



Second Interim Report
of the Committee on
Supreme Court Practice
and Procedure

*Presented by the Lord High Chancellor to Parliament
by Command of His Majesty
March 1951*

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TERMS OF REFERENCE

"(1) To enquire into the present practice and procedure of the Supreme Court (excluding the practice and procedure in actions for the infringement of patents and under the Patents and Designs Acts, 1907 to 1946, and in matrimonial proceedings in the Probate, Divorce and Admiralty Division of the High Court, but including the practice and procedure on appeals from that Division), and to consider what reforms of such practice and procedure should now be introduced, whether by legislation or otherwise, for the purpose of reducing the cost of litigation and securing greater efficiency and expedition in the despatch of business.

(2) To consider the Reports made by the Hanworth Committee on the Business of the Courts* and the Report of the Royal Commission on the Despatch of Business at Common Law, 1934-6,† and, for the purposes set out in the foregoing paragraph, to make recommendations generally on the proposals contained in those Reports.

(3) To consider, for the purposes aforesaid, whether any, and if so what, modifications should now be made in the present rights of appeal to, from or within the Supreme Court, other than appeals in matrimonial proceedings from courts of summary jurisdiction.

(4) To consider what appropriate machinery might be evolved to enable cases involving points of law of exceptional public interest (arising in any Division of the High Court or in the Court of Appeal) to be determined wholly or partly at the public expense, whether by making the Attorney-General or the King's Proctor a party to litigation or otherwise.

(5) To make interim reports on any matter or matters arising out of their terms of reference as may from time to time appear to the Committee to merit immediate attention or to warrant separate treatment."

22nd April, 1947.

* Cmds. 4265, 4471 and 5066. (H.M.S.O., Price 4d., 1s. 0d. and 4d. respectively.)
† Cmd. 5065. (H.M.S.O., Price 2s. 6d.)

SECOND INTERIM REPORT

TO THE RIGHT HONOURABLE THE VISCOUNT JOWITT,
Lord High Chancellor of Great Britain.

PART I

INTRODUCTION

1. In the introduction to our first Interim Report* we said “. . . we have felt and feel strongly that if the very difficult question of the cost of litigation is to be successfully tackled, it must be approached and judged as a whole rather than piecemeal and decisions—possibly far-reaching in effect—reached upon matters of general principle.” Nothing that has occurred since the date of our first Report has in any way qualified this view ; it has rather been emphasised. At the date of our first Interim Report we had hoped that we might, by now, be in sight of the end of our labours. For various reasons (but not for lack of application on the part of the Committee) these hopes have been disappointed ; and though we have (in the classic phrase) reached the end of the beginning and perhaps the beginning of the end, we feel no doubt that some time must elapse before our Final Report can be presented.

2. In these circumstances we have thought it right to consider whether there are any matters which could properly and conveniently form the subject of a Second Interim Report, on the ground that having regard to their character—in most cases highly technical—they are not dependent upon conclusions having first been reached on the matters of general principle mentioned above and that our recommendations in respect of them (if accepted) can usefully be implemented without awaiting our Final Report. We have in mind also that it may be a convenience to those responsible for considering our various recommendations not to have to deal with them all at the same time, and that effect can be given (if thought fit) to most of the matters covered by this Report by Rules of Court, without legislation.

3. The present Report is accordingly confined to four matters, *viz.*—

- (a) Procedure in Admiralty cases.
- (b) Miscellaneous matters of procedure in the Chancery Division and the Court of Protection ; Procedure before Official Referees.
- (c) The Annual Practice.
- (d) Court Fees.

Each of the subjects was remitted, in the first place, to one or more Working Parties, which included those of our members who had special knowledge or experience of them. The Working Parties held many meetings to hear evidence and to consider their recommendations, and it is only right to place on record that the main burden of work involved in preparing this Report fell on their shoulders. Their recommendations were, of course, in every case, reviewed and, where approved, adopted by the full Committee.

* Cmd. 7764 (H.M.S.O., Price 1s. 0d.)

4. Of the matters mentioned in the preceding paragraph we do not desire to say anything here by way of introduction upon (a) and (b) save that, as will appear, the various questions discussed were all of a highly technical nature. We believe that, by the means we suggest, appreciable improvements in machinery and appreciable savings in costs may be achieved and achieved, moreover, without legislation.

5. By the "Annual Practice" referred to in paragraph 3 (c) is meant the volume or volumes (for the 1949 Edition consists of three) popularly known as the "White Book". For many years this publication has been a standard text-book on the practice of the Supreme Court. There exists no separate up-to-date publication of the Rules of Court themselves. The Annual Practice contains all these Rules together with very elaborate notes in which are included references to the reported judicial decisions upon the Rules and generally upon matters of practice.

6. The enormous bulk of the Annual Practice has been the subject of sharp criticisms. As will appear from our Report we do not think that all these criticisms are, upon examination, justified. Nevertheless we have come to the clear conclusion *first* that the time is over-ripe for a complete revision of a set of Rules which, originally drafted 65 years ago, has suffered from obsolescence and from all kinds of amendments and additions not always related together or to the framework of the Rules as a whole; and *second* that, although a text-book on the practice of the Court is of the greatest value to practitioners, there ought to be available both to practitioners and the general public a separate publication, kept up to date by modern "loose-leaf" methods, of the Rules themselves and of effective Practice Directions which are supplemental to the Rules.

7. As regards this matter, we are well aware that the new body of Rules cannot be properly drawn up until the whole of our recommendations have been finally considered. But we think it also obvious that the task of preparing a new body of Rules is an extremely heavy one calling for a high degree of drafting experience and skill and a long period of preparation in the study of the existing Rules and practice. We are of the opinion that, having regard to the circumstances just mentioned and to the weight of the criticism directed upon the existing Rules, as well as to the strong view we have formed, we should include this matter in the Report so that the necessary start can (if thought fit) be made at once.

8. The last matter, court fees, referred to in paragraph 3(d) above, is in a somewhat different category from the rest. As regards this matter we have been influenced by the fact that a new schedule of court fees in the county court has been promulgated, following the Final Report of the Committee on County Court Procedure,* which expressed the strong opinion that the preceding schedule was altogether too complex. We have in like manner concluded that the existing Supreme Court Fees Order is unnecessarily elaborate and can be usefully and justly simplified. Although important points of principle are involved in the subject of court fees (and these are discussed in the Report) it became at an early stage of our deliberations manifest that (contrary, we believe, to the belief of many) court fees play a relatively small part in the total cost of litigation and such costs would not be substantially reduced even if court fees were totally abolished—a proposal which would in any case be outside our terms of reference. We think it desirable that the fact, and the reasons for it, should be generally appreciated. Court fees, which are a part of the costs of litigation quite distinct from other costs, can thus, as it were, be got out of the way.

* Cmd. 7668 (H.M.S.O., Price 2s. 0d.).

