severe process of disclosure and discovery before they are placed upon the trial cause list. Cases calling for summary judgments and declarations of rights are in this way withdrawn from the regular dockets, permitting them to go forward very rapidly under appropriate special proceedings, and at the same time, freeing the regular dockets from much congestion and delay. And the regular dockets themselves, because of the preliminary discovery which forces each party to lay most of his cards upon the table, are tried with remarkable speed and accuracy.

(*a*) *Summary Judgments*

Summary judgment procedure, in essence, is nothing but a process for the prompt collection of debts. It was never employed by the common law courts, because they developed all their rules of procedure as mere by-products of controversial litigation, and such litigation is not adapted for collecting debts. Machinery for that purpose must provide a test to determine that the plaintiff has a debt and not a controverted claim, and a means for getting an immediate judgment without the expense and delay of a trial. The English practice does both of these things with neatness and dispatch.

The creditor issues a summons with a description of the debt indorsed upon it, files an affidavit of the truth of his claim and of his belief that there is no defense, and upon that showing, without pleadings and without the aid of counsel, he may bring the debtor before a High Court master on four days notice to show cause why a sum-

mary judgment should not be forthwith rendered against him. The burden is thus placed upon the debtor to satisfy the master, by convincing proofs, that he ought to be given the right to litigate the claim. No formal gesture, such as the affidavit of merits so often provided for in our summary judgment acts, will suffice. The masters want solid assurances, and sham defenses are ruthlessly rejected. Under the skillful hands of the masters these cases are disposed of very rapidly, five or ten minutes being usually enough. Very large judgments, running into thousands or even millions of dollars, are constantly being rendered in this summary way.

The immense value of the practice is indicated by its wide use. In the year 1923, for example, there were 6,773 summary judgments rendered by the masters of the King's Bench Division, as compared with 1,546 judgments entered by the judges after trial of issues. That means that by this device the trial dockets were relieved of 80 per cent. of the cases which would otherwise have come before the courts for formal trial, and that claimants in all those cases got their judgments in as many days as it would have required months through ordinary litigation in the courts.

(*b*) *Declarations of Rights*

Declarations of rights are not made in this summary way, but applications for them present limited issues, often largely of law, which can be disposed of in much less time than cases brought in the ordinary way. Most of these cases ask for the construction of deeds, wills, contracts or other written instruments, statutes or governmental orders.

The practice enables parties to bring questions before the courts for determination at an early period in the controversy, when few complications have arisen, and when the adjudication of a simple issue of construction may save parties from doing acts and committing themselves to courses of conduct which may afterwards be very difficult to deal with. At this stage no damages have yet been suffered, no steps have been taken which will have to be retraced, and no rights of third parties have intervened. Taken in time, the controversy may be kept within very narrow limits, and the decision will almost amount to an amicable adjustment under the advice of the court. Legal

conflicts between individuals are evidences of social friction, and a wise government will be anxious to offer a remedy at the earliest possible moment.

The service rendered by the courts under the declaratory judgment practice is quite analogous to that rendered by modern hospitals which diagnose and treat diseases in their incipient stages and thereby prevent the development of more dangerous conditions.

So useful and effective has this practice become in England that several judges of the High Court are frequently engaged simultaneously in making declarations of rights, and the size of the dockets which they dispose of is eloquent testimony of the speed with which the work can be done.

The procedure by which English courts administer both summary and declaratory relief, has begun to stimulate a general interest in the United States. Notwithstanding the unfortunate experience of Michigan, whose supreme court announced the extraordinary doctrine that declaring the rights of parties is not a judicial function, a constantly growing number of states—no less than eighteen at the present time —are employing the declaratory judgment procedure, and the American Bar Association is urging similar legislation by Congress. Summary judgments have not yet made so persuasive an appeal, but New York and New Jersey have both adopted the very effective provisions of the English practice.[1] In a land where time-saving devices are valued as highly as in this country, an adequate means for the prompt collection of debts through judicial process cannot be indefinitely deferred, and the English summary judgment ought to prove as useful to us as the declaration of rights.

