STUDIES IN ENGLISH CIVIL PROCEDURE.*

II. THE RULE-MAKING AUTHORITY.

I.

In no province does the familiar constitutional doctrine of the separation of powers break down more completely than in the special field of the law of civil procedure occupied by what we know as the rules of practice. The substantive law of the State may lay down with the greatest precision the rights of an individual, and how far their infringement will be repaired by legal remedy, but to the person wronged the question of how and when he can obtain his remedy is equally important. Suitors are not satisfied with syllogisms; they are more interested in the results. It is therefore necessary to provide a safe means by which the litigant can, with proper expedition and directness, pass through contention and attain satisfaction. Upon what department of the State should that duty be placed? Is the function of prescribing rules of procedure executive, judicial or legislative? In so far as it pertains to the carrying out and practical enforcement of substantive law, it is an executive duty; in so far as it aids judges to arrive at the true issues in controversy, it is judicial; and in so far as it has a binding effect upon the conduct of

*Part One of this article, "The Atmosphere," appeared in the December issue, 63 UNIVERSITY OF PENNSYLVANIA LAW REVIEW. 105. (151)
the parties, it is of legislative nature. Undoubtedly it partakes
of all three of the attributes enumerated. It appears, therefore,
that no one of the three branches of our government is, by the
theory of the constitution or the character of the duty, so peculi-
arily fitted for this work that the other two must be excluded from
consideration. In such a position, the guiding principle becomes
one of expediency. Now expediency is a matter on which there
may be argument, and different conclusions may be arrived at by
different minds, though faced with the same problems and seek-
ing the same ends.

It is by some such process of reasoning that the impartial
observer must explain to himself why it is that the great nations
on opposite sides of the Atlantic who rule themselves by legal
principles developed out of a common law have come to such dif-
ferent conclusions as to the method of defining the practice by
which those principles are applied to specific disputes. Although
practically all of the United States are committed to the plan of
issuing practice rules from their State capitols by way of legisla-
tive fiat, the people of England place in the hands of their judges
the power to mould and alter the practice of the courts. In Penn-
sylvania, as in her sister States, suitors and courts alike are ruled
in their conduct by an iron hand that reaches out from the statute
books;1 in England the rules of procedure are not master but ser-
vant to the courts, ever studying and conforming to the progress
of the times.2

The motives behind these strikingly different conclusions
are, in some measure, capable of historical explanation. The
courts of Pennsylvania were, from their very beginning, tribunals
not of a superior power, but of the people themselves, set up not
to serve as channels for the outpouring of royal grace and favor,
but to provide for a mutual settlement of disputes among the

1Observe, for instance, the mandatory refinements of the Execution Act
of 1856, P. L. 755, or of the Service Act of 1901, P. L. 614, as samples of
rigid enactments.

2Lord Collins, M. R., said, in Re Coles and Ravenshear [1907], 1 K. B.
1, 4: "Their relation to the work of justice is intended to be that of hand-
maid rather than mistress, and the Court ought not to be so far bound and
tied by rules which are, after all, only intended as general rules of pro-
cedure, as to be compelled to do what will cause injustice in the particular
cause."
Indeed, legal proceedings in early Pennsylvania were more in the nature of arbitration than of lawsuits, for "before the Revolution the Bench was rarely graced by professional characters." The Council of the Colony, in its capacity of representative of the people, deciding on all matters affecting the public weal, naturally undertook the task of shaping the power and procedure of the courts it created. Thus began the custom which is still observed today. An omniscient legislature still undertakes to solve all problems that trouble the good people of Pennsylvania, and in occasional moments of respite from the tasks of social reform, it hammers out, by way of change, a rule or two for the courts.

The English courts, on the other hand, were not the people's but the king's. The Crown, in the English constitution, is the fountainhead of justice. However much of a fiction the participation of the king in public affairs may be today, he was, in the early days, in a very real sense, the dispenser of right. It was to him, personally, or to his Chancellor, that pleas were addressed and it was by him or by his deputies that judgments were rendered. Until the signing of Magna Charta, his court even followed him when he departed from Westminster. Obviously, the methods and proceedings of the king's justices were not, in the beginning, matter for supervision by the Parliament. First by decisions and directions given in particular cases, and later by rules and orders formulated for general use, the judges of each of the superior courts gradually built up a procedure suited to the character of the issues that came before them for trial.


*From an address delivered in Philadelphia in 1826 by William Rawle, Sr., quoted in Bar Association Report (op. cit.), p. 6.

*The courts have at common law jurisdiction to make general rules for the regulation of the practice before them. Bartholomew v. Carter, 3 Manning & Granger, 125 (1841).

**Technically on the same legal footing as the modern Statutory Orders in Council, but in fact, and historically, inclining somewhat heavily towards judicial legislation, are the various Rules and Orders affecting the practice of
ognized was this form of authority when Parliament set out upon its career as law reformer about the middle of the nineteenth century, that, rather than upset a useful and established custom, it clothed the custom with its sanction and elevated it to the dignity of statute law. Such, briefly, is the historical background of the present Rule Committee as constituted under the Judicature Acts.

Apart from these interesting historical speculations, the mere fact that there exist two such divergent streams leading from a common source is in itself sufficient excuse for exploring the courses of both. To this incentive must be added the interest which the best Pennsylvania lawyers are beginning to take in the importance of logical modifications in our system of civil procedure. The present article will attempt to describe the rule-the courts, which have from time to time been published. These go back for a long period in English legal history; and it is impossible, without further research into the archives of the fourteenth century, to state definitely when they began." Edward Jenks: A Short History of English Law (London, 1912), p. 190.


2A beginning was made with the Civil Procedure Act, 1833 (3 & 4 Will. IV, c. 42, s. 3), which authorized any eight of the Common Law judges (including the three Chiefs) to make rules for the reform of pleading; and the step, having been found beneficial, was repeated, with wider reach, in the year 1850 (13 & 14 Vict., c. 16). These two statutes, which were temporary in their effect, were incorporated, with many additional powers, into the Common Law Procedure Acts of 1852 and 1854 (Act of 1852, §§223-225; Act of 1854, §§97-98). Meanwhile, in the year 1850, a similar provision, with a limited scope, had been introduced into the Chancery Amendment Act of that year (13 & 14 Vict., c. 35, §§30-32); empowering the Chancellor, with the concurrence of the Master of the Rolls and one of the Vice-Chancellors, to make General Rules and Orders for carrying out the objects of the Act. In the Chancery Amendment Act of 1858, this power was extended to cover virtually the whole procedure of the Court (21 & 22 Vict., c. 27, §§81-12); the Rule-making body being enlarged to include the newly created Lords Justices of Appeal in Chancery. Under this power the great Consolidated Orders of 1860 were issued, and thus the way made easier for the reform undertaken by the Judicature Act of 1873." Jenks (op. cit.), p. 191. Under the Act of 1833 the judges issued the Hilary Rules of 1834; the Rules issued under the Acts of 1852 and 1854 may be found in Day: Common Law Procedure Acts (4th ed., London, 1872), p. 413 et seq. There also appear Rules made under the Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict., c. 67), the Judges' Chambers (Despatch of Business) Act, 1867 (30 & 31 Vict., c. 68), and the Debtors' Act, 1869 (32 & 33 Vict., c. 62).

3For instance, "Canadian Sidelights on Prospective Changes in Pennsylvania Procedure, by David Werner Amram, in 62 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 269 (1914). For opinions outside the State, see "Courts
making power now exercised by the English Bench and the use that has been made of it since it was bestowed in 1875. If we are to decide, on grounds of expediency, where best to put the rule-making power in Pennsylvania, the English experience must be deemed admissible evidence, and its weight can be determined by those who have to pass upon it.

II.

It is necessary, in the first place, to understand the general organization of the court set up by the Judicature Acts. American students of law are apt to think of those Acts as being a sort of political upheaval which accomplished, with one stroke, the complete fusion of law and equity. In fact they were, in one way, much less than that, and in another, much more. Long before 1875, the three superior courts of common law at Westminster had been authorized by statute to take cognizance of certain equitable rights and to administer certain equitable remedies. Under the Common Law Procedure Acts, the law of the common law courts correspond closely to what we have at the present day in Pennsylvania, where, for historical reasons and with little statutory assistance, the courts administer a great deal of equity through the forms of common law. The Court of

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10 The original Judicature Act was introduced by Lord Chancellor Selborne and passed in 1873, to take effect in November, 1874. But in 1874 a change in administration occurred; the new Government deferred the operation of the Act until November, 1875, when, together with certain changes and improvements introduced by Lord Cairns, the new Lord Chancellor, it finally came into operation. It is not often that political opponents collaborate so generously, even in law reform.

11 "The main object of the Judicature Act was to assimilate the transaction of equity business and common law business by different courts of judicature. It has been sometimes inaccurately called 'the fusion of law and equity'; but it was not any fusion or anything of the kind; it was the vesting in one tribunal the administration of law and equity in every cause, action or dispute which should come before that tribunal." Sir George Jessel, M. R., in Salt v. Cooper, 16 Ch. Div. 544, 549 (1880).