PART II

PROCEDURE IN ADMIRALTY CASES

Introduction

9. As we have stated, the subject matter of Admiralty proceedings is highly technical. We thought it right, in the circumstances, instead of hearing evidence separately from the various individuals or bodies who had submitted memoranda to the Committee or who seemed to the Committee to be in a position to give valuable advice and assistance, to invite these individuals or bodies to attend or send representatives to a conference at which all the material questions were discussed round the table. Representatives of the following attended:—members of the Bar practising in the Admiralty Division, the Admiralty Registrar, the Law Society, the Solicitors' Managing Clerks' Association, the Corporation of Trinity House, the Chamber of Shipping of the United Kingdom, the Liverpool Steam Ship Owners' Association, the Committee of Lloyd's, Lloyd's Underwriters' Association and the British Insurance Association. A written memorandum was also received from the Hon. Mr. Justice Pilcher. The paragraphs following represent the Committee's conclusions upon the report made to it of that meeting.

10. We have not thought it necessary, by way of preface to these paragraphs, to set forth an exposition of Admiralty proceedings, for the subject matter is one of interest and concern to a limited section only of the community and to them the paragraphs which follow will be understood without exposition. We should, however, make it clear that this section of our Report is confined to procedural matters affecting Admiralty cases. It is not concerned with and in no way pre-judges a subject which has been referred to us and is under active consideration, that is to say, the relation of the Admiralty Court or the Probate, Divorce and Admiralty Division to the Supreme Court as a whole.

Initiation of proceedings

11. The procedure by way of originating motion, as used in the Chancery Division, could usefully be extended to Admiralty proceedings in actions for distribution of salvage where the total award has already been agreed or fixed by arbitration. This, though not common, is an extremely simple form of action, but at present there exists no cheap and simple method of bringing it before the Court.

12. We also recommend the use of the procedure by way of originating summons in actions for limitation of liability. Our detailed recommendations in respect of this type of action are fully set out in paragraphs 35 and 36 *post*.

Pleadings

13. It was proposed that in collision actions Preliminary Acts in the county court form should be filed, and that pleadings should then be dispensed with. The county court form of Preliminary Act contains two additional questions, the first of which asks what charges of negligence are made against those in charge of the other ship. The second additional question, which has to be answered only by the defendants, asks whether it is alleged that any, and if so what, other ship by her navigation caused or contributed to the collision. It was suggested that with the addition of these two questions the Preliminary

Acts would contain all the information to be obtained from the statement of claim and defence, and that both the latter could then safely be dispensed with. This proposal, however, encountered a good deal of opposition, particularly from members of the Bar, but also from various other interested parties, who expressed the view that in many cases the pleadings do contain a certain amount of important information not disclosed in the Preliminary Acts. It was also pointed out that in the not uncommon case where a third ship, not herself in collision, is charged with negligence causing or contributing to the collision between the first two, it would be extremely difficult to dispense with pleadings. We have come to the conclusion that it would not be wise to dispense with the statement of claim and defence as a general rule. We do consider, however, that the parties should be free to dispense with them by agreement in appropriate cases, as indeed is sometimes done at present.

14. We are of opinion that Preliminary Acts could be made more valuable if Order XIX, Rule 28, required certain further information to be given as follows :—

(a) Paragraph (g), which requires the course and speed of the vessel to be stated at the moment of first sighting the other vessel, is often not very informative in the case of fog collisions, when the course and speed at the moment of first sighting may be quite different from the original course and speed. To meet this point we consider that paragraph (g) should be sub-divided into three questions, as follows :—

(i) original course and speed before any measures were taken to avoid collision ;

(ii) any alterations of course or speed ;

(iii) course and speed at the moment of first sighting.

(b) Paragraph (i), which requires the distance and bearing of the other ship to be stated, would be more informative and valuable if it also required the approximate heading of the other ship to be stated.

(c) Paragraph (n), which requires the initial points of contact between the two vessels to be stated, should also, in our view, require the approximate angle between the two vessels to be given.

15. No reply or reply and defence to counterclaim should be delivered without an order of the Court. In Admiralty actions these are normally delivered as a matter of routine, but in the great majority of cases they are purely formal documents. Normally they consist of nothing beyond a formal traverse, adding nothing to the case and merely wasting costs. So far as reply is concerned, this recommendation does not involve any alteration of the Rules. No reply is at present required by the Rules, but such is the conservatism of practitioners that a reply is nevertheless habitually delivered, and although the costs thereof are always disallowed on taxation *inter partes* the lay client presumably still has to pay. All that is required here is that practitioners should obey the existing Rules. So far as reply and defence to counterclaim are concerned, our recommendation will involve an amendment to the proviso to Order XXVII, Rule 13.

Proof of values in salvage actions

16. A suggestion was received for amendment of the procedure for proving values in salvage actions. The suggestion, however, was not pressed, and was agreed to be unworkable. We accordingly recommend no change in the existing procedure.

Discovery of documents

17. It is recommended that in Admiralty actions discovery of documents should be given automatically, without the necessity of an order of the Court, within a specified time after close of pleadings. This would avoid the necessity for incurring the costs of a summons for discovery. There was some difference of opinion whether an affidavit of documents is necessary in all cases, or whether a list of documents would suffice in the absence of a special order to the contrary. One of the features of the Admiralty Court is that the great bulk of the work is in the hands of a comparatively few practitioners, who have grown up in the Court, and who know and trust each other. In these circumstances we are of opinion that in ordinary cases the expense of swearing and filing an affidavit of documents is not really necessary. We recommend that discovery should be given in the first instance by means of a list of documents, subject to the right of either party to give notice within a specified time that he requires an affidavit of documents instead of a list.

Summons for directions

18. At present there is normally no summons for directions in an Admiralty action. It is, however, necessary to issue a summons to fix the date for the hearing. Consideration has been given to a suggestion that advantage should be taken of the opportunity afforded by the summons to fix the date, for the purpose of obtaining the directions of the Court as to the number of witnesses to be called, admission of statements and reports, and similar matters. The view is commonly expressed that Admiralty actions take too long to try, largely because an unnecessarily large number of witnesses is commonly called. A typical list of witnesses in an ordinary collision action might well include the pilot, the master, the officer of the watch, the helmsman, the look-out, one or possibly two of the engineers on watch and possibly also a marine surveyor to give expert evidence, based on the damage sustained, as to the angle of the blow and as to the speeds of the two ships. In the great majority of cases it is quite unnecessary to call so many witnesses; yet junior counsel, when advising on evidence, dare not dispense with any of them, nor can leading counsel safely refrain from calling them all, for fear that the absence of any of them will call forth adverse comment either from the other side or from the Bench.

19. There are several respects in which special considerations apply to the evidence in Admiralty actions. Firstly, in a large number of cases there is quite a wealth of documentary evidence available, apart from that of the witnesses actually called, *e.g.*, deck and engine-room logs, pilot's and master's reports, depositions taken by the Receiver of Wrecks, protests, maritime declarations, *etc.* Secondly, the witnesses from any one ship normally tend to speak as a team; mostly they can be relied on to tell substantially the same story, so that hearing a large number of witnesses leads to a great deal of duplication. It is often the case that when the evidence of the pilot, master or officer of the watch has been heard, the evidence of the other witnesses adds little, if anything, merely affording scope for cross-examination by counsel on the other side, which of itself considerably lengthens the proceedings, often with very small result. Thirdly, the difficulties of procuring the attendance of witnesses are often peculiarly great in Admiralty proceedings, seeing that seamen are liable to be serving in remote parts of the world at the time when the case comes on for trial. Lastly, it may be extremely expensive to detain a nautical witness ashore. If it becomes necessary to take him out of his ship, so as to avoid detaining the ship, the witness must be kept, at the expense of the litigant, until such time as he can obtain an appointment in another ship. The expense of detaining witnesses often involves quite a considerable sum, and probably constitutes a larger proportion of the total bill of costs in Admiralty actions than in any other kind of proceedings.