(*c*) *Disclosure and Discovery*

Having eliminated from the trial docket the cases calling for summary and declaratory judgments, the next problem is to provide the parties to the cases which must be regularly tried with all the information which is necessary to enable them to prepare for trial. Instead of conniving at the instinctive desire of counsel to keep his adversary as far as possible in the dark, lest by obtaining informa-

[1]Summary Judgments under the Civil Practice Act in New York. By Judge Edward R. Finch. 49 Am. Bar Ass'n Rep. (1924) pp. 588-594.

tion he should become more formidable, the English rules provide for the most thorough disclosure and discovery.

Discovery is one of the primary titles in the books on English procedure. From a minor doctrine in the chancery practice it has grown into a controlling principle embracing all litigation in the High Court. Practically every case, commenced in the ordinary way, is sent at once to a master on a summons for directions, who makes an order mapping out the course which it is to follow, and the main purpose of this order is to specify and direct the discovery which must be made forthwith.

If there are facts which either party believes will not be actually disputed, although formally in issue, and which he wishes to avoid the expense of proving, he may have an order calling upon his adversary to admit them. Unreasonable refusal to make such admission will load the cost of proof, after it has been successfully produced, upon the party who refused to admit. The practice is admirable, for such admission not only saves expense to the parties but saves the time of the courts in hearing proofs.

If there are matters regarding which either party wishes to obtain information from the other, he may have an order allowing him to put interrogatories which must be answered under oath.

And most important of all, each party is entitled, almost as a matter of course, to an order requiring the other party to furnish a sworn list of all the documents—whether admissible in evidence or not[2]—which he now has, or ever has had, in his possession, relating to the matter involved in the suit. This list must embrace everything in writing or printing capable of being read.[3] It must be set forth in two schedules. The first must contain all the documents that are in the possession or power of the deponent, and must be subdivided into those which he is willing to produce and those which he is not willing to produce; the second must contain all the documents no longer in the deponent's possession, with a statement as to what became of them and in whose possession they now are.[4] Upon the receipt of this list, the party usually gives notice in writing to produce such documents

[2]Compagnie Financière du Pacifique v. Peruvian Guano Co. (1882), 11 Q. B. D. 55.

[3]Rex v. Daye (1908) 2 K. B. 333.

[4]11 Halsbury's Laws of England, 59, 60.

as he wishes to inspect,[5] and within a few days, subject to the possibility of an argument regarding the documents not willingly produced, by this simple and effective means, each party is supplied with copies of all the documents which he is entitled to inspect and which are known to be in existence, bearing upon the case.

There is nothing in the English court system which proceeds under such speed and pressure as a hearing before a master on a summons for directions. The solicitors are not allowed the luxury of a seat, but stand at a sort of high desk before the master, and are hardly given time to gather up their papers before the next group of solicitors has crowded forward to take their place. Each of the masters has a docket of sixteen or eighteen cases per hour, and he usually finishes the list on time. The summons for directions, by which the vast scheme of discovery is largely administered, is thus a tremendously efficient instrument.

It is of course impossible to determine how much court time is saved by these preliminary admissions, answers to interrogatories, and disclosures of documents, but an observer who compares the time used in an English trial with that ordinarily consumed by a similar trial in the United States, and notes the points at which speed is secured by reason of prior discovery, might perhaps estimate a fifty per cent. saving. With the facts on each side mutually understood by both parties when the trial opens, leading questions no longer become objectionable on many features of the case, and the witness is brought at once to the point in controversy with no waste of time over formal preliminaries; the necessity for cross-examination is greatly reduced, and it is frequently omitted altogether; the formal introduction of evidence is largely dispensed with, for complete typewritten sets of copies of the documents previously inspected are already in the hands of the judge and of counsel on each side when the trial begins, and they are usually introduced by consent; formal admissions of facts, and answers to interrogatories, eliminate entirely many features of the case which with us would call for extensive proof. With the element of surprise largely out of the case at the opening of the trial, there is no occasion for that elaborate maneuvering for advantage, that vigilant and tireless eagerness to insist upon

[5] Id., 68.

every objection, with which we are so familiar, and which not only prolongs and complicates the trial, but helps to make the outcome of an American law-suit turn as much upon the skill of counsel as upon the merits of the case.