12 Before the completion of the new Royal Courts of Justice, at Temple Bar, in the Strand, in 1882, the Courts of King's Bench, Common Pleas and Exchequer sat at Westminster, and the Court of Chancery sat at Lincoln's Inn.

Chancery, too, had been commanded, by the provisions of the Chancery Amendment Acts, to recognize certain rights and forms that had previously been considered legal, as opposed to equitable. There were, therefore, even before the Judicature Acts, equitable powers in the common law courts and legal powers in the Court of Chancery. The Judicature Acts were a final step which removed the remaining distinction between the two, in point of jurisdiction, and infused the spirit of equity into the whole administration of justice. This was but the logical consummation of a development that had been in progress for nearly half a century.

But the great triumph of the Acts was in the revolution they brought about in the organization of the courts and in their methods of procedure. True, they left the nominal forms of separate courts still standing. But these courts, instead of

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14 The general effect of these Acts is described as follows, by the Royal Commission of 1867, whose Reports were the basis for the Judicature Act of 1873 (in the Report of March, 1869): "By virtue of these Acts the Court of Chancery is now, not only empowered, but bound to decide for itself all questions of Common Law without having recourse, as formerly, to the aid of a Common Law Court, whether such questions arise incidentally in the course of a suit, or constitute the foundation of a suit, in which a more effectual remedy is sought for the violation of a Common Law right, or a better protection against its violation than can be had at Common Law. The Court is further empowered to take evidence orally in open Court, and in certain cases to award damages for breaches of contract or wrongs as at Common Law; and trial by jury,—the great distinctive feature of the Common Law,—has recently, for the first time, been introduced into the Court of Chancery.

"On the other hand, the Courts of Common Law are now authorized to compel discovery in all cases, in which a Court of Equity would have enforced it in a suit instituted for the purpose. A limited power has been conferred on Courts of Common Law to grant injunctions, and to allow equitable defences to be pleaded, and in certain cases to grant relief from forfeitures."

15 §24 of the Act of 1873 (36 & 37 Vict., c. 66) is the keynote of this part of the Acts.

16 §25 of the Act of 1873 concludes (subsec. 11): "Generally in all matters not hereinbefore mentioned, in which there is any conflict or variance between the Rules of equity and the Rules of the common law with reference to the same matter, the Rules of equity shall prevail." This section has been held to apply not to substantive rights but to practice.

17 Under the Act of 1873, the High Court consisted of five Divisions: Chancery, Queen's Bench, Common Pleas, Exchequer, and Probate, Divorce and Admiralty. But after the death of Lord Chief Baron Kelly on September 17, 1880, and of Lord Chief Justice Cockburn on November 20, 1880, the Exchequer, Queen's Bench and Common Pleas Divisions were reduced and consolidated into one Division, the Queen's (now King's) Bench, by an Order in Council of December 16, 1880, which came into force February
being walled off from each other as before, now sit, as it were, merely in different corners of one great hall. They are all divisions of one Supreme Court, with equal powers and jurisdictions. Although in effect the business is divided into two main departments,\(^{18}\) the chancery and the common law,\(^{19}\) the forms of ac-

26, 1881 (Statutory Rules and Orders, 1903, vol. 12, p. i). The Supreme Court is therefore now constituted as follows: the High Court, in three Divisions, and the Court of Appeal. The Court of Appeal consists of the Master of the Rolls and five Lords Justices of Appeal (although it can be enlarged if occasion demands, as the Lord Chancellor, all ex-Lord Chancellors, the Lord Chief Justice and the President of the Probate Divorce and Admiralty Division are members \textit{ex officio}; see also note 25, infra). The High Court contains the Chancery Division, consisting of the Lord Chancellor (who, in fact, never sits) and six justices; the King's Bench Division, presided over in fact as well as in name by the Lord Chief Justice, containing eighteen justices; and the Probate Divorce and Admiralty Division, where there are only two justices, one of them the President of the Division. What time the Lord Chancellor can devote to judicial work is divided between the House of Lords (which hears appeals from the three Supreme Courts of the United Kingdom) and the Judicial Committee of the Privy Council (which hears appeals from the Supreme Courts of all the British dependencies):

\(^{18}\) Apart from the varied work done by the Probate Divorce and Admiralty Division, which is naturally small in comparison with the other two Divisions.

\(^{19}\) \S 34 of the Act of 1873 made a general catalogue, subject to Rules of Court, of the causes to be assigned to each Division of the High Court. Under it all actions in their nature equitable are assigned to the Chancery Division. But it is left to the discretion of the judge, guided by the balance of convenience, whether he will retain or transfer a cause assigned contrary to the provisions of the section. Bradford v. Young, 26 Chanc. Div. 656 (1881). In Gibson and Weldon; Practice of the Courts (London, 1912), the matter is put thus (pp. 10-11): ‘Though, if a plaintiff bring an action, say for specific performance of a contract to sell real estate, he is bound to commence it in the Chancery Division, yet this does not rob the King’s Bench Division of its power, as a part of the High Court... to decree specific performance. Thus, suppose A brings an action against B for misrepresentation. The Division to which he would assign his action would be the King’s Bench Division. But B might set up as a counterclaim against A, a claim to have a contract to sell land specifically enforced; and, in spite of this counterclaim coming within the class of subjects specifically assigned to the Chancery Division, the King’s Bench would have just as much power to decree specific performance as the Chancery Division. Another example is afforded by Pinney v. Hunt, 6 Chanc. Div. 98 (1877), in which it was laid down that the Chancery Division has full power to grant probate of a will in an action for partition, Jessel, M. R., saying, ‘It is clear that all the judges of the High Court have the same jurisdiction, and any judge may, if he choose, retain the action and exercise the jurisdiction.’... Subject to cases which seem to show that one division may, but will not lightly, encroach on the exclusive jurisdiction of another, it may be taken as certain that the assignment of special business to each division does not give wholly exclusive jurisdiction in that business to that particular division, but amounts to a mere direction that, as a matter of convenience and to facilitate exposition, an action involving a special cause of action must be assigned to its appropriate division.'
tion are alike in each, and a litigant is not embarrassed by the choice.  
It is clear, therefore, that justice is now administered in England not by courts but by judges. The old fictions and traditions of the rival courts of law and equity have been swept away, and in their place the sound discretion of the judiciary has been left free to declare the rights and settle all controversies between parties in a single proceeding. To match the new powers over substantive law bestowed upon the judges, they have been given the widest possible latitude as to the arrangements they consider best for disposing of and distributing actions among themselves, and, equally important, for the regulation of the procedure which those actions must follow from beginning to end.

20 "In the case of In re Besant, 11 Chanc. Div. 508 (1879), Sir George Jessel tried an action in which the claim was for an injunction to restrain a lady from breaking a covenant in a deed of separation between herself and her husband, and the lady counterclaimed for a judicial separation. In practice, the matter rests with the judge before whom the matter is brought. If he thinks that it would be better tried by a judge of another division, he forces the parties to assign it to that division." R. Story Deans: Students' Legal History (3rd ed., London, 1913), p. 155. Thus the parties are spared delay and the utmost penalty is the costs of transfer.

21 "The ordinary civil jurisdiction of the Court of King's Bench rested upon the absurd fiction that the defendant in an action, e.g. for a debt, had been guilty of a trespass. The ordinary civil jurisdiction of the Court of Exchequer rested upon the equally absurd fiction that the plaintiff in an action was a debtor to the king, and, owing to the injury or damage done him by the defendant, was unable to pay his debt to the king. These long labyrinths of judge-made fictions seem to a lawyer of today as strange as the most fanciful dreams of 'Alice in Wonderland,'" Dicey (op. cit.), p. 91.

22 §24 (7) of the Judicature Act, 1873, provides that in every action the court shall grant "all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them in such cause or matter; so that, so far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." It is very frequent for plaintiffs to ask both legal and equitable relief in the same writ; for instance, to ask for an injunction together with damages for trespass, or for an account together with damages for breach of contract, or, in the alternative, for specific performance, etc.

23 Under §§29 and 37 of the Judicature Act, 1873, the Lord Chancellor is empowered to appoint Commissioners of Assize, who may hear causes on circuit and have all the powers of judges. This is done when, either through illness or the need for judges in London, there are not enough judges available in the King's Bench to cover all the circuits. See note 29, infra.
Short of appointing additional judges (and even that can be done, in time of emergency) the Lord Chancellor and his colleagues on the bench have complete control over the organization of the Supreme Court, the size of its divisions, the length of its sittings and vacations, the assignment and transfer of judges to or from one division or another, the arrangements for the work done in London, in district registries and the Supreme Court, the size of its divisions, the length of its sittings and vacations, the assignment and transfer of judges to or from one division or another, and the arrangements for the work done in London, in district registries.