20. It was at first suggested that the number of witnesses to be called should be limited by Rule, but after discussion it quickly became apparent that it would be quite impossible to deal with this matter by Rule. Cases are almost infinitely various, and what would be a reasonable number of witnesses in one case would be quite unreasonable in another. The Evidence Act, 1938, (as it now stands) gives facilities for the admission of statements, and this Act is peculiarly applicable to Admiralty actions, in which so often material witnesses are overseas. Yet little use has been made of this enactment in practice, partly because of the fear of adverse comment referred to above. The present methods and practices are too well settled, and the profession is too conservative, to justify any hope that the calling of unnecessary witnesses can be curtailed, unless somehow or another the fear of adverse comment can be removed.

21. In these circumstances, after a very full discussion we have come to the conclusion that the best hope lies in the introduction of a summons for directions, to be heard by the Judge, who must be prepared to make a robust use of his powers. It appears to us that this is an instance where something in the nature of a "pre-trial conference" may be expected to lead to quite a notable reduction in the costs of the trial. Seeing that in any event a summons to fix the date of hearing is necessary, the additional costs involved by combining this with a summons for directions would not be great, and in most cases it should be possible to save a much larger amount of costs by curtailing the length of the trial. There would be no difficulty in practice in bringing on the summons before the Judge. In most cases, counsel would be only too anxious to dispense with the calling of witnesses and to obtain leave to read their statements at the trial. The opposition would be expected to come from the other side, who might well desire the production of this or that witness for the purpose of cross-examination. It would then be for the Judge, in the robust exercise of his powers, to decide whether the statement should be admitted or whether the production of the witness for cross-examination was justifiable in the circumstances. If the Judge refused leave to admit the statement because of an expressed desire on the part of the other side to cross-examine the witness, the costs of procuring his attendance would be payable by the party refusing to admit the statement unless otherwise ordered by the trial Judge. Once an order had been obtained from the Judge on the summons for directions, admitting the statement of a witness and dispensing with his attendance at the trial, there could be no room for adverse comment on the absence of the witness, and the greatest single factor in prolonging trials would have been removed.

22. It is thought that the Judge should also deal on the hearing of the summons for directions with the question of expert evidence. A few years ago expert witnesses were regularly called on both sides in practically every collision action. Recently evidence by surveyors has been much less common. But surveyors are still sometimes called as witnesses, and if a surveyor is called to give evidence on one side it sometimes drives the other side to call a surveyor, which they might not otherwise have done. In our view the cases in which expert evidence of this character really helps in the ascertainment of the truth are few and far between. In the circumstances we consider that on the hearing of the summons for directions the Judge should always exercise the power conferred by Order XXX, Rule 2(2)(e), by specifying whether any, and if so how many, expert witnesses may be called on either side. Any party desiring to obtain leave to call expert evidence at the trial would have to submit the expert's report or proof to the Judge at the hearing of the summons for directions. The Judge should also have power to order in a proper case that the expert's report be admitted as evidence without the necessity for calling the expert.

23. It was also suggested that an effort should be made to encourage the trial of salvage actions upon statements and documentary evidence alone. Disputes as to salvage are habitually dealt with in this way by arbitration—indeed, so popular has this method of dealing with salvage disputes become, that a salvage action in Court is now something of a rarity. If arbitrators can successfully deal with salvage claims on documentary evidence alone, why, it is asked, cannot the Court do likewise? Clearly there is no reason why the Court should not do so, and if it became the practice of the Court to deal with salvage claims in this way the probability is that more actions for salvage would come before the Court. We agree with the view that every encouragement should be given to the trial of salvage claims on documentary evidence. At the same time, it seems hardly desirable, or indeed practicable, to provide for this by Rule. It appears to us that this is another instance where a summons for directions, robustly handled by the Judge, might be expected to produce the desired result.

Nautical assessors

24. We have considered two suggestions which have been made with regard to nautical assessors. The practice hitherto has been for two of the Elder Brethren of Trinity House to sit with the Judge in all actions of collision and salvage. It has been suggested, firstly, that one Elder Brother, instead of two, should normally attend, unless otherwise specially ordered, and secondly, that in cases arising out of collisions between small vessels the assessor (or assessors) should be drawn, not from the Elder Brethren of Trinity House, but from a panel of seamen having experience of the navigation of small vessels. As to the first point, the view expressed at the conference, not only by the representative of Trinity House, but also by all the members of the Bar and by the representatives of the Chamber of Shipping, was that there is a definite advantage in having two assessors and that the small amount of costs saved by dispensing with one of them would in the end prove a poor economy. The same view is expressed by members of the Bench having experience of Admiralty work. Seamanship is not an exact science, and it often happens that the proper answer to the problems of seamanship which arise in Admiralty actions only becomes clear to the Judge after he has had the advantage of hearing the assessors discussing it between themselves. We are satisfied that this is the right view, and accordingly we do not recommend any departure from the present practice of having two nautical assessors. It will still remain open to the Court, as it always has been, to order that a particular action be tried with only one assessor if the parties so desire.

25. With regard to the second point, it is the fact that most of the Elder Brethren (who are generally retired master mariners of great experience) have served, at any rate during their later years, in big ships. It is a mistake to suppose, however, that they are totally devoid of experience in small ships. Many of them served during their earlier years exclusively in small ships. There would be obvious difficulties in selecting a panel of assessors having experience in the navigation of small ships. One such difficulty would be to draw the line between what is deemed to be a big ship and what a small ship. If such a panel were selected, it is doubtful whether it would command the same universal respect as is now commanded by the Elder Brethren of Trinity House. Moreover, there would be a difficulty in the selection of assessors in a case of collision between a big ship and a small ship—by no means an uncommon occurrence. On the whole, our conclusion is that it would be wrong to make any general departure from the present practice of selecting the assessors in Admiralty actions from among the Elder Brethren of Trinity House.

26. There is, however, one class of case in which the Elder Brethren avowedly have no experience and in respect of which a case can in our view be made out for the appointment of assessors from another source. This is the case of collision between fishing vessels actually engaged in fishing. It was represented to us that cases of this class are very rarely brought to court, but are normally submitted to arbitration, for the very reason that the Elder Brethren are not regarded as competent to advise the Judge on the technical questions involved. We were informed that there is already in existence a panel of assessors having experience in fishing vessels, in connection with wreck inquiries under the Merchant Shipping Acts. One of H.M. counsel, who has had experience as a Wreck Commissioner in cases involving fishing vessels, expressed the view that, in cases of collision between fishing vessels engaged in fishing, the assessors might with advantage be drawn from this panel instead of from the Elder Brethren of Trinity House. This view was strongly supported by the representative of the Liverpool Steam Ship Owners' Association, and was not opposed by the representative of Trinity House. We concur in this view, and recommend that, in cases of collision between fishing vessels engaged in fishing, it should be competent for the Court, on the summons for directions, to appoint assessors having experience of this class of vessel instead of calling upon the Elder Brethren of Trinity House. Except for this particular class of case, however, we recommend no change in the existing practice.