Our bar has always been inclined to fear and distrust disclosure before trial. They have thought it would tend to produce framed-up cases and perjured testimony. But it must not be forgotten that want of disclosure causes great delay, inconvenience and expense in the preparation for trial, seriously prolongs the trial itself to the prejudice of the parties, the witnesses, the jurors and the court, and results in a defective and inadequate presentation of the real merits of the case, thereby diminishing public confidence in the ability of the courts to find the truth. In the development of the law of evidence, every reform has been opposed on the same ground,—that it would tend to encourage perjury. It is hard to realize that no longer ago than 1851, Lord Brougham's Act for the first time made parties competent witnesses in civil proceedings in the superior courts. There was great dread of the act, lest the interest of parties should encourage false swearing. Lord Campbell wrote in his Journal on June 19, 1851: "It (the Bill) is opposed, as might be expected, by the Lord Chancellor. I support it, and I think it will be carried, although all the common law judges, with one exception, are hostile to it."[6] But the fear felt by the legal profession was groundless, as events have proved. The history of reforms both in pleading and in evidence has shown a continuous tendency to remove more and more restrictions on the disclosure of the truth. The spirit of the times calls for disclosure, not concealment, in every field,—in business dealings, in governmental activities, in international relations, and the experience of England makes it clear that the courts need no longer permit litigating parties to raid one another from ambush.

2. The Trial

When we pass from the preliminary and preparatory procedure already discussed, to a consideration of the second stage in the process of litigation, namely, the trial, the obvious differences in court-room methods at once attract attention. But it is not so easy

[6]Odgers, in A Century of Law Reform, p. 235.

to identify the reasons for the points of difference. In making an analysis we are likely to stress the specialized bar, which develops experienced and skillful trial lawyers. But that is hardly an adequate explanation, for our larger law offices also have their specialists in court work, who are equal to the best of the English barristers, and yet their participation in a trial seems to make no material change in the character of the performance.

The secret of English efficiency probably lies in another feature of their system, which exercises a profound influence upon the entire conduct of the case in court, namely, non-partisan control by the judge rather than partisan control by the attorneys.

One seldom observes carefully those things with which he is very familiar, and American lawyers were generally somewhat surprised, after watching the proceedings in English courts, to realize how preponderant is the part taken by the attorneys in an American court, and, to a corresponding degree, how little the American judge participates in the active work of the trial. As the English themselves express it, the barristers only assist the judge in trying the case. There are, of course, three official agencies involved in a trial, the judge, the jury, and the attorneys, and the main problem of trial practice is to make them cooperate most effectively in arriving at the merits of the controversies. Two of them, the judge and the jury, should be non-partisan, because they are required to decide disputed questions between the litigants, while the attorneys, whose task it is to present the rival claims of the contestants, must of necessity be strongly imbued with the zeal of the advocate. Now the English theory of an efficient trial procedure seems to be predicated upon a distribution of the various proceedings embraced in the trial in such a way that those requiring impartiality shall not be delegated to the attorneys, and that those, on the other hand, which involve partisan interest shall be placed in the hands of the representatives of the contending parties.

Such a classification of the steps in a trial is perfectly easy. Since the selection of the jury is something which should be absolutely divorced from partisan influence, the empanelling should not be done by the attorneys. The opening statement of the claims of the contestants, if it is to be made forcibly, *must,* on the other hand, be the work of the attorneys, and the same is true of the offering of evidence

and arguments relative to its force and effect. But the jury should be instructed on the law with complete impartiality, and in this the attorneys should have no hand, and the same is true of the summing up of the evidence and the supervision of the form of the verdict. If, therefore, each branch of the tribunal is to do what it is best fitted for, and is to refrain from attempting to do those things which are inconsistent with its nature and character, the jury will be impanelled by the judge or other court officer without any interference by the attorneys, and will be instructed on the law and informed (by way of summing up) upon the facts by the impartial action of the judge, who will decide without any partisan advice or pressure as to what should be said to the jury. And finally, since the verdict is the judicial decision of the jury, and its value and effect may depend upon its form, an impartial direction and control should be exercised over this vital feature of the trial in the interests of both parties, indifferently, which of course points to the judge as the proper guide.