*Under §32 of the Judicature Act, 1873, the number of divisions of the High Court may be increased or decreased, upon the recommendation of the Council of Judges to the Privy Council. See notes 31 and 32, infra. It was under this section that the Order in Council which consolidated the Queen's Bench, Common Pleas and Exchequer Divisions was made in 1880. See note 17, supra.*

*Under §32 of the Judicature Act, 1873, the number of judges permanently attached to any division may be increased or decreased by Order in Council. Divisional Courts, which have taken the place of the old Court in Banc, are to be regularly, composed of two judges, under §17 of the Appellate Jurisdiction Act, 1876 (39 & 40 Vict., c. 50), but under §4 of the Judicature Act, 1884 (47 & 48 Vict., c. 61), there may be more than two judges if, at any time, considered expedient by the President of the Division and two other of its members. The Lord Chief Justice may order more than one Divisional Court to sit, if business in the King's Bench so requires, and a majority of the judges in the Division so agree, under §41 of the Judicature Act, 1873. Under §6 of the Appellate Jurisdiction Act, 1908 (8 Edw. VII, c. 51), the Lord Chancellor may build up additional courts, of three members each, in the Court of Appeal, by requesting judges of the High Court to sit, temporarily, in the Court of Appeal. Similarly, under §51 of the Judicature Act, 1873, he may call upon any permanent member of the Court of Appeal to sit as an additional judge in any Division of the High Court. Or, by transfer of judges temporarily from one Division, the size of another can be increased if necessary; see note 27, infra. Finally, under §37 of the Judicature Act, 1873, it is left to the judges of the King's Bench Division to make arrangements among themselves for the sittings for trials by jury, so that the greatest number of courts may be sitting at all times.*

*§26 of the Judicature Act, 1873, abolishes terms of court, and provides for the distribution of sittings according to Rules of Court; see note 55, infra. §27 provides that orders regulating the vacations may be made, revoked or modified by Order in Council upon recommendation of the judges. Under this section two changes have been made in the Long Vacation (which now runs from August 1 to October 11), one on December 12, 1883 (Statutory Rules and Orders, 1903, vol. 12, p. 7), and another on March 1, 1907 (W. N., Mar. 16, 1907, p. 79).*

*Besides the temporary transfer from the High Court to the Court of Appeal and vice versa (see note 25, supra), the Lord Chancellor may transfer or assign any judge from one Division of the High Court to another, either because of the illness of a judge, or to sit as an additional judge, with the concurrence of the President of the latter Division. This transfer may be either temporary, under §5 of the Judicature Act, 1884, or permanent, under §31 of the Judicature Act, 1873.*

*As the High Court is a court of original jurisdiction over all of England and Wales, the Judicature Acts have provided a system of provincial offices of the Court in places more or less remote from London, where all the steps in an action from summons to execution, with the exception of the
on circuit, and the disposition to be made of funds in court. Sometimes this power is exercised through the form of a council of all the judges, sometimes through a resolution of the King's Privy Council in the form of a statutory Order of Council, and frequently by the Lord Chancellor or the Lord Chief Justice.

actual trial, may be taken. Each of these District Registries is in charge of a Registrar, who exercises most of the powers of a judge in chambers with relation to interlocutory applications. Under §66 of the Judicature Act, 1873, the number and position of these Registries may be prescribed by Order in Council, and proceedings therein regulated by Rules of Court. Under the Order in Council of May 19, 1899 (Statutory Rules and Orders, 1903, vol. 12, p. 932), and three subsequent Orders, eighty-nine of these Registries have been created, their Districts usually coinciding with the County Courts (whose jurisdiction is limited in amount, to £100).

At certain times of the year, the judges of the King's Bench Division visit a number of towns all over England and Wales, to hold trials of actions. The country is divided into eight Circuits, and sittings (assizes) are held in fifty-six different places two or three times a year (four times in Liverpool, Manchester and Leeds). There is always about a half of the King's Bench judges travelling the circuits. As venue has been abolished, the place of trial of an action (irrespective of whether the action is going on at the Central Office in London, or in a District Registry) is made to suit the convenience of the parties, and is always fixed, if not in London, at the assize town where it will be cheapest to collect all the parties and witnesses. Under §23 of the Judicature Act, 1875 (38 & 39 Vict., c. 77), the arrangement for circuits and assizes, as to places and times, are made by Order of Council. No less than fourteen Orders are now in force under this power, the effort being to do away with assizes where the volume of business does not warrant the expense. More than half of all the civil actions tried on circuit are tried in Manchester, Liverpool, Birmingham and Leeds; only about four hundred trials a year are held in all the other fifty-two assize towns together. There is a strong feeling that the circuit system is too costly, for the results it shows.

Under §24 of the Judicature Act, 1875, the Lord Chancellor, with the concurrence of the Treasury (who are presumably more expert in purely financial matters) may make Rules for the disposition of funds in court. At the present time the Supreme Court Funds Rules, 1905, are in force, under the Chancery Funds Act, 1872 (35 & 36 Vict., c. 44), the Judicature Act, 1875, the Judicature Funds Act, 1883 (46 & 47 Vict., c. 29), and the Judicature Act, 1894 (57 & 58 Vict., c. 16).

Orders in Council affecting the length of vacations or the number of Divisions or of judges in them can be made only upon the "report or recommendation of the Council of Judges of the Supreme Court." By §17 of the Judicature Act, 1875, this Council can be made up of five of the Presidents of the Divisions and Lords of Appeal, together with a majority of the puisne judges in the three Divisions of the High Court. There is another Council, consisting of all the judges, constituted by §75 of the Judicature Act, 1873, whose duty it is to meet annually and discuss the working of the Act and of the Rules, but it has held only three meetings since 1875. In practice, such discussion goes on informally among the judges all the time, so the formal meeting has been dispensed with.

These have no counterpart in the American scheme of government. Parliament passes many Acts which create new duties for the administrative departments to perform; such Acts frequently contain a provision that leaves the lesser details to be settled and promulgated by Orders in Council,
either alone or with the concurrence of other Government departments or other members of the judiciary. When the cause list is in such a state, in any division, that actions are too long delayed, additional judges are transferred to the division from another which is not so far behind. Within a division itself, judges can be assigned to handle specific kinds of cases, who are more expert than their colleagues in particular fields. Trials such Orders to be read as part of the Act. This allows of changes in administrative detail to meet conditions as they arise, without either violating the broad directions of the statute or throwing the burden on an already overworked legislature. "The Privy Council never meets as a whole now, except for ceremonial purposes. . . . The adoption of Orders in Council is a formal matter, requiring the presence of only three persons, who follow the directions of a minister, for all cabinet ministers are members of the Privy Council." (Lowell: The Government of England, New York, 1908, vol. 1, p. 79.) Thus the head of the department affected has a fairly free hand in setting new policies of the legislature into practical operation. See notes 24 to 29, supra, for the functions of the Privy Council under the Judicature Acts.

In practice, nearly all administrative details are settled by the Lord Chancellor or the Lord Chief Justice, acting alone. Sometimes a merely formal concurrence is required from the head of another Division. See notes 27 and 30, supra, and 34, infra. Under §§3 of the Judicature Act, 1873, the Lord Chancellor (with the concurrence of the Lord Chief Justice) may determine the number, qualifications and tenure of official referees. There are now three of these, to whom, in rotation, are referred all issues of fact which involve complicated accounts or lengthy inspection of documents. They have all the powers of a judge. The Lord Chancellor may, at any time, call an extraordinary council of all the judges, under §75 of the Judicature Act, 1873 (see note 31, supra), but very seldom does. Under §15 of the Judicature Act, 1879, he may, with the concurrence of the Treasury, determine the amounts of the salaries of all officers of the Supreme Court. Frequently he is, with the concurrence of other Government officers, empowered by specific statutes to make rules for their legal operation; see Part IV, infra.

As to arrangements for jury trials, see note 38, infra. As to District Courts, see note 25, supra. At the request of the President of the Probate Divorce and Admiralty Division, probate causes may be heard by a judge of the Chancery Division (with the consent of the Lord Chancellor), or of the King's Bench Division (with the consent of the Lord Chief Justice). §44 of the Judicature Act, 1873.

See notes 25 and 27, supra. As to probate causes, see note 34, supra. A similar power in Pennsylvania would enable the courts of the large cities to bring their dockets into such shape, without extra expense, that actions could be tried within a fortnight after issue is joined.

In the King's Bench Division, one of the judges is assigned to hear all bankruptcy causes; another sits in all trials before the Railway and Canal Commission Court, whose jurisdiction is under special statutes which provide that railway and canal companies shall afford reasonable facilities to all, without undue preference; two judges are told off to hear all disputes over elections to Parliament; and one judge is selected before whom are tried all causes in a special list called the Commercial List, which includes actions on policies of insurance, contracts for carriage by sea, and all similar
are not held up because of the illness or absence of a judge, as his place can be taken by another judge or by a commissioner delegated thereto.\textsuperscript{37} Jury trials and non-jury trials may be begun or continued or discontinued at any part of the sittings, in accordance with the state of the lists and the number of judges available for the work.\textsuperscript{38} Causes may be transferred from one judge's list to another, even after they have been reached for trial, and they may be set down for trial on specific days or in specific places in the list, if occasion demands, instead of going down to the foot of the list.\textsuperscript{39} The place of trial may be made either London or some town in the country, according as the convenience of the majority of the witnesses demands.\textsuperscript{40} In short, all things may be done which will make it physically possible for the court to get on quickly with its work; the individual members are not immovable pillars of the Temple of Justice, but go hither and thither at the command of the High Priest, giving ear to the petition of all the faithful.

matters. In the Chancery Division, the winding-up of companies (voluntary or involuntary dissolution of business corporations) is regulated by Part IV of the Companies Consolidation Act, 1908 (8 Edw. VII, c. 69); two judges are assigned to do the judicial work under the statute. Finally, all issues in which lengthy accounts must be taken, or documents inspected, or scientific matters investigated, come before official or special referees or arbitrators, so that the judges are not delayed by them at all.