Examiners in Admiralty

27. It was suggested that there is room for improvement in the machinery for examining witnesses before trial in Admiralty actions. Owing to the nature of his life, it is not always possible for a nautical witness to be present at the trial of the action, and for this reason it is probably fair to say that the question of examining witnesses before trial assumes a rather larger importance in Admiralty proceedings than in other types of litigation. Because of this there is a special procedure for appointing examiners in Admiralty, which dates back to the Admiralty Court Act, 1861, and which is specifically preserved by Order XXXVII, Rule 39. Wherever possible, the parties in practice try to arrange to take the evidence of the witness before the Judge who will try the case. This is obviously desirable, if it can be done. Often, however, it is not possible. The witness may be available, for instance, only during the vacation, or on a day when the Judge is otherwise engaged. It is obviously impossible to guard against such an eventuality by Rule. But there are other occasions when the obstacles in the way of examining a witness before the Judge are merely technical. The only method at present available for bringing a witness before the Judge is to set the case down for hearing. This involves paying the hearing fee and briefing counsel as for the trial of the action, although it is known that on the conclusion of the witness's evidence an adjournment will be asked for and granted as of course. Moreover, the action can only be set down for trial after pleadings have been closed and discovery completed. This means that in many cases it is technically impossible to bring the matter before the Judge in the time available before the witness has to sail. In such a case the parties are driven to apply for the appointment of an examiner. This is unsatisfactory, because it deprives the Judge of the chance of seeing the witness, and also because it involves extra costs. The examiner, although he takes no part whatsoever in the proceedings beyond swearing the witness and appending his signature afterwards to the transcript, has to be paid a fee. In these circumstances it appears to us that some relaxation of the Rules is desirable, so as to make it easier to take the evidence of a witness before the Judge. Provided that Preliminary Acts have been exchanged and the party whose witness is being tendered has given discovery of such ship's documents as are in his possession, we can see no reason why it should not be possible

at any stage of the action to apply for the immediate taking of the evidence before the Judge, without the necessity for setting the case down for hearing. If in spite of this relaxation it is still impossible to bring the witness before the Judge, and it becomes necessary to examine him out of Court, we consider that the appointment of an examiner could well be dispensed with. As pointed out, the examiner in practice performs no useful function—frequently, after swearing the witness, he goes away and does not even stay to hear the examination. We see no reason why the shorthand-writer, who can be sworn by counsel, should not administer the oath to the witness ; the transcript of the witness's evidence can be certified by the signatures of both counsel. The Court would get exactly the same record of the witness's evidence as it does at present, and the costs of the examiner and of the application for his appointment would be avoided.

Admiralty Short Cause Rules

28. A suggestion was made that the Short Cause Rules should be brought up to date, and their use made compulsory in cases where the total amount involved does not exceed, say, £2,000. The Short Cause Rules were introduced in 1908 and revised in 1930 and 1931. They provide machinery for a shortened form of trial, e.g., no pleadings unless specially ordered, admissibility of documentary evidence and written statements, and no right of appeal except by leave of the Judge on a point of law. These Rules do, no doubt, provide machinery for a very cheap and expeditious form of trial, but the procedure can be adopted only with the written consent of both parties. In practice the Rules have been little used—presumably because it has rarely been found possible to obtain the consent of both parties. We are informed that in practice the absence of a right of appeal has been the principal factor deterring litigants from resorting to this procedure.

29. When the matter was discussed we found that the proposal to make the adoption of the Short Cause Rules compulsory in certain cases was not at all well received. It was felt that no litigant should be compelled to forego his right of appeal. Moreover, it was considered that in order to make the Rules more acceptable they ought to be amended so as to provide at least for the filing of Preliminary Acts and for the right to call at any rate one witness on each side. If the Rules were to be amended so as to cover these points, and also so as to provide a right of appeal, it would seem that the result might not be very different from what could be achieved in an ordinary Admiralty action by a robust use of the summons for directions, such as is envisaged in paragraphs 21 to 23 hereof. On the whole we have come to the conclusion that it would be wrong to compel parties to resort to these Rules, which experience has shown have proved generally unpopular. We therefore make no recommendation either for amending the Rules or for making their use compulsory. They should in our view be left in their present form, available for use in those cases where both parties consent to their use.

Reproduction of documents

30. Pleadings in Admiralty actions are normally, if not quite universally, printed. This is because their length almost invariably exceeds 10 folios. All witnesses expressed the view that this practice is in these days an unnecessary extravagance. We, therefore, propose that the Rules of the Supreme Court should be amended so as to render printing of pleadings as well as of other

documents no longer permissive, except by leave in special circumstances. It should be made clear, if necessary by the publication of a Practice Note, that what will be recoverable on taxation will be no more than the cost of procuring a reasonably satisfactory reproduction by the cheapest practicable method.

31. There is a further matter with regard to the reproduction of documents which is peculiar to Admiralty actions. In the event of an appeal to the Court of Appeal, the record, consisting of the Preliminary Acts and pleadings, the documents, the transcript of evidence and the judgment of the Court below, is normally printed and bound in book form. This involves an expenditure similar to that involved in preparing a record for a case in the House of Lords, with the added disadvantage that the size of the book used in the Court of Appeal is different from that used for a House of Lords record. This means that in the event of a further appeal to the House of Lords the whole record has to be printed all over again on paper of a different size. The practice of printing the record in Admiralty appeals dates from the time before the Judicature Acts, when appeals in Admiralty actions went to the Privy Council. The practice is not sanctioned by any Rule, but depends solely on custom. So deeply rooted is the custom, however, that it has managed to survive two World Wars, and even to this day the record in appeals to the Court of Appeal in Admiralty actions is nearly always printed. It appears to us that this is an extravagant anachronism which ought to survive no longer. We can see no reason why the record in Admiralty appeals should not be prepared in the same way as in the case of appeals from other Divisions of the High Court. We propose, therefore, that stencil-duplicating should be adopted as the standard method of duplicating documents (including transcripts of evidence) for the Court of Appeal, and that the costs allowable on taxation in respect of copying should be based on the cost of stencil-duplicating. In the event of special circumstances rendering it necessary to use some more expensive method of duplication, *e.g.*, where it is necessary to employ the photostatic method in order to display the actual form and lay-out of the original document—the sanction of the Court would have to be specially obtained.

Right of appeal in Admiralty actions

32. It was at one time suggested that there should be no right of appeal in Admiralty actions unless the Judge or the Court of Appeal gives leave on the ground that an important question of law is involved. This suggestion was hotly opposed and was not pressed. We can see no reason for differentiating between Admiralty actions and other forms of action. So long as there is an unrestricted right to appeal to the Court of Appeal in other cases, we are of opinion that there should be the same right in Admiralty actions.

References to the Registrar

33. We are of opinion that the report of the Registrar as to damages should be final and that confirmation by the Judge should no longer be required. At present the report of the Registrar is, as its name suggests, merely a report and is not binding on the parties unless confirmed by the Judge. Such confirmation is usually a pure formality, and is in practice normally dispensed with—the parties agreeing to treat the report as final unless notice of objection is lodged by one of the parties. In a limitation action, however, confirmation of the report is necessary before an order for payment out can be made, and confirmation is also required when one of the parties is under a disability. We can see no good reason for this requirement. In the absence of objection to the report, the summons to confirm is a quite useless expenditure of costs.