This theoretical division of functions in the interests of a fair trial is the absolute rule of practice in the English courts.

Five minutes before the court opens, the clerk calls twelve jurors into the box — usually ten men and two women — and promptly swears them to try the case. As he finishes this brief and simple ceremony, the judge steps through a door behind the bench, bows to the barristers and to the jury, takes his seat, and the trial is under way.

How many hundreds of thousands of hours are wasted annually in the United States in impanelling juries? How much do we reduce the average of jury intelligence, particularly in criminal cases, by our excessive challenges? To what extent is the systematic avoidance of jury duty on the part of our well-to-do citizens, traceable to the humiliating cross-examinations to which we subject our jurors and to the tedious and useless length to which we drag our trials? And finally, how much is the confidence of the public in the justice and integrity of the jury system impaired by our partisan wrangling over the personnel of the panel? These are interesting subjects for speculation.

The empanelling of an English jury is a dignified and impressive performance. They have already been selected for character and intelligence, like the judges themselves, and their names can be ob-

tained by counsel for a shilling, in advance of the trial, if there is any desire to investigate them with a view to a challenge. As a matter of fact this list is almost never asked for. The clerk, as the representative of the government, not of the parties, draws and swears them, thus giving them a status independent of the contending parties, like that of the judge on the bench. Freed from the hostile inquisition of the rival lawyers, the jurors undoubtedly approach the case in a much more judicial frame of mind than would be possible under the American practice, and this clearly manifests itself in a closer cooperation between jury and judge.

English counsel state their cases well, put in their evidence carefully and thoroughly, and argue the facts with simple directness, without any attempt to carry the jury by emotional appeals or by flights of eloquence. This rather cold and business-like attitude toward the jury is doubtless due to their conviction of the futility of any other course. For the judge has the last word with the jury, and no emotional effects could stand against the clear, cold summing up of an English judge, who has followed every move in the trial with experienced skill, taking diligent notes of all the salient features of the case. The judge is expected to see to it that the jury get a properly balanced view of the case, and if one side is pressed too hard the judge must correct it. In *Hepworth's Case*, 4 Cr. App. 130, complaint was made that the judge made derogatory observations upon the argument of appellant's counsel, but the Court of Criminal Appeals said that no harm had been done, for counsel had made a very eloquent speech and the judge had only tried to administer an antidote.

The value of a summing up is not appreciated in the United States, but in England it is considered the most important function of the judge. Doubtless that strange and anomalous rule followed by most of our state courts, which forbids comment by the judge on the weight of the evidence, has created so great a risk of error in summing up that our judges hesitate to take the chance, and either omit the summing up entirely or make it quite formal and perfunctory. A few weeks spent in watching jury cases tried in England will convince one that the summing up does more to secure a verdict based on the merits of the case than all the rules of evidence which legal ingenuity has devised. The judge not only recalls to the jury the

various parts of the evidence and the different witnesses who testified, but he suggests such inconsistencies and improbabilities and such elements of corroboration, as he has observed, and cautions the jury in regard to such evidence as is likely to appear entitled to too much or too little weight, such as admissions, testimony of accomplices, proof of a bad reputation for veracity, testimony colored by interest, evidence admitted for a limited purpose, and evidence inherently weak or strong. He warns the jury against improper remarks of counsel or facts improperly brought to their attention, and in general undertakes to present to the jury a full, discriminating and well balanced summary and analysis of the whole case proved before them. Naturally his presentation will have weight with the jury, as it ought to have, for there can hardly be any doubt about the immense value of a non-partisan summary after counsel have urged their antithetical views upon the jury.