\textsuperscript{2} See notes 23, 27 and 34, supra.

\textsuperscript{3} §30 of the Judicature Act, 1873, provides that jury trials shall be held continuously throughout the year by as many judges as the business to be disposed of may render necessary, and §37 of the same Act makes the sittings for trial by jury subject to arrangements by mutual agreement between the judges. The actual cause lists are made up in the Central Office, under directions contained in the Judges' Regulations of September, 1888, the Judges' Resolutions of May and general orders from the Lord Chief Justice, 1894, and published each day.

\textsuperscript{4} Clauses 8, 9, 10 and 11 of the Judges' Resolutions of May, 1894, allow the judge to order, "on special grounds," that causes though postponed should keep their place in the list, that any cause in any list may be marked urgent or fixed for a day certain, and that a cause may be interpolated in the week's list even after the list has been made up and sent to the printer. Section 6 of the Judicature Act, 1884, allows a judge to whom a cause has been assigned to get another judge in his own division to bear it, for special reason, although an objecting party can force him to get the Lord Chancellor's consent. The Judges' Resolutions are, of course, liberally interpreted by the judges themselves.

\textsuperscript{5} See note 29, supra. Official and special references are also allowed by the Lord Chancellor to try issues and hear evidence in the country if necessary, though there is no express provision for this in the Acts.
This system, simple and elastic, leaves entirely to the discretion of the Bench itself the organization and arrangement of its work, free of legislative interference. In the present state of public opinion in America, the first comment that rises to the lips of the reader is: “This is too lax. There is too great opportunity for favoritism and abuse.” But the conditions surrounding the English law courts are the best safeguards against that. The English newspapers give to the doings of the courts a far greater share of space than do the American dailies. The judges of the Supreme Court are few in number, and therefore more subject to scrutiny and criticism. There are especially active and independent journals in London, in whose editorial columns the administrative policy of the judges is constantly discussed and commented upon. The mutual reliance between the Bench and Bar is too strong to admit of misuse of power. These considerations are wholly apart from the principal and obvious one that the occupants of judicial office are, in England, usually the best type of men at the Bar, drawn from the small circle of King’s Counsel who have won their way to the front rank. It must also be remembered that we have in none

\footnote{As Lowell remarks (op. cit., vol. 2, p. 458), “a most elastic and intelligent method of regulating judicial procedure.” After one term, it was said in the Times (November 29, 1875): “Its operation has tended to economize judicial power and to prevent delay of justice.”}

\footnote{The law reports in the daily Times are so complete that they are often cited in briefs and text-books, on points untouched by the more official reports. All the penny newspapers devote several columns each day to special law reports, which are usually written for them by barristers. Interesting law cases figure almost as largely in the headlines as popular sports, while the courts are sitting.}

\footnote{There are only twenty-six who sit as judges of first instance, although their jurisdiction includes a population of nearly forty million people—the whole of England and Wales. There are, it is true, fifty-nine county court judges, but their jurisdiction is limited to £100.}

\footnote{The Law Journal, Law Times, Solicitor’s Journal, and Justice of the Peace, are published weekly. The Law Quarterly Review and the Law Magazine and Review are more learned periodicals, which appear quarterly.}

\footnote{The Law List for 1913 discloses the names of two hundred seventy-eight King’s Counsel; it is estimated there are nearly ten thousand barristers living. Of late years, from ten to fifteen King’s Counsel have been created annually. There is some risk involved in accepting the honor, as the etiquette of the Bar forbids a King’s Counsel to accept a brief unless there is a junior briefed along with him. It is not infrequent that a barrister who has made a success as a junior does not inspire the kind of confidence necessary for larger cases, and he may find himself stranded without business after he}
of the American States an officer who corresponds to the English Lord Chancellor. His powers are far greater than those of the Chief Justice in a State system of judicature. He is, besides being the head of the English judiciary, a member of the Cabinet, a member of the Privy Council, and presiding officer of the House of Lords. His functions are today even more political than they are judicial; in fact he goes out of office when his party goes out of power, like the rest of the Cabinet. An appointment or order made by him has, therefore, the double aspect of being an act of the executive (for which he is directly accountable to the electorate), and yet an exercise of judicial discretion. Certain of his official acts are subject to a Parliamentary veto.

So much for the organization and machinery of the court itself. From this brief account, it is apparent that the Supreme Court of Judicature over England and Wales is a sort of a portable house, the parts of which may be interchanged and shifted about at will, to accommodate the crowds that frequent it. But even more versatile is the procedure which has grown up under the Acts. Containing within itself all the elements of develop-

has "taken silk" (the robe of a King's Counsel is supposed to be made of silk, while a junior's is merely "stuff"). The judges are usually chosen from the busiest of the silks. The Lord Chancellor is generally chosen by the Prime Minister from among the higher judiciary or the law officers of the Crown. He, in turn, has the appointing of the other judges, who serve "during good behavior."

E. S. Roscoe: The Growth of English Law (London; 1912), p. 189: "In England changes proceed so gradually that one is apt to overlook the effect of a slow transition; it is clear, however, that the office of Lord Chancellor is now less judicial and more administrative in its nature than it was at the beginning of the reign of Victoria. The holder now fulfills more political and fewer judicial duties."

Lord Westbury was forced to resign the Great Seal in 1865, as a consequence of censure in the House of Commons, of his laxity in the making of certain minor appointments. His downfall was, however, partly due to his personal unpopularity.

If the Chief Justice of Pennsylvania were appointed by the incoming Governor, to hold office while the party had a majority, with the right to appoint all the State judges, and, upon retirement, became a paid life member of the State Senate, he would occupy approximately the position of the English Lord Chancellor. This merely by way of illustration.

§ 25 of the Judicature Act, 1875, provides that any Order in Council made under the Acts must be submitted to Parliament within forty days, and may be annulled by that body. So also, as to Rules of Court, for which, however, see infra.
ment and improvement, it alters almost automatically with the demands of changing years. This spirit of accommodation and change is the most striking feature of the manner in which the rule-making power has been used.

III.

The authority to make rules of procedure is now vested in a committee of twelve persons, who include the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division, four other judges of the Supreme Court, two barristers and two solicitors (the four last named being representatives of the Bar and of the Law Councils respectively). In its discretion lies the making or amending of all rules affecting the sittings of the court, the duties of its officers, pleading, practice, procedure and costs of proceedings therein. Within the scope of its authority, rules can be made, amended, or repealed as frequently as it considers necessary, and the power has been freely used.

44 The Judicature Act, 1875 (§17), left it in the hands of a sort of general council of the Bench. But this was found rather vague, so the following year, in the Appellate Jurisdiction Act, 1876 (§17), a definite Rule Committee of six judges was constituted. Five years later (§19 of the Judicature Act, 1881, 44 & 45 Vict., c. 88) the size was increased to eight members, including the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate Divorce and Admiralty Division, and four judges of the High Court named by the Lord Chancellor. In 1894 it was thought advisable to add to the Rule Committee a few active practitioners, which was provided by §4 of the Judicature Act, 1894. That Act made the President of the Incorporated Law Society (the association of the London solicitors), for the time being, a member of the Committee, and empowered the Lord Chancellor to appoint two additional members, of whom at least one must be a barrister in practice. This was not entirely a success, as the Law Society changes its President annually, so that one solicitor on the Committee hardly had a chance to take part in its work. The defect was repaired by the Rule Committee Act, 1909 (9 Edw. VII, c. 11), which enacted that the General Council of the Bar (as representing the barristers) should choose two of their number to sit in the Rule Committee, that the Council of the Incorporated Law Society (representing the London solicitors) should have one member on the Committee, and that the Lord Chancellor should appoint a fourth practitioner, who must be a member of a provisional Law Society (therefore, a solicitor). Under these provisions, there are at the present time in the Rule Committee a King's Counsel and a junior, to speak for the barristers, a London solicitor and a Liverpool solicitor to represent the solicitors. They all take an active interest in the Committee's work. The four judges appointed by the Lord Chancellor include one member of the Court of Appeal, one member of the Chancery Division, and two from the King's Bench, although such an arrangement is optional with him.