In our view, the Registrar should have jurisdiction to make a final award of damages in all cases, subject to the right of the dissatisfied party to appeal to the Judge on motion in objection. This would bring the jurisdiction of the Admiralty Registrar into line with that now exercised by King's Bench Masters and Divorce Registrars in relation to summonses under section 17 of the Married Women's Property Act, 1882.

34. It was also suggested that the Registrar should no longer sit with a merchant, but that power should be retained to summon any kind of technical assessor that the particular case might seem to call for. We were informed by the Registrar himself that in modern times more often than not he sits alone, and that it is the exception rather than the rule for a merchant to attend. The Registrar expressed the view, with which upon consideration we agree, that the existing provisions of Order LVI, Rule 1, are perfectly satisfactory.

Actions for limitation of liability

35. We are of opinion that the procedure in limitation actions could be considerably simplified and cheapened. At present a limitation action, like any other action, is commenced by writ, to which the defendants must appear. Statement of claim follows, in which the plaintiffs set out the circumstances of the casualty, allege the absence of fault or privity on their part and the tonnage on which they claim to limit their liability, and pray for relief in accordance with the Merchant Shipping Acts. The defendants must then put in a defence. In most cases this is a pure formality merely putting the plaintiffs to the proof of the allegations contained in the statement of claim. Save in the exceptional case where there is some matter of substantial dispute, the evidence for the plaintiffs is normally given on affidavit, the affidavit frequently being an almost verbatim repetition of the statement of claim. There is normally no evidence for the defendants. Ten days' notice of trial must be given, as in other actions. On the appointed day the action comes on for trial before the Judge, both sides being represented by counsel. Normally the proceedings are entirely formal, and occupy about two minutes. The Judge pronounces a decree of limitation and refers the claims of the injured parties to the Registrar for assessment, specifying a time limit within which the claims must be brought in and prescribing the advertisements which are to be inserted. Normally three insertions in each of three separate newspapers are prescribed. This in itself seems a needless extravagance, seeing that in practice there have been extremely few cases in which claimants have actually appeared in response to the advertisements; generally the possible claimants are well known already. The reference is held at a later date, when the various claimants prove their claims, and the Registrar makes his report. The plaintiffs must then file the report, and give notice of filing to the other parties. After this the parties must attend upon the Judge on a summons to confirm the report, even though there may be no objection to the report—and not until the report has been confirmed by the Judge can payment out be ordered and the fund in Court distributed.

36. Much of this complicated procedure could be avoided by (a) using the procedure by way of originating summons, and (b) conferring on the Registrar jurisdiction to deal with cases in which there is no dispute of substance. A procedure along the following lines is suggested. The plaintiffs would issue an originating summons, setting out the relief to which they claim to be entitled. The summons would be returnable before the Registrar, and would be supported by affidavit briefly setting out the facts relied on by the plaintiffs. On the return day, the parties would appear before the Registrar, normally by solicitor.

If it then appeared that there was some dispute of substance, the Registrar would treat the summons as a summons for directions, order pleadings if necessary, and give appropriate directions, *e.g.*, for discovery, date and mode of trial, *etc.* Such a case (which would be quite the exception) would then come on for trial before the Judge in due course in the ordinary way. If, as would commonly be the case, it appeared that there was no dispute of substance, the Registrar would there and then pronounce a decree *nisi* of limitation, fix the time within which the decree in the absence of objection would become absolute, fix the time (normally the same) within which claims would have to be brought in, and give the appropriate directions as to advertisements. Normally it is thought that one insertion in each of three separate newspapers should be sufficient. At the expiration of the prescribed time, in the absence of objection the decree would automatically become absolute, and the Registrar would proceed with the hearing of the reference to assess the claims. In the absence of objection the decision of the Registrar would be final, and he would have power to direct payment out to the respective claimants. In the event of objection, the matter would be brought before the Judge upon motion in objection to the Registrar's report in accordance with the normal present-day procedure. The above procedure, which in the great majority of cases would save quite a considerable amount of costs, was fully considered and it was agreed to be desirable and workable.

Summary of Recommendations on Admiralty Procedure

37. We summarise our recommendations in this Part of our Report as follows :—

- (1) The procedure by way of originating motion is recommended in actions for distribution of salvage where the total award has already been agreed or fixed. (Paragraph 11.)
- (2) The procedure by way of originating summons is recommended in actions for limitation of liability. (Paragraphs 12 and 36.)
- (3) Certain additional information should be given in the Preliminary Act, but the statement of claim and defence should not be dispensed with as a general rule ; the parties should be free to dispense with them by agreement in appropriate cases. (Paragraphs 13 and 14.)
- (4) Reply or reply and defence to counterclaim should not be delivered without an order of the Court. (Paragraph 15.)
- (5) No change is recommended in the existing procedure for proving values in salvage actions. (Paragraph 16.)
- (6) Discovery of documents should be given automatically within a specified time after close of pleadings without the necessity of an order of the Court ; discovery should be given in the first instance by means of a list of documents, subject to the right of either party to call for an affidavit of documents within a specified time. (Paragraph 17.)
- (7) A summons for directions should be introduced into Admiralty actions and should deal with the questions of the witnesses to be called, admissibility of statements by witnesses, expert witnesses, date of hearing and similar matters. Such summons should be heard by a Judge who should make robust use of his powers. It is thought that the hearing of the summons for directions would be something in the nature of a pre-trial conference, which might be expected to lead to a notable reduction in the costs of the trial. (Paragraphs 21 and 22.)

(8) It is not recommended that the trial of salvage actions upon statements and documentary evidence alone should be provided for by Rule. It is suggested, however, that a summons for directions robustly handled by the Judge might be expected to produce a similar result. (Paragraph 23.)

(9) No departure is recommended from the present practice of having two nautical assessors. (Paragraph 24.)

(10) Nautical assessors should in general cases be drawn from the Elder Brethren of Trinity House, but it is recommended that, in cases of collisions between fishing vessels engaged in fishing, it should be competent for the Court to appoint assessors having experience in that class of vessel instead of Elder Brethren. (Paragraphs 25 and 26.)

(11) Some relaxation of the Rules is desirable to make it easier for the evidence of a witness to be taken by a Judge before trial. If it is necessary to examine a witness out of Court, the appointment of an examiner could be dispensed with. (Paragraph 27.)

(12) The Admiralty Short Cause Rules should be left in their present form. (Paragraph 29.)

(13) The Rules of the Supreme Court should be amended so as to render printing of pleadings, as well as other documents, no longer permissive, except by leave in special circumstances. (Paragraph 30.)

(14) Stencil-duplicating should be adopted as the standard method of duplicating documents for the Court of Appeal. (Paragraph 31.)

(15) The right of appeal should be the same as in the other Divisions of the High Court. (Paragraph 32.)

(16) The Admiralty Registrar's report as to damages should be final and should not need confirmation by the Judge, subject to the right of a dissatisfied party to appeal to the Judge on motion in objection. (Paragraph 33.)

(17) A simplified procedure in actions for limitation of liability is recommended, commenced by originating summons. The Registrar should have jurisdiction to deal with all cases where there is no dispute of substance. (Paragraph 36.)