"Trial by jury," says Dicey in his Law of the Constitution, "is open to much criticism; a distinguished French thinker may be right in holding that the habit of submitting difficult problems of fact to the decision of twelve men of not more than average education and intelligence will in the near future be considered an absurdity as patent as ordeal by battle. Its success in England is wholly due to, and is the most extraordinary sign of, popular confidence in the judicial bench. A judge is the colleague and the readily accepted guide of the jurors."[7]

Even more novel to an American lawyer is the English practice as to instructing the jury upon the law. Counsel have no more to say about the judge's charge than about his summing up. Instead of being a mere phonographic instrument for reading the instructions which counsel have prepared, the English judge makes his own statement of the law to the jury. The principles involved in the case are pointed out, briefly and simply, in the course of the summing up, wherever they are applicable, rather than in the form of elaborately constructed paragraphs read to the jury one after another in a tiresome and unintelligible series. Counsel are not expected to even intimate to the judge how they would like to have the jury charged, and I once saw a learned barrister make a subtle effort to convey

[7] 8th Ed., pp. 389, 390.

such a suggestion through his argument to the jury, only to be instantly stopped by the judge, who said, "Sir Edward, I think you may assume that I have sufficient knowledge to charge this jury properly without the assistance of counsel."

American appellate courts have often said that the judicial language of the judge is much more suitable for instructions than the strongly biased language of counsel, each of whom tries to state the law as favorably as possible for his own side. Neither of the lawyers striving to win his case, can be expected to explain the law as clearly and fairly as the judge, therefore the English very logically, put the whole responsibility upon him, and exclude the partisan hand, and even the partisan advice, of counsel.

Finally, the English are much more economical than we are, of the fruits of the trial, and always endeavor to adjust the verdict so that in case of error no new trial will be necessary. They do this wherever possible by means of special questions put to the jury, covering the actual issues litigated.

Special verdicts in the American practice are very unsatisfactory, because they are construed with the most technical severity. In the first place, they must be stated in the form of ultimate facts, and not evidence or legal conclusions, and since no one has ever been able to devise a test to identify ultimate facts, the use of a special verdict always involves a risk. Furthermore, we seem to have inherited the absurd rule that every fact in issue on the pleadings must be found in the special verdict, whether actually contested at the trial or not. This again adds to the hazard, for special verdicts, naturally but unfortunately, tend to follow the lines of the trial, rather than the pleadings, and one discovers only after the jury has been discharged that some uncontested though material fact has been omitted, thereby ruining the verdict. Again, the formal requirements are exacting, for the questions through which the jury are brought to deal with the facts, must be clear, simple, direct, unambiguous, free from suggestive implications, and not too numerous or detailed; and the answers must meet the same tests. After fortunately escaping from the Scylla of the pleadings, one hesitates to take a chance with the Charybdis of the special verdict, and the result is that this immensely useful procedure is feared and avoided, and the parties timidly succumb to that crude relic of barbaric times, the general civil verdict.

If one questions the reality of the hazards involved, let him glance at Mr. Vilas's little book on Special Verdicts in Wisconsin, where the propriety, form or effect of the special verdict is shown to have been litigated before the supreme court of that state in 250 cases in the first 112 volumes of reports.

In contrast to our practice, which has made the machinery of special verdicts so intricate that it hardly functions at all, the English have developed an astonishingly simple and effective procedure. The judge himself, noting the material issues which have actually developed in the evidence, frames a few simple questions to cover them. He asks counsel on each side if they are satisfied with them, and any reasonable changes will be made if suggested, and other appropriate questions added if desired. In a few minutes judge and counsel have agreed in open court upon the questions to be put, and neither side may thereafter complain that the questions are insufficient in substance or form or are inadequate in scope. They are put to the jury, the answers are taken, and judgment is rendered on the answers with or without argument.

The common law obsession that the technical record, or judgment roll, must alone be sufficient to support the judgment, without reference to what really occurred at the trial, although it flourishes with undiminished vigor in the United States, seems to have completely lost its power to hypnotize and charm the English. For them the record is only a means to an end, and its importance cannot extend beyond the limits of its utility. The framing of issues by the judge at the trial is a practical and effective method of administering justice, and this alone is a complete defense of its validity. By means of these special issues, the verdict is in effect made up in separate compartments, one or more of which may be affected by error without scuttling the whole verdict.