45 These are the general terms used in §17 of the Judicature Act, 1875. More specific provisions of the Acts, as to the scope of the Committee's
The statutes make no stipulation as to the times for its meetings or of the routine it should observe in its deliberations. Its organization is therefore very simple. Its only officer is its secretary, who is also the Lord Chancellor's, a permanent official in the civil service. Meetings of the full committee take place two or three times a year, at the call of the Lord Chancellor, and may take place in his room at the House of Lords, or in the rooms of the Lord Chief Justice or the Master of the Rolls at the Royal Courts in the Strand. Such meetings are, as a rule, for the purpose of taking definite action on some change which has been proposed. It must not be supposed, however, that these are the only occasions on which there is any consideration of new rules. It is a characteristic of the English judges that they are shy of formal meetings when friendly discussion can accomplish the same ends, and before the actual meeting takes place, the member proposing the change will probably have talked it over with two or three of his colleagues and settled fairly definitely the wording of the proposal. Sometimes the full committee will depute to a sub-committee the task of considering the advisability of a proposed change, or of settling the form of a new rule, but this has been done only rarely. Suggestions come to the committee in a variety of ways. The persons who come to it most frequently with new ideas are the masters of the Supreme Court, who come into personal contact with all the solicitors and counsel engaged in active litigation. They are the officers most intimate with the operation of the court's practice, as it is their duty to stand guard over the steps taken in each ac-

authority, will be cited infra. The right of the Committee to make rules for procedure in the Supreme Court is exclusive, with these exceptions: (1) Under §15 of the Judicature Act, 1875, the enactments in respect to appeals from County Courts may, by Order in Council, be made to apply to appeals from other inferior courts of record. This covers the old Borough Courts, many of which still survive. (2) Under §18 of the same Act, the general Rules of the Supreme Court do not apply to divorce proceedings; they are regulated by the President of the Probate Divorce and Admiralty Division, under the powers conferred on him by §53 of the Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85). (3) Certain statutes confer the power to make rules for their legal enforcement upon the Lord Chancellor in concurrence with other named officials or bodies in the public service; such are the court funds Acts, for which see note 30, supra, the Solicitors Remuneration Act, 1881 (44 & 45 Vict., c. 44), etc.
tion and see that the game is fairly played. It has recently been suggested that there should be a master on the Rule Committee. What happens in such a case is that the masters have talked the matter over in one of the monthly meetings they hold, and threshed it out carefully. If the suggestion survives that ordeal, the master who made it will frame a tentative draft of a new rule embodying it and will make a personal call on one of the judges with it. All the judges and masters are in the same building, so this is not a difficult business; the Master of the Rolls seems to be the judge who is usually approached by the masters, but that is a purely personal matter. If the judge considers the suggestion a useful one, he will probably obtain the opinion of one or two of the other judges upon it, and then reserve it for the next meeting of the committee. Or, if it is a subject of immediate importance he will communicate it to the Lord Chancellor, who will then call a meeting of the full committee for the earliest convenient date. Not infrequently, suggestions come from the great body of the practitioners themselves. A number of solicitors may have encountered the same difficulty in respect to some point of practice. They have the subject brought up at a meeting of the Council of the Law Society; if some definite possibility of remedy emerges from the discussion, the Council will instruct its member to submit it to the whole committee in the shape of a new rule or an amendment. So also the General Council of the Bar, acting for the other branch of the profession, can speak through the two barristers it has on the committee. The Bar Council is not as active, in this connection, as that of the solicitors, probably because the details of procedure do not trouble the barrister so much as they do his professional client; it is the solicitor who must placate the irate layman when rules stand in his way. On occasion, other legal bodies or officers, such as provincial Law Societies, or the Public Trustee, may make recommendations based on personal experience. The Lord Chancellor's Permanent Secretary is the channel through which the general public are invited to send complaints and suggestions. In every case, the final decision as to whether or not action is necessary rests entirely with the committee, which is not hampered in
its consideration of the facts by statutory regulations of any kind.

When the conclusion is reached that a change of any kind is needed, the committee is, however, obliged to publish due notice of it in the Gazette. It usually publishes the full text of the draft rules, of which printed copies may be obtained from the official printer at a fixed price per folio, by any public body. The legal journals invariably publish such drafts also, with comment upon them. Interested parties then have forty days within which to send to the committee criticisms of the draft rules, or fresh suggestions. These must be considered by the committee, and forty days after the first publication it may issue the new rule or rules, either in their original form or as altered, and the rules are then considered "made." They go into effect either at once, or at a specific future time stated in the committee's resolution, and are then as binding upon the profession and upon parties as though they were part of an Act of Parliament. Parliament has reserved to itself a right of veto upon such rules. Within forty days after they are "made," the new rules must be laid by the committee before both Houses of Parliament. If, thereupon, within the next forty days, either House passes an address to the Crown requesting that the rules or any of them be annulled, the Privy Council may make an order in Council annulling them.

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§1 (1) of the Rules Publication Act, 1893 (56 & 57 Vict., c. 66).

§1 (2) of the Rules Publication Act, 1893.

Alterations in the original draft are, of course, entirely discretionary with the Committee. It takes advantage of this preliminary publication to hear expressions of opinion, and not infrequently does change its original draft. The new Poor Persons Rules (which regulate actions brought in forma pauperis) have been altered and postponed several times as a result of adverse criticism upon their first publication.

As allowed by §1 (2) of the Act of 1893. The usual custom is to pass the Rules near the end of one "sittings," to come into operation at the beginning of the next. The year is divided by Rule of Court (Order LXIII, Rule 1) into four Sittings and a Long Vacation, as follows:

- Hilary Sittings: January 11 to the Wednesday before Easter.
- Easter Sittings: Tuesday after Easter Week to the Friday before Whit Sunday.
- Trinity Sittings: Tuesday after Whitsun Week to July 31.
- Long Vacation: August 1 to October 11.
- Michaelmas Sittings: October 12 to December 21.

§25 of the Judicature Act, 1875.

It is eloquent of the care with which the Committee does its work, that there seems to be no instance in which Parliament has exerted this right.
without prejudice to proceedings that have, meanwhile, been taken under them. Otherwise they stand as made.

With the admirable foresight of the Judicature Acts, there is a further provision that in any case of urgency, the committee may make rules to take effect at once, without the requirement of forty days' prior publication. These, however, must be merely provisional rules, to stand only until the committee is able to promulgate final rules through the regular channels.\textsuperscript{58}

IV.

Although its powers are wide, the scope of the committee's authority is fairly well defined and delimited by the Judicature Acts. There are certain bounds beyond which it may not go, and certain roads which it is obliged to follow. But the territory assigned to it is a large one, and it should be of interest to American lawyers to note how much less hampered it is by statute than are the somewhat similar informal committees of judges who, in America, exercise what discretionary power there is in the Bench to make its rules.

In two very broad sections are contained the bulk of the committee's duties. The first is:

"The jurisdiction [of the Supreme Court] shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by such Rules and Orders of Court as may be made pursuant to this Act,"\textsuperscript{59}

and the second reads:

"Rules of Court may be made for regulating the pleading, practice and procedure in the [Supreme] Court, and, generally, for regulating any matters relating to the practice and procedure therein."\textsuperscript{60}

These are flanked on either side by an array of provisions which expressly enumerate some of these general powers. First are the sections relating to certain statutes; the old court rules

\textsuperscript{58} §2 of the Rules Publication Act, 1893. This power has been exercised some half dozen times.

\textsuperscript{59} §23 of the Judicature Act, 1873.

\textsuperscript{60} From §17 (2) and (3) of the Judicature Act, 1875.
under which a number of statutes were administered are made subject to alteration by the committee; 61 any rules of procedure actually laid down in statutes passed prior to 1875 are subject to modification by the committee, so as to fit in with the new rules; 62 the committee may make new rules for the proper carrying out of any statutes passed after 1875 which impose new duties upon the courts; 63 and there is a saving clause that all old procedure not affected by the new rules is to remain in force. 64 Then follow two sections relating to inferior courts; the committee may regulate procedure on appeals from inferior courts to the High Court; 65 and its concurrence must be obtained to any rules made for the practice and procedure in inferior courts. 66 The very

61 §5 of the Judicature Act, 1874 (57 & 58 Vict., c. 16). A schedule to the Act applies this power specifically to the Vexatious Suits Act, 1697, the Transfer of Stock Act, 1800, the Courts Funds Act, 1829, the Civil Procedure Act, 1833, the Judgments Acts, 1838 and 1840, the Court of Chancery Act, 1841, the Common Law Procedure Acts, 1852 and 1860, the Lis Pendens Act, 1867, and the Partition Act, 1868.