PART III

CHANCERY PROCEDURE, COURT OF PROTECTION AND OFFICIAL REFEREES

Introduction

38. As in the case of Admiralty procedure covered by Part II of this Report, the matters dealt with in this Part are in general highly technical. The paragraphs which follow will, we are satisfied, be well understood by all who are experienced in, and concerned with, Chancery procedure, lunacy matters and the procedure before Official Referees. It has seemed to us, therefore, that further exposition would be out of place. As we have said in regard to Admiralty procedure, nothing in this Part of our Report should be taken as pre-judging in any way more general and important recommendations which will affect the Chancery as other Divisions of the Supreme Court but

which will be more fittingly dealt with in our Final Report. On the other hand, the suggestions which we make in this Part of our Report are independent of any conclusions on such larger matters.

39. To what is said above as regards the purely technical character of this Part of our Report there are, however, two exceptions :

- (a) as will be seen, we make certain suggestions for dealing with problems of construction affecting small estates in the Chancery Division, and
- (b) we make recommendations for transferring certain lunacy jurisdiction to the Chancery Division.

Both these matters are of some substance and importance. As regards the former, we have felt that a bold step is necessary to be taken in order to save in a certain limited number of cases a heavy burden of costs falling on a small estate. We realise that the change suggested is in some respects far-reaching, but we believe that the end achieved will make it generally acceptable. As regards the second matter (lunacy proceedings), we venture to think that the present procedure is over-weighted in so far as it requires members of the Court of Appeal to deal with problems which the Chancery Judges are by experience and practice well qualified to undertake. Though the number of cases involved will be small, we cannot see any good reason against a change which will, among other things, serve to prevent some disorganisation in the ordinary sittings of the Court of Appeal.

Practice in the Chancery Division

40. The early section of this Part of the Report is concerned with various suggestions made in regard to the practice in the Chancery Division, a number of which were contained in memoranda submitted to the Committee. Upon these matters we received oral evidence from representatives of the Law Society and from officials of the Lord Chancellor's Office. The Senior Judge of the Chancery Division was also good enough to attend one of the meetings and give us the benefit of his views on the subjects under discussion. In addition, written comments were obtained from the then Official Solicitor, the Public Trustee and the Solicitors' Managing Clerks' Association, as well as the then Chief Master of the Chancery Division who is referred to in this Part of the Report as the "Chief Chancery Master."

41. A number of matters considered were raised by the Law Society, and since many are comparatively non-controversial they may be disposed of first. It is convenient to deal with them by setting out in the following paragraphs (Nos. 42-60) the suggestions made and our recommendations upon these suggestions.

Representation orders

42. "That Order XVI, Rule 32, should be amended so as to enable the plaintiff to join one or more parties to represent a class or body of persons whose interests are the same, or alternatively, so as to enable the Court to appoint one or more persons to represent a class solely on the grounds of the saving of expense."

(a) In its present form Order XVI, Rule 32, gives the Court power to make a representation order only when a person having an interest in the proceedings cannot be ascertained or readily ascertained, or, though ascertained, cannot be found. The Rule was amended to this wording in 1945, prior to which date the saving of expense was also a ground for making such an order. The 1945 amendment has been the subject of a good deal of criticism and in our view the Rule is not now satisfactory.

(b) The importance of a representation order made under this Rule has been emphasised, in view of the fact that it has the effect of binding persons who are not represented before the Court, and who may, by the order made, be deprived of their rights in the matter.

(c) It is necessary to consider the position of a person who is a member of a class but wishes to be separately represented. It sometimes happens that such a person particularly wishes to have his own solicitor representing his interests, or, through his solicitor, the choice of his own counsel. It has therefore been questioned whether it is fair for that person to have to pay the cost of separate representation himself. It should be pointed out that, even where parties with the same interest engage different solicitors, one counsel is often instructed to represent them all, and in a great many cases there should be no practical difficulty in the solicitors concerned making appropriate arrangements for the briefing of counsel acceptable to all the persons concerned. Unless separate representation is discouraged in cases concerning the administration of estates, save in special circumstances, the result in practice may be that an unfair burden of all the added costs is in effect borne by the person or persons entitled to the residuary estate. Such a result is particularly striking when (as sometimes happens on a construction summons) a number of persons—say charities—each having a relatively small but identical interest, is separately represented. Only one may present any effective argument. Yet the tendency is for the brief fees of all to be on the same scale as those appropriate to the counsel briefed to argue the substantial point on the summons.

(d) Full consideration has been given to these various aspects of the matter and the following recommendations are made :—

(i) That Order XVI, Rule 32, should be amended by adding appropriate words giving jurisdiction to the Court or Judge to make a representation order, if so doing would, in the opinion of the Court or Judge, save expense and it was considered expedient to use this power, having regard, amongst other things, to the amount at stake and the difficulty of the point to be determined.

(ii) That in cases where several persons have the same interest and one or more such persons attend by separate solicitors and counsel from those already appearing, the Court shall direct only one set of costs of the hearing to be allowed and divided between the persons concerned unless the Court considers the circumstances justify separate representation.

(iii) That if the foregoing suggestions are acceptable, consideration should be given to the possibility of combining Rules 9, 9A and 32 of Order XVI into a single Rule to cover all cases.

(e) In this connection the Committee thinks it important to emphasise that in taxing the costs on an originating summons the Taxing Master should freely use his discretion as regards the amount of counsel's fees—*i.e.*, he should award fees appropriate to the significance of the respective points to argue which counsel have been briefed ; and should take into account other relevant considerations, notwithstanding that (as we have been informed is not uncommonly the case) the brief fees have all been marked at the same figure. We shall deal further with this particular matter in our Final Report.

(f) Attention is drawn to our recommendations with regard to construction summonses (paragraph 75, *post*) which have a bearing on this subject.

Originating Summons.

43. "That a single form should be used for all applications by originating summons."

(a) There is a number of forms of originating summons for various applications given in Appendix K to the Rules of the Supreme Court, and the Law Society suggested that only one form need be used. Having regard to the fact that in some cases there should be plaintiffs and defendants and that appearance is requisite and in others that appearance is not generally requisite, we are of opinion that there should, and need, be only two forms, namely :—

(i) A general form *inter partes* for which an appearance is requisite (Form 1A in Appendix K) ;

(ii) A form applicable for *ex parte* applications and for other cases not *inter partes*, for which appearance is not requisite. A suggested form for this purpose is set out in Appendix A to this Report.

(b) The effect of this recommendation will be to require appreciable alteration of the existing Rules, *i.e.*, where provision is made therein for a form of summons not *inter partes* to which an appearance is required.

Summons for foreclosure.

44. "That on a summons for foreclosure the requirement of a Master's certificate of the amount payable should be abolished."

It appears that in simple cases the certificate of the amount payable is sometimes dispensed with already and we consider that this is in proper cases desirable. In more complicated cases however, this would not be practicable, and we recommend that it should be in the discretion of the Court to dispense with a certificate in suitable cases. This would necessitate an alteration in the form of order made by the Court, *i.e.*, by making provision for dispensing with an account.

45. "That on a summons for foreclosure the power of attorney at present required if the plaintiff does not attend the appointment for redemption in person should be abolished."