The result of the English system is to make the calamity of a new trial almost unknown. The English reports for 1924 show only two cases sent back for new trials in the King's Bench Division during the whole year. In the same period the Supreme Court of Michigan, which I assume is typical of the United States, sent back fifty-seven cases for new trials. But the discrepancy is really much greater than this, for in England the trial courts cannot grant new trials, but application must be made by way of appeal, while in Michi-

gan, as in most American states, new trials are ordered with great freedom by trial courts, so that the total number of new trials actually ordered in Michigan during the year 1924 might very likely have been a hundred times as great as in all of England and Wales.

Lord Alverstone, when Chief Justice of England, testifying before a select committee of Parliament which was investigating the state of the business in the King's Bench Division in 1909, said: "In the old days * * * the judges used to rule and there were arguments before the court *in banc* and cases were sent down for new trial. The modern practice * * * is that points are taken if necessary and questions of fact are left to the jury to decide. The other questions are dealt with in the Court of Appeal. In the result * * * the number of new trials is, comparatively speaking, infinitesimal. They only take place now practically when the judge has misdirected the jury. They do not take place where the judge has heard the case without a jury, because the Court of Appeal set him right. New trials are very, very few.[8] * * * I have myself on more than one occasion said: 'I think that such-and-such is the view of the law, but I will ask the jury this question and get their verdict;' and the Court of Appeal have entered judgment the other way, having regard to what the true view of the law was. If I had not done that they would have sent it down for a new trial in order that the facts might be ascertained.[9] * * * A judge is expected to exhaust the questions of fact which are likely to arise in the case.[10]

New trials are a total economic loss, and their frequency in the United States is the most convincing proof of the utter inadequacy of our trial procedure. The profession is inclined to take a rather fatalistic attitude, as though rules of practice, especially if hallowed by long observance, were immutable, like the law of gravity, and the public must make the best of them, just as men make the best of the various forces of nature. But the profession is suffering from the complaisance which affects every monopolistic institution. Instead of expecting commercial, industrial and social relations to adjust themselves to the obsolete equipment with which the judicial estab-

[8]Report of the Joint Select Committee on the High Court of Justice, 1909. Appendix, p. 10.

[9]Id., p. 14.

[10]Id., p. 15.

lishment does business, the profession should, as it has done in England, scrap a large part of the machinery and provide new devices to correct the defects which have become an intolerable burden upon society.

3. Appeals

In the final stage of litigation, the appellate review, the English rules are clearly founded upon the simple proposition that an appeal, in its formal aspects, should involve no technical difficulties whatever. The judgment record already exists. If the papers which make it up are filed in the appellate court office, and the appellee is notified of such filing, nothing more would be essential to a perfected appeal. An appellate process reduced as nearly as possible to this degree of simplicity would be an unmixed economic advantage, for the only purpose served is the mechanical one of effecting the transfer with notice to the appellee, and every added restriction, requirement or condition merely presents an obstacle and imposes a risk. Unnecessary friction always impairs a mechanical device.

The English practice in taking an appeal so successfully meets its theoretical aim that there is almost no way of making a mistake. Nothing is required but the ability to read and to operate a typewriter. Bills of exceptions became obsolete in England so long ago that some of the oldest men now in the law court offices never heard of them. Assignments of error have also gone the way of the cross appeal, the writ of error, and the other extinct monsters of the cave-dwelling period of English law. To perfect an appeal the English barrister serves a notice upon the respondents that he will move the Court of Appeals in fourteen days to reverse the judgment.[11] He then files with the clerk of the Court of Appeal three typewritten copies of the notice of appeal and of the pleadings, evidence and opinion below.[12] There are no abstracts, or condensations, or reductions to narrative form, to be worked out, wrangled over, and settled. The appellate record is merely a copy of existing documents. There are no exceptions. If the appeal is too late, the court can extend the time for good cause shown; if the parties change by death or otherwise, the court may order substitution; if additional parties