63 §22 of the Judicature Act, 1879. Such power is expressly included in the Settled Estates Act, 1877 (40 & 41 Vict., c. 18, s. 42); the Bills of Sale Acts, 1878 and 1882 (41 & 42 Vict., c. 31, s. 21, and 45 & 46 Vict., c. 43); the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict., c. 26, s. 39); the Statute Law Revision and Civil Procedure Act, 1881 (44 & 45 Vict., c. 59, s. 6); the Settled Land Act, 1882 (45 & 46 Vict., c. 38, s. 46); the Conveyancing Act, 1883 (45 & 46 Vict., c. 39, s. 2, 5); the Guardianship of Infants Act, 1886 (49 & 50 Vict., c. 27, s. 11); the Local Government Acts, 1888 and 1894 (51 & 52 Vict., c. 41, s. 29 and s. 89; 56 & 57 Vict., c. 73, s. 70); the Statute Law Revision Act, 1888 (51 & 52 Vict., c. 57, s. 1, 2); the Charitable Trusts (Recovery) Act, 1891 (54 & 55 Vict., c. 17, s. 6); the Mail Ships Acts, 1891 and 1902 (54 & 55 Vict., c. 31, s. 3, 8; 2 Edw. VII, c. 36); the Finance Act, 1894 (57 & 58 Vict., c. 30, s. 10); the Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60); the West Riding of Yorkshire Rivers Act, 1894 (57 & 58 Vict., c. 166, s. 14, 4); the Life Assurance Companies (Payment into Court) Act, 1896 (59 & 60 Vict., c. 8, s. 3); the Judicial Trustees Act, 1896 (59 & 60 Vict., c. 35, s. 4); the Special Juries Act, 1898 (61 & 62 Vict., c. 6, s. 1, 2); the London Government Act, 1899 (62 & 63 Vict., c. 14, s. 29); the Open Spaces Act, 1906 (6 Edw. VII, c. 25, s. 4, 3); the Merchant Shipping Act, 1906 (6 Edw. VII, c. 48, s. 68); and the Finance (1909-1910) Act, 1910 (10 Edw. VII, c. 8, s. 33, 4). The Rules made under these Acts are either incorporated into the main body of the Rules of 1883 (which are now in force, as amended from time to time,) or published as separate appendices. The full list is given to illustrate how frequently the Rule Committee is called on in this way. In the case of technical statutes, it is usually assisted by the appropriate government department.

64 §21 of the Judicature Act, 1875.

65 §23 of the Judicature Act, 1884.

66 §24 of the Judicature Act, 1884. Rules for the County Courts are prepared, in the first instance, by a committee of five judges, under the County
important matter of practice on appeals from the High Court to the Court of Appeals is completely in the committee’s control, as is the equally important one of costs, although in respect to costs there is a further stipulation that they shall, subject to the rules, be entirely in the discretion of the trial judge, who “shall have full power to determine by whom and to what extent such costs are to be paid.” The power to make rules includes the useful one of prescribing forms, and many needless explanations are saved by the setting out of numerous forms in appendices to the rules. The Rule Committee is then empowered to settle the details about the vacations and sittings, the distribution of work among the divisions and judges, and the character of the proceedings to be taken in District Registries. Finally, the general powers conclude with some suggestions as to methods by which to facilitate the trial of issues of fact; the rules

Courts Act, 1888 (51 & 52 Vict., c. 43); Rules for the other inferior courts of record (the Borough and Hundred Courts) are prepared by the judge of each court.

* §19 of the Judicature Act, 1873: “Appeals may be taken ... subject to such Rules and Orders of Court for regulating the terms and conditions ... as may be made.”

* §17 (3) of the Judicature Act, 1875.

* §5 of the Judicature Act, 1890. Costs, in England, differ from costs as usually understood in Pennsylvania in two particulars. First, they include the charges of solicitor and counsel; second, they are itemized to show the charge made for every separate act done, pleading drawn or paper copied. It is therefore a material penalty if a party is obliged to pay the costs of any particular step in the action in which he has been remiss. Even though a winning party may obtain the general costs of the action from his defeated opponent, he may himself be ordered by the judge to pay any costs which have been unnecessarily incurred—for instance, by forcing his opponent to call witnesses to prove a fact which might just as well have been admitted on the record. Solicitors are sometimes ordered to pay costs out of their own pockets, if it appears they incurred them in bad faith, simply to increase the bill.

* §100 of the Judicature Act, 1873. The forms given include writs of summons, entries of appearance, indorsements on writs, notices, affidavits, interrogatories, admissions, statements of claim, defences, counterclaims, replies, judgments, praecipes and writs for executions, subpoenas, summonses and orders for interlocutory applications, bonds, accounts, and general forms for various aspects of chancery and probate business and taxation of costs.

* §§26 and 27 of the Judicature Act, 1873.

* §§33 and 36 of the Judicature Act, 1873.

* §§64, 65 and 66 of the Judicature Act, 1873. They may also prescribe what records and documents should be kept in District Registries. See note 28, supra.
may provide for official or special references, and prescribe the procedure to be followed before such referees and arbitrators; they may confer upon a Master the powers of a judge under the Arbitration Act; and they may allow courts to call in assessors with whose assistance difficult issues of fact may be tried.78

These general powers were, to a slight extent only, cut down by certain specific provisions in the Acts, which were necessary principally to define the new double jurisdiction, legal and equitable, and because of the creation of such altogether new judicial bodies as the Court of Appeal and the Divisional Courts. Full recognition of all rights and liabilities and granting of all remedies, both legal and equitable, are dictated in the keystone section of the Act of 1873, and the following section of the Act makes the equity procedure supersede that of the common law in certain actions where they had conflicted. As to the Court of Appeal, it is laid down that interlocutory orders may be made by a single judge, that motions for new High Court trials must be made in that court and heard by three judges, and what matters are appealable, with and without leave. Then it is enacted that appeals to the High Court from inferior courts should

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14 §13 of the Arbitration Act, 1889 (52 & 53 Vict., c. 49); §57 of the Judicature Act of 1873. See notes 33 and 36, supra.
15 §14 of the Arbitration Act, 1889.
16 §15 of the Arbitration Act, 1889.
17 §21 of the Arbitration Act, 1889.
18 §56 of the Judicature Act, 1873. This is done in most Admiralty cases, which are heard by a judge and two retired sea-captains—a picturesque tribunal.
19 §24 of the Judicature Act, 1873.
20 §25 of the Judicature Act, 1873. Subsection 8 allows the court to issue a mandamus, grant an injunction or appoint a receiver, by an interlocutory order, in any case where it appears "just or convenient."
21 §52 of the Judicature Act, 1873.
22 §1 of the Judicature Act, 1890. But by consent of the parties, they may, under §1 of the Judicature Act, 1890, be heard by the judges.
23 No order made by consent, or as to costs (§49 of the Judicature Act, 1873) and no interlocutory order (§1 of the Judicature Act, 1894) may be appealed from without leave (except in certain cases enumerated in the section). All practice points go to the Court of Appeal, which may give leave to appeal from an interlocutory order even after the judge below has refused it. The practice on application for leave to appeal is defined in an Order of Court.
be heard by Divisional Courts,84 that Divisional Courts may not be appealed from without their leave,85 and that points of law may be reserved by High Court judges for argument before or consideration by a Divisional Court.86 These matters are partly jurisdictional, but are mentioned here because of their bearing on procedure.

More specific restraint is put on the Rule Committee by three prohibitions and a few definite rules embodied in the statutes. The former are: First, that the old "common injunction" may no longer stay a proceeding in any division of the court;87 second, that the rules do not apply to divorce proceedings;88 and last, but most important, that the rules may not alter the established rules of evidence in jury trials, or do away with oral examination of witnesses, or completely abolish the jury.89 Scattered here and there through the Acts will be found the following specific rules, which were, for various reasons, fixed beyond the Rule Committee's reach: A plaintiff may assign his action to any division he thinks proper, and all interlocutory steps must be taken in that division;90 every matter commenced in the Chancery Division must be assigned to a particular judge;91 all

84 §1 of the Judicature Act, 1874.
85 §45 of the Judicature Act, 1873.
86 §46 of the Judicature Act, 1873. But this is subject to the right of every party in a jury trial, under §22 of the Judicature Act, 1875, to have rulings on the evidence admissible, and a direction to the jury based thereon, so that exceptions may be taken on the ground of an improper charge. It should be added that a motion for a new trial based on such exceptions is treated with suspicion, unless they affect the substantial merits of the case.
87 §24 (5) of the Judicature Act, 1873, does away with this veteran scandal of the law courts, by allowing equitable matters which formerly would have been ground for the injunction to be pleaded in defence. A party may still, however, move for a stay on proper grounds.
88 Under §18 of the Judicature Act, 1875, the President of the Probate and Divorce Admiralty Division retains the power to make rules for divorce proceedings, conferred by the Matrimonial Causes Act, 1857.
89 §20 of the Judicature Act, 1875. But an exception to this was made by §3 of the Judicature Act, 1874, which allowed the means and mode of proving facts to be regulated by Rules of Court (1) in any proceeding for the distribution of property, and (2) in any interlocutory application in a pending cause.
90 §11 of the Judicature Act, 1875. But this is to be read together with §34 of the Judicature Act, 1873; see notes 19 and 20, supra.
91 §42 of the Judicature Act, 1873. The plaintiff marks his writ (or other paper commencing proceedings) "Chancery Division," or "King's Bench Division," which is the assignment to a Division. If it is Chancery, the
trials shall be, as far as possible, before a single judge, and all applications between trial and final judgment must be made to him; a judge may hear causes for any other judge in his own division without the necessity of a formal transfer; and provision must be made for the hearing of all such applications as require to be promptly heard in London during vacation.