(a) Where an appointment for redemption of a mortgage is made, a power of attorney authorising some person to attend on the plaintiff's behalf has to be prepared. The mortgagor hardly ever attends the appointment so that in the great majority of cases the power of attorney may be regarded as an unnecessary (though not a large) expense. The place for redemption is at a room in the Royal Courts of Justice and the plaintiff's solicitor has to allow the mortgagor one hour from the time of appointment, resulting in a considerable waste of time if the mortgagor does not attend. But if and when a mortgagor does attend he is entitled to receive a proper receipt endorsed on the deeds before he hands over the redemption money and such receipt can be given only by the mortgagee or by his attorney authorised on his behalf. We do not, therefore, think it right to recommend the general abolition of the power of attorney.

(b) We do, however, make the following recommendations :—

(i) That the place for redemption should be fixed either at the office of the plaintiff's (*i.e.* the mortgagee's) solicitor if this is within a reasonable distance (say five miles) from the Royal Courts of Justice, or at the Courts as at present, and that the order should provide that the

defendant (*i.e.* the mortgagor) should give seven days' previous notice of his intention to redeem on the date stated. This would give the plaintiff's solicitor an opportunity of having the deeds and receipt available for handing over.

(*ii*) That in the event of the defendant attending the appointment without having given the required notice, such attendance should be regarded as giving notice to attend at the same place and time in seven days, and that the period allowed for redemption should be treated as enlarged accordingly.

Inheritance (Family Provision) Act, 1938

46. "That in applications under the Inheritance (Family Provision) Act, 1938, the applicant should be at liberty to join as parties not only the personal representatives but also one of the principal beneficiaries, and that the Court should thereupon make a representation order."

(*a*) Upon this suggestion it appeared that the Chief Chancery Master was inclined to take the opposite view and to think that the existing Rules as to joining parties should remain as they are. On the other hand, the Senior Chancery Judge expressed the opinion that the applicant should be entitled to join such parties as he thought fit, including particularly the person out of whose interest any provision ordered by the Court would be taken.

(*b*) It appears that the Rules, as they now stand, were drawn at the time when the Act came into operation by the Chief Chancery Master under the direction of the then senior Judge of the Division, the late Mr. Justice Farwell; and the provisions as to joining parties were designed to keep down costs as much as possible. As things now are, according to the view of the Chief Chancery Master, only parties are joined whose presence is strictly necessary. If the applicant were free to join such parties as he thought fit, there would, in the Chief Chancery Master's view, be a likelihood that costs would be substantially increased in many cases by the joinder of parties whose presence was not strictly required.

(*c*) It appeared, however, from what was said by the Senior Chancery Judge, that the Act and the procedure will be reviewed by the Chancery Judges. In the circumstances the Committee is of opinion that the matter could properly be left to the discretion of the Chancery Judges.

(*d*) We are aware that a Committee has recently been appointed under the chairmanship of Lord Morton of Henryton to consider, *inter alia*, whether, and if so to what extent and in what manner, the provisions of the Inheritance (Family Provision) Act, 1938, ought to be made applicable to intestacies.

Administration actions

47. "Where a receiver has to give security, an affidavit justifying the solvency of the surety should not be required if the surety is an insurance company of repute."

We agree with this suggestion, subject to the Court or Judge having discretion to call for an affidavit.

48. "The form of affidavit in verification of a receiver's accounts should be shortened."

This suggestion is dealt with in paragraph 61(*h*) (*post*).

49. "The necessity for affidavits of fitness of a receiver should be abolished."

We recommend that a certificate of fitness by a reputable independent person who has known the proposed receiver for five years at least should be accepted in lieu of this affidavit.

50. "Claim lists, which are at present three in number, should be combined into one list in three parts and the practice as to 'nil' lists should be standardised."

(a) These claim lists are set out in Appendix L, Forms 6, 6A and 6B, to the Rules of the Supreme Court.

(i) Form 6 is a list of claims sent in by persons claiming to be creditors pursuant to an advertisement.

(ii) Form 6A is a list of claims by persons claiming to be creditors other than those sent in pursuant to advertisement.

(iii) Form 6B is a list of sums of money which may be due but in respect of which no claim has been received. Each list is in two Parts, Part I being claims which do not need proving and Part II claims which ought to be proved.

(b) We are of opinion that Forms 6 and 6A could be combined but that 6B should be preserved, although it need not be a separate document. Each list should be in two parts as at present. Where there are no claims, although a list is not required, one is often produced, and we suggest that a note should be put in the Annual Practice or other steps taken to make it clear that in such cases it is sufficient to make a short affidavit stating that no claims have been received. These recommendations would necessitate some alteration to Order LV, Rule 51.

51. "Instead of requiring a formal affidavit in the first instance it should be sufficient to prove a claim by a statement of facts and an affidavit should only be required if the statement of facts is not admitted."

There appears to us to be no need for alteration in the present procedure which is dealt with in Order LV, Rule 51. The affidavit referred to is not in fact always required.

52. "The affidavit in answer to accounts and enquiries should be shortened." This point is dealt with in paragraph 61(h) (*post*).

53. "Rules of Court should be framed exonerating the rest of the estate from the costs of an enquiry for a particular person or class of persons when it is clear that the number of *stirpes* is ascertained and the only question is whether a person entitled under a distribution *per stirpes* is alive or who are the persons who comprise the *stirpes*."

(a) In its memorandum the Law Society pointed out that these enquiries are troublesome and sometimes result in the whole of an estate being held up for a considerable time pending the clearing of a question which affects only one family or *stirps*. In cases where the number of shares is defined, the Law Society suggested that it should be possible without going to the Court to distribute the shares as to which no question arises; that this is at present difficult to do because the Court may direct that the costs of the enquiry are to be paid out of the estate as a whole. It was suggested that in such a case any costs relating to the ascertainment of persons entitled should be borne by the share in respect of which the doubt arises. These proposals pre-suppose that there is no doubt as to the number of *stirpes* involved.

(b) We feel there is some doubt whether it would always be fair that, because costs are involved in tracing a particular person or particular persons, that person or persons should bear the expense of the enquiry. For example,

if it happens that one member of a family has emigrated to Australia, is it necessarily fair—or within the presumed intention of the deceased—that by reason of that fact and the extra cost incurred, the shares of his Australian beneficiaries should be smaller than the share of the rest of the beneficiaries? It might well be thought that such additional costs ought to be shared by all the beneficiaries of the estate.

(c) We make the following recommendations (with which the representatives of the Law Society who attended before us expressed agreement):—

(i) It would not be desirable to introduce a general Rule authorising in all cases and without application to the Court the immediate distribution of shares on which no question arises or appears to arise and without regard to the facts affecting other shares.

(ii) Subject to the above, where there is an application before the Court, Rules 14B and 14C of Order LXV appear to cover the point, particularly having regard to the decision in *Public Trustee v. Phillips* (referred to in 186 *Law Times Journal*, page 462) in which it was held that the Judge's discretion under Rule 14B is not displaced by a direction in the will to pay administration expenses out of residue. A form of order approved by the Chancery Judges is set out in [1945] W.N. 68.

(iii) Practitioners should be made aware of the fact that under the above Rules they can always apply for an order for partial distribution or for distribution of particular shares, or for the variation of an order already made.

(iv) There seems to be no reason why the phrasing of the provision for the costs of an enquiry in Rule 14C should not be brought into line with Rule 14B.