[11]Order 58, rule 1, rule 3. Chitty's King's Bench Forms, p. 611.
[12]The Annual Practice, 1923, p. 1145.

should be joined, the court may at any time order that they be notified; if additional evidence is needed in the Court of Appeal it may be ordered brought in, either by oral testimony or affidavit or deposition; if new points not raised below ought to be considered, the court may order or allow that this be done.[13]

The appeal is by way of rehearing, which was defined by Sir George Jessel, Master of the Rolls, as meaning that the appeal was not to be confined to the points mentioned in the notice of appeal.[14] Indeed, the rules do not require any grounds of appeal to be mentioned in the notice and, according to the current practice, about half the notices specify grounds and the other half do not. The case is therefore not reviewed for errors, but reviewed at large upon the merits, and to insure the broadest usefulness, the Court of Appeal is given all the powers of the trial court, and may draw inferences of fact and make any judgment or order that ought to have been made or make any further order that justice may require.[15] The avowed aim is to enable the appellate court to completely dispose of the case so that when the appeal has been decided the litigation is at an end.

The good business sense of the English shows itself in the fact that they do not require records in the Court of Appeal to be printed, although the House of Lords is more fastidious. It is an obvious extravagance to set up anything in type when only a half dozen or a score of copies are needed. Costs taxed for printing bills are practically thrown away, for preliminary typewritten copies must be prepared anyway, and, with substantially no extra expense, carbon or mimeograph copies could be run off for the court and parties, and the printing dispensed with entirely. By using good paper, open spacing and left-hand binding, the English records are perfectly easy to read and refer to. Printed records and briefs in the Supreme Court of Michigan now average about 20,000 pages per volume of reports. If this is typical of all our courts, the present output of about 150 volumes of reports a year indicates an aggregate printing bill of enormous proportions.

The most remarkable thing about the hearing of an English appeal is the total absence of written briefs and the supreme importance of

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[13]The Annual Practice, 1923. Order 58 and notes.

[14]Purnell v. Great Western Ry., 1 Q. B. D. 636, 640.

[15]Order 58, rule 4.

the oral argument. In the Court of Appeal, and even in the House of Lords, briefs, such as we universally use in this country, are unknown, and neither the opposing counsel nor the court are notified in advance of the hearing what arguments or what authorities will be relied upon. The theory seems to be that since the case has once been tried and comes before the appellate court for a rehearing, there is no reason why counsel should not be presumed to know enough about the case to discuss the merits of the decision intelligently without special notice of points. In fact it is quite possible that the want of specification of points has a distinct tendency to emphasize the importance of the broader equities and aspects of the case, and to confine the argument to such questions as obviously affect the merits. The same result perhaps follows from the want of written briefs. A multitude of inconsequential points may be argued quite effectively in a written brief, but an oral argument, if actively participated in by the judges, almost inevitably centers about the solid and meritorious features of the case. Trivial or technical matters which would fill many pages in the briefs, might never emerge into the region of serious discussion if they waited for the oral argument. Having been strongly urged in the briefs, they seem to call for consideration in the opinion, with the final result that the merits of the case have become involved in a mass of collateral issues, which may unfavorably influence the disposition of the case and are likely to be the means of introducing uncertainties and technicalities into the law. Technical points get a cold welcome when argued before the judges of the English Court of Appeal, and the result is that counsel do not raise them. The appeal proceeds, therefore, as a simple rehearing on the merits of the judgment, and, with the case cleared of legal bric-a-brac, the attention of court and counsel is effectively concentrated upon the main questions involved.