To these must be added the one section which contains practically all the authors of the Judicature Acts thought necessary to insert in the statutes on the burning question of pleading, the same section that blew up the last dike that stood between the waters of equity and of law. Its command to every judge of the court to take cognizance of all rights and liabilities, both legal and equitable, and to terminate the whole controversy between the parties in one action is the inspiration of the new pleading which has been created by the rules. The greatest liberality as to joinder of parties and of causes of action, as to amendment, counterclaim, discovery, execution and a dozen other matters has been displayed in the exercise of the duty here imposed.

This completes the list. As has been stated, the restraints on the Rule Committee's powers are few. The Judicature Acts are in no sense a code of practice, and only in a general way a

writ clerk who stamps the writ assigns the matter to one of the six judges, according to a rota. That judge then has personal charge (through his own set of clerks) of all matters connected with that proceeding. The plaintiff cannot make his choice of a judge, as he can of a Division.

* §17 of the Appellate Jurisdiction Act, 1876.

* §6 of the Judicature Act, 1884.

* §28 of the Judicature Act, 1873. Two judges are always designated to hear such applications.

* §24 of the Judicature Act, 1873.

Subsection 3 of §24 is specific on the subject of counterclaim. It reads:

"... Every judge ... shall have power to grant to any defendant all such relief against any plaintiff or petitioner as ... said judge might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner." The subsection goes on, to bring into existence an entirely new weapon for the pleader—the "third party procedure," which enables a defendant to obtain "all such relief ... connected with the original subject of the cause ... claimed against any other person, whether already a party to the same cause or not, ... as might properly have been granted against such person if he had been made defendant to a cause duly instituted by the defendant for the like purpose." The Rules drawn under this last power limit the right to cases where "a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action," but the device is frequently made use of.
code of court organization. But they contain general principles within which it is possible to exercise the widest discretion. Not to leave that discretion entirely at sea, the Act of 1875 carried with it, in a schedule, a model set of rules, which were recommended for adoption, but were made wholly subject to alteration and amendment at the committee's will. A brief inspection of these rules (though they have been greatly altered since) will convey in a concrete way how very large a power was entrusted to the committee's expert hands.

V.

Every biographer prefaces his narrative with some account of his hero's parentage and antecedents, to satisfy the reader's human interest in gossip of the family connection and give to scientists material with which they can prove that either heredity or environment is the common denominator of all human affairs. No such justification can be pleaded for the following paragraphs, but the Rules of 1875 have a history of their own which, though it throws but little light upon that "intent of the legislature" which alone has legal value in the interpretation of statutes, yet cannot fail to be of interest to those students of legal reform who know how greatly its progress is influenced by the exigencies of practical politics. Especially in England, where the directing power of the Cabinet is so complete over Parliament, is the personnel of the Ministry a matter of moment to the shape which legislation will assume. In this case the interest lies in discovering why the new rules of procedure appear in the particular form of a schedule to an Act of Parliament.

In point of time, the period of the Judicature Acts corresponds to that of the rivalry of those two momentous figures in

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9 The schedule to Lord Selborne's Act of 1873, contained 58 Rules intended to serve the same purpose, and in the summer of 1874 the judges issued a complete set of Rules based on that schedule. But Lord Cairn's Act postponed the operation of the former Act from November 1, 1874, to November 1, 1875. The schedule of Rules in the new Act of 1875, was a consolidation of the original schedule of 1873 and the subsequent Rules of 1874, with some changes and additions. As the former rules were repealed before they went into effect, it will be sufficient to examine them in the form in which they appear in the schedule of 1875 (L. R., Statutes, 1875, p. 778 et seq.).
Victorian history, Gladstone and Disraeli. Their successive victories and defeats mark milestones along the road of judicature reform, though both leaders favored the principle in a general way. Without describing the agitation for law reform that characterized the sixties, it is sufficient to remark that the division of the field of remedies between equity and the common law was the irritant that urged it on, and that, like most popular movements affecting the law, it began many years before it reached its greatest intensity and was not appeased by the fact that substantially all it asked for had already been accomplished by the Common Law Procedure Acts and the Chancery Practice Amendment Acts of the preceding decade. It was, however, strong enough to be one of the political problems which Lord Derby's Conservative Cabinet of 1866 felt itself called upon to solve. The task was set about in the typically English way: before making any proposals a Royal Commission was appointed to report on the situation and outline recommendations for any necessary changes. At the head of that commission Lord Derby put his former Attorney-General, Hugh McCallmont, Lord Cairns, recognized as easily the first lawyer of his time, to whom more than to any other man the ultimate success of the whole movement

98 The Commission was created on September 18, 1867, with thirteen members; two more were added on October 22, 1867, and two more on January 25, 1869 (when the Liberals came in). Included among its seventeen members were three who were destined to become Lord Chancellors: Lord Cairns, then a Lord of Appeal of a year's standing, became Lord Chancellor when Lord Derby resigned and Disraeli took office in March, 1868, and again when Disraeli formed his second Cabinet in 1874; Sir William Page Wood, then a Vice-Chancellor, became Lord Chancellor Hatherley upon Gladstone's Liberal victory in December, 1868; and upon Lord Hatherley's resignation in October, 1872, Sir Roundell Palmer accepted the Great Seal and the peerage he had previously refused, to become Lord Chancellor Selborne. Another member of the Commission (added in 1869) was the Liberal Solicitor-General Sir John Duke Coleridge, who later became Chief Justice of the Common Pleas, and, upon the death of Sir Alexander Cockburn in 1880, Lord Chief Justice of England. Two judges in the Commission who later became Lords of Appeal were Baron Bramwell of the Exchequer, and Mr. Justice Blackburn of the Queen's Bench, the author of Blackburn on Sales. Two members were later elevated to the Judicial Committee of the Privy Council—Sir Montague Smith, then a judge in the Common Pleas, and Sir Ribert P. Collier (later Lord Monkswell), Gladstone's Attorney-General. Two other valuable members were Sir John B. Karslake, Disraeli's brilliant Attorney-General, and Sir R. J. Phillimore, the Judge of the Admiralty Court, a polished and scholarly master of the canon law. As these names testify, the greatest legal minds of the day were gathered together for this important investigation
must be ascribed. In the eighteen months during which the commission worked, its chairman became Lord Chancellor for nine months, and then another of its members took his seat upon the woolsack, but its deliberations continued unabated until finally, in 1869, it presented its first report, the report on which all the great reforms of the next few years were built. In less than twenty pages the report reviews the defects in the administration of the superior courts of England and sets forth a practical plan for a general consolidation and unification of jurisdiction and procedure. Such brevity, clearness and constructive genius are all too rare in the dreary wilderness of government publications.

The section of the report devoted to procedure covers not five pages, but it reviews the entire progress of a litigation from beginning to end, naming specifically the weaknesses it objects to, and proposing specifically the remedies it would apply. “We can only give a sketch in this report, of the leading principles of the system which we recommend,” the section begins, “leaving for General Orders, or for a Code of Procedure, as may appear most advisable, the fuller development and completion of the scheme proposed.” Then, after enumerating the suggestions evolved by the commissioners, it concludes: “Power should be vested in the Supreme Court to regulate from time to time by General Orders the procedure and practice in all its divisions, and to make such changes in the duties of the several officers of the court as may from time to time be thought fit, and may be consistent with the nature of their appointments.” These few

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8a Lord Cairns shared Disraeli’s brief first instalment of power, from March to December, 1868. The defeat of the Conservatives opportunistically set him free to devote his undivided attention to the work of the Commission.

8b Published March 25, 1869, as Parliamentary Paper No. 4130 (1868-69, xxv, 1). It dealt solely with the constitution of the new court it recommended and with the procedure which should be used in it. The other three reports of the Judicature Commission, published from time to time in the next few years, were the work principally of new members who were added to the Commission; they cannot compare with the First Report in any respect and have been of little practical value.

8c Its excellence was appreciated at once. The Law Magazine and Review said of it (Old Series, vol. 27, p. 143, 1869): “There has not, probably, for years been a Commission whose labours have proved so thoroughly satisfactory to the public.”
words made it clear that the commissioners were convinced the sections of a possible code of procedure should, at any rate, not form part of the same statute which defined the constitution and jurisdiction of the court itself. Further, the recommendation as to power in the court to make alterations in its procedure from time to time showed they thought the procedural code should not have the rigid form of an Act of Parliament. But the question of form was left open, and it turned out to be one of great importance.

Lord Hatherley was the legal head of the Government to whom the historic first report was made; he was also one of its signers.\textsuperscript{101} Within a very few months he introduced in the House of Lords a bill embodying the suggestions of the report as to the consolidation of the superior courts. But his bill contained only this slight reference to the important procedural changes which the creation of the new court would require: It proposed to bestow the power to make rules of procedure exclusively on a committee of the Privy Council,\textsuperscript{102} and provided that a set of rules should be drafted by that committee after the bill should have passed into law. This left the whole problem of the court's procedure up in the air. The provisions of the bill relating to the structure of the court itself was acceptable enough, but without some indication of how the machine would work, all discussion on its usefulness was perforce academic. The common law judges, just before the bill was to be brought up in the Lords for its second reading, sent to the Lord Chancellor, on May 13, 1870, a resolution which forcibly attacked this omission in the bill, among others.\textsuperscript{103} They said: "While the judges are agreed that subordinate rules of procedure and rules of practice

\textsuperscript{101} He had not, unfortunately, the ability of his predecessor Cairns, and the fate of his Judicature Bill was partly due to his own limitations.

\textsuperscript{102} Lord Hatherley's first draft gave to the judges the power to make Rules of Procedure, but he became convinced they would have no time to devote to such a duty and changed the section to give it the effect above described.

\textsuperscript{103} The personal animosity between Chief Justice Cockburn, who signed the Resolution on behalf of the judges, and Lord Hatherley, was undoubtedly increased by the Lord Chancellor's proposal to put the rule-making power into executive rather than judicial hands. Even from an unprejudiced viewpoint such a provision seems weak.
may be left to be settled hereafter, they are of opinion that, looking to the great and substantial difference which exists between the procedure of the equity and the common law courts, the more important matters of procedure ought to be considered and determined by Parliament, and should form part of the bill. . . . The judges submit that certain fixed guiding principles and rules should, after due consideration, be embodied in the bill, instead of being left to be decided upon hereafter.” This protest was of sufficient solidity to block the passage of the bill through Parliament,104 and as Lord Hatherley failed to bring his measure into more practical and acceptable shape, the Government of the day withdrew its support and the Judicature bill fell by the wayside.105

In October of 1872, Lord Hatherley’s failing eyesight forced him to give up the onerous duties of his office,106 and Gladstone offered the Lord Chancellorship again to Sir Roundell Palmer, who now saw his way clear to accepting107 and took the title of Lord Selborne upon his entrance into the Upper House. He at once set about drafting a new bill to bring into being the

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104 In the House of Lords itself, Lord Cairns had attacked this feature of the Bill consistently. His view, as paragraphed in 5 Law Journal, 245 (May 6, 1870), was that “the Legislature ought to declare the leading principles to be followed by the framers of the Rules, so that those persons may be builders, and not architects.”

105 This was explained in 14 Solicitors’ Journal, 829 (August 13, 1870): “What more than anything else prevented the passage of the Bill this year was, it appears to us, the unwillingness of Parliament, at any rate of the House of Lords, to delegate absolutely to anybody outside Parliament the power of dealing with everything falling under the head of procedure and practice. . . . The code of procedure ought, in outline at least, to be prepared at once, not only because Parliament is hardly likely to pass the measure at all until it is done, but also because it must be done some time before the Act can come into operation.” But several years passed before this advice was followed.

106 During 1871 and 1872 the only topics of law reform discussed in Parliament were the constitution of the Judicial Committee of the Privy Council as the final Imperial Court of Appeals, and the efforts of a few far-sighted thinkers, headed by Lord Selborne, to establish in London an Imperial College of Law which should unify and supplant the scattered agencies of legal education in England and the Colonies. Little came of the first, and nothing at all of the second.

107 He had refused it when Gladstone first offered it in 1868 as, being a strong Churchman, he was opposed to the Premier’s policy of Church disestablishment in Ireland. This spirit of independence prompted him to reject the offer again in 1886 when Gladstone was forming his third Cabinet, because he had not joined in the Prime Minister’s conversion to Irish Home Rule.
great court recommended by the commission of which he, too, had been a member. In a few months he was ready, and on February 13, 1873, he introduced his measure in the Lords. Profiting by the experience of Lord Hatherley, he had inserted as a schedule to the bill a series of fifty-eight short rules, covering the changes recommended by the commissioners in their First Report of 1869. However, it was manifestly impossible to define the entire practice of a superior court of general jurisdiction in such brief compass, so the bill further provided for the drafting of a complete set of detailed rules and forms after it should become law, guided by the principles enunciated in the schedule.\textsuperscript{108} This was, at any rate, an advance, as it gave the legislature something tangible to discuss. It proved sufficiently satisfactory to be the basis of a compromise, and rather than postpone reform indefinitely again, Parliament passed the bill with minor changes, and it became law on August 5, 1873. It was not, however, to go into effect for over a year, the intention being to give ample time to draw up the complete rules and allow the profession to become familiar with them before they were set into operation. Accordingly, on November 25, Lord Selborne appointed a committee of three expert draftsmen to carry out in detail the principles of his schedule,\textsuperscript{109} and placed them under the supervision of

\textsuperscript{108} The comment of the Solicitors' Journal upon this was (17 Sol. J. 721, July 19, 1873): "No one is quite satisfied with the provisions of the Bill as it stands. ... The Bill, which is in many points, especially in everything that affects procedure, a mere skeleton, has to be clothed with flesh and blood by means of Rules of Court and Forms of Proceedings. ... To whomsoever the duty of actually framing the Rules and Forms may be entrusted, the task will be about as anxious and difficult a one as could well be undertaken, and it will only be successfully carried out if the profession generally give their assistance by free discussion and intelligent suggestion."

The barristers' journal was no less appreciative of the importance of the Rules (8 Law Journal, 129, March 1, 1874): "It may safely be averred that if the Lord Chancellor's Judicature Bill with the Schedule thereto be passed into law, the rules of procedure embodied in that Schedule will effect a greater revolution in the ordinary business of barristers, attorneys and solicitors, than will be accomplished by the Bill itself."

\textsuperscript{109} The three he selected were H. Cadman Jones, who, with Josiah W. Smith, Q. C., had drawn up the Consolidated General Orders of the Court of Chancery of 1860; Arthur Wilson, the tutor of Common Law at the Inner Temple, who later published the commentaries on the Acts and Rules known as "Wilson's Judicature Acts," which took the place of "Day's Common Law Procedure Acts" and "Morgan's Orders in Chancery" as the practitioner's guide, philosopher and friend; and Dr. Tristram, the noted authority on practice in probate, admiralty and divorce courts of ecclesiastical lineage.
a committee of judges, at whose head he put his Master of the Rolls, the great Jessel.\footnote{The other judges on the committee were the Lord Chancellor (Lord Selborne), the three Common Law Chiefs—Sir Alexander Cockburn, Sir John Duke Coleridge and Sir Fitzroy Kelly, Lord Justice Mellish, Vice-Chancellor Hall, Baron Bramwell, Mr. Justice Lush, Mr. Justice Brett, Sir James Hannen and Sir Robert Phillimore. Some of these were among the signers to the Judicature Commission’s First Report. But for the untimely death of Mr. Justice Willes in October, 1872, who was then the best living authority on practice and procedure, he would undoubtedly have been placed in charge of the work.}

But before these draftsmen had gone far in their labors, another turn came in the political wheel, in February, 1874, when the Conservatives came back into office and Disraeli once more took the helm. Lord Selborne was displaced by Lord Cairns, who had ideas about the new Supreme Court that had not found place in his Liberal predecessor’s arrangement. In July, 1874, he had Parliament pass an Act postponing the operation of Lord Selborne’s Act for another year, so he might have time to work out his plans. This they were not at all unwilling to do, as the promised rules for the previous Act had been slow in making their appearance. Not until June 1, 1874, had the draftsmen submitted their completed rules to the committee of judges, and up to July the judges had not yet finished considering them.\footnote{The Rules were prepared by the draftsmen in three separate batches, and as each batch was completed it was laid before the judges, and copies were circulated by them among such official and representative persons as they thought desirable, and the whole subjected to the committee’s revision.}\footnote{Not in any spirit of partisanship, for Cairns, like his predecessor, was no party figurehead. Soon after he first accepted a peerage at the hands of Lord Derby in 1867, he voted against his party in the Lords on an important measure affecting an extension of the Parliamentary franchise. It was this willingness to cooperate with his political opponent that led him to retain the three draftsmen Lord Selborne had appointed, rather than break into their collaboration after three months’ of work together.}

Only in the first week of August, 1874, was the final text of the rules for the 1873 Act laid before Parliament. By that time the operation of the Act had already been postponed to November, 1875, and Lord Cairns was busy on a new bill with which he intended to modify certain portions of the work Lord Selborne had done.\footnote{The principal changes it made in the Act of 1873 were with regard to the final court of appeal. Lord Selborne’s Act had made the Supreme Court}
1873, it carried with it a schedule of rules, but this time the schedule was more than a skeleton. It was the full text of the rules approved by the judges under the Schedule of 1873, into which had been consolidated the schedule of 1873 itself and a few changes rendered necessary by the text of the principal Act. On November 1 practice in the new court began under the new directions, and the transformation was complete.

(To be Continued.)

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the highest court in England, cutting off the old right of appeal to the House of Lords. But this proved unsatisfactory on further inspection, as the Act did not affect Ireland and Scotland, appeals from which could go, as before, to the House of Lords—a right which the English would hardly deprive themselves of with equanimity while reserving it to the other kingdoms in the Union. Rather than set about remodelling the entire judicial systems of these countries, Lord Cairns restored the right of appeal to the House of Lords, in English cases.