One may sit for days in the courts of the King's Bench Division and hardly hear a question raised on the admission or rejection of evidence. The fundamental principles of evidence are observed with substantial fidelity, and yet an American lawyer would find opportunities for constant objections. Why is the barrister so indifferent? Presumably the answer lies in the Court of Appeal, which through its power to affirm or reverse, sets and maintains standards for the conduct of the trial. Unless technical objections will be sustained above,

they will not be made below. The trial inevitably reflects the attitude of the reviewing court. In the year 1924 not a single case from the King's Bench Division was reversed for error in admitting or excluding evidence. That simple fact explains why the intricacies of evidence no longer terrorize the English lawyer. And it explains the success of the whole judicial establishment. Procedure has become a practicable means to an end. Its rules are no more exacting than efficiency requires. The human elements with which judges and lawyers deal,—namely, witnesses and jurors,—are subject to so many psychological factors which cannot possibly be measured or known, that it is unreasonable to expect mathematically accurate results. No one demands that a stone mason shall show the same degree of precision as a diamond cutter, and it would be foolish to refuse to accept a job of stone work because it did not measure up to the jeweller's standards. The common law judges overlooked this obvious truth, and were always examining masonry work with microscopes and condemning it if they found flaws. That tradition has come down to us. Hundreds of different elements enter into a verdict,—the education, associations, environment, family connections, religious convictions, social habits, prejudices, ambitions, and moral character of each juror, which must be multiplied by twelve for the panel; the same elements plus the vagaries of memory, the effect of imagination and suggestion, personal capacity for observation, and the influence of interest, for every witness; the skill of the lawyers in selecting witnesses, putting in proof, and appealing to the jury; the acccidents of the trial which emphasize this or that feature unexpectedly. None of these factors can be quantitatively determined, and yet the result is affected by every one of them. Their aggregate weight measures the unavoidable liability to error in either direction, and this aggregate is very large. Now it is quite clear that it is useless to demand a greater degree of precision in one element than is possible in the others which enter into a final result. If scales are accurate only within a pound, there is no value whatever in taking reading of fractions of a pound. So if the unascertainable elements in the trial give a certain accidental range of variation, it is absurd to reject the verdict because of errors elsewhere in the trial which affect the result to a less degree than the unknown elements. For example, a bit of hearsay is admitted. The question should be,—

Is that feature of the case likely to exercise a more profound effect upon the verdict than the whole personal and psychological complex of the jurors, witnesses, lawyers and judge? If not, it should be ignored, by the simplest principles of logic. By this test very few of the errors which daily occur in countless numbers in trial courts would be reversible. The common law strained at the gnat,—the error in evidence or trial practice, and swallowed the camel,—the vast unknown elements of personality and psychology which every lawyer knows are the powerful undercurrents which draw verdicts in one direction or another. The English Court of Appeal founds its practice on a more thorough understanding of the nature and the possible precision of a judicial tribunal. If the mesh of its sifting device is large enough to let a camel through, it shows no perturbation if gnats or even larger insects pass.

The rules of evidence and the rules of trial practice should be deemed at best only statements of judicial policy, mere guide-posts for the information of court and counsel. The excellence of the results obtained in a given case depends with no more certainty upon a literal compliance with those rules than does success in literature, sport or politics invariably depend upon the exactitude with which one follows the formal rules for writing poetry, playing golf, or running for office. Good methods are to be encouraged, but ought not to become a fetich. After all, the courts are engaged in the business of adjudicating cases, not of vindicating procedure, and every judgment which is upset merely because obtained contrary to rules, shows a failure of the courts to serve the main purpose of their existence. Such failures have been rare in England since the opening of the present century.

Why have the English succeeded in developing a system of procedure so much superior to ours? The answer appears obvious. Although we in the United States have been as keenly interested in procedural reform as the English, they have been much bolder in the measures they have adopted. Perhaps our Constitutional system, which has accustomed us to an acquiescence in things as they are, is partly responsible for our timidity. But procedure stands on a totally different ground from the law of rights and duties. The whole body of rules could be changed over night without prejudice to anyone except the lawyers who would have to learn the new ones. But that

would be a small price to pay for a really adequate and business-like system of judicial administration. Our reforms in procedure are too slight, too tentative. They have no sweep and scope. We feel our way like blind men who fear to fall. In every other field of human endeavor more efficient methods are being sought with restless eagerness and with no concern for the old equipment which must be scrapped. The legal profession alone halts and hesitates. If it is to retain the esteem and confidence of a progressive age it must itself become progressive. In this respect the old world has set an example for the new.