Actions for specific performance

54. "That the provisions of Order XIVA should be extended to specific performance actions where the defendant has failed to appear or where the contract is an oral agreement supported by acts of part performance."

Order XIVA provides a procedure for obtaining summary judgment for specific performance, but it can only be used for claims founded on a contract in writing and when the defendant has entered an appearance in the action. We see no reason why the scope of this Order should not be extended as suggested.

Actions for accounts

55. "That all actions for accounts should be dealt with under Order XV."

(a) Order XV provides a summary method for dealing with applications for an account, but if the right to an account under the Rule is not clear the action has to proceed to trial. In explaining their proposal the Law Society suggested that, if all applications for accounts were dealt with under Order XV, it would be possible, if the right to an account were disputed, to deal with the matter on affidavit evidence filed in support of the application without the necessity for a trial or pleadings. The Law Society representatives pointed out that a plaintiff would often not make use of Order XV because he could not tell with any certainty whether the defendant intended to dispute any liability.

(b) The Chief Chancery Master expressed the view that whilst simple accounts could be dealt with under Order XV it would be impracticable in some cases, e.g., partnership, administration or trust accounts.

(c) It does not appear to us that so wide an application of Order XV as is suggested is practicable, particularly in the cases referred to by the Chief Chancery Master. The advantage of extending the originating summons procedure will be dealt with in our Final Report ; and in the meantime we do not make any recommendation for altering the practice under Order XV. In this connection we would draw attention to the fact that Order XXXIII, Rule 2, gives the Court power to direct an account to be taken at any stage of the proceedings.

Summons to proceed

56. "That summonses to proceed should be abolished."

(a) In their memorandum the Law Society explained that whenever an order is made in the Chancery Division which necessitates further steps being taken, it is necessary to issue a summons to proceed on that order and the Law Society suggested that there is no necessity for such summons and that it should be sufficient to obtain an appointment in chambers and to give notice thereof in the usual way by Rule.

(b) It seems clear to us that the other side must generally be given some notice of an appointment in chambers and, if that be so, the question whether this should be in the form of a summons or notice may be one of court fees only. We do not make any recommendation on this point.

Change of parties

57. "That a change of parties should be dealt with by the Master without a formal summons on evidence of the devolution of the interest."

We recommend that an application for change of parties should be dealt with by the Master on affidavit without a formal summons subject to the proviso that the Master should have discretion in appropriate cases to direct that a summons or notice should issue. This is the practice already adopted in the King's Bench Division.

Garnishee proceedings

58. "That the procedure in the King's Bench Division in respect of garnishee proceedings should be adopted in the Chancery Division whereby the order nisi is obtained *ex parte* on affidavit without a summons."

We agree with this proposal.

Payment out of Court

59. "That there should be no limit on application for payment out of Court on summons to a Master."

(a) At present applications for payment out of a fund in Court in the Chancery Division can be made by summons only in cases where there has been a judgment or order declaring the rights of the beneficiary, or where the title depends only upon proof of the identity, *etc.*, of any person, or the fund does not exceed £1,000. In other cases it is necessary to apply by way of petition. We recommend that the limit should be removed in Chancery matters, and the provisions of Order LV, Rule 2(1) and (2), amended accordingly, but we think, having regard to the complexity of many payment out cases and the liability of the Consolidated Fund in case any mistake is made, that it should be left to the Chancery Judges to decide and direct the Masters what cases should be dealt with by the Judge in person.

(b) Reference is also made to this subject in its application to District Registries in paragraph 68 (*post*) of this Report.

Drawing up of Chancery orders

60. "That the solicitor having the conduct of the action should be permitted to draft orders made by a Master in the Chancery Division and to copy all draft Chancery orders, whether made by a Master or a Judge, and to engross such orders."

(a) At the time when this suggestion was made, there was evidence of considerable delay mainly due to the time taken by the Scrivenery Department to deal with the typing required. In the perfecting of a Chancery order the Scrivenery Department has to type a copy from the Registrar's draft, and when the final form of order has been settled between the parties and the Registrar, the Scrivenery Department has to type the engrossed copy. At the time above mentioned, each of these operations was said to occupy approximately two weeks; but it has since appeared that the situation has greatly improved, though the Law Society have stated that the delay cannot be said to have been entirely eliminated. From the enquiries we have made, it seems clear that in so far as delay has occurred, or may occur, it should be attributed to staff difficulties. The Lord Chancellor's Office is responsible for recruiting the typing staff and the witnesses from that office who attended before us explained the difficulties they were experiencing in recruiting typists, largely owing to the fact that the wages offered by the Treasury compared unfavourably with commercial rates. In 1939, the number of typists in the Scrivenery Department was 68; today it is approximately 50. A comparison was made by the Committee of the rates of pay appropriate to typists in the Civil Service and in commerce and this comparison lent support to the opinion of the witnesses above mentioned. There has, however, very recently been an advance in the relevant Civil Service salaries, and we hope as a result that the difficulties referred to will be found to disappear.

(b) We have considered the suggestion of the Law Society that solicitors should be permitted to draft, copy, and engross Chancery orders. We are of opinion, which is endorsed by the evidence we have received and has been since accepted by the Law Society, that, having regard to the complicated nature of many Chancery orders, it would not be practicable to allow the solicitor to draft the order. This is done in the Chancery Registrar's office and is highly specialised. Similarly the draft is copied by a typing staff who have by experience become skilled in this task, including the deciphering of the Registrar's notes. Once the draft has been typed, however, it is in an easily readable form and assuming there is not a great deal of alteration during the settling stage any competent typist should be able to type the engrossed copy. We therefore recommend that it should be made a regular practice to allow solicitors to prepare the engrossed copy if they so desire, care being taken to ensure that the quality of paper used is appropriate for record purposes. Also, in appropriate cases, the Registrar or his Principal Clerk might have discretion to allow the solicitor to type the drafts when they have been prepared in the Registrar's office. We have to point out that this recommendation may have the effect of the solicitor's bill being liable to increase by the charge for such copying, but against this must be set the advantage of the saving in time.

(c) As regards the copying of orders by solicitors it is to be borne in mind that long schedules would have to be carefully checked so that it appeared doubtful whether much time would be saved having regard to the staff required for checking.

(d) It seemed to the Committee that the matter was not one upon which it could make much useful contribution except to emphasise the desirability of discouraging applications for numerous copies of the orders.

Accounts in the Chancery Division

61. The above concludes the non-controversial matters raised by the Law Society. Their memorandum also included the following :—

“That there should be established in the Chancery Division an accounts branch to which all accounts (*e.g.*, receivership accounts, accounts in debenture-holders’ actions or partnership actions) should be referred and that in this connection a Committee of Accountants should be set up to investigate and report upon the method of accountancy adopted in the Chancery Division with a view, if necessary, to its modernisation and standardisation.”

(a) This matter appeared upon the face of it to be the most important and far-reaching—and also likely to be the most controversial—of the recommendations made by the Law Society. The Chief Chancery Master in his memorandum stated that in his opinion the establishment of an accounts branch in the Courts was unnecessary and impracticable.

(b) We accordingly invited one of our members, Sir Richard Yeabsley, F.C.A., to make an investigation on our behalf and report to us. This he did and advised (upon the main questions) that having regard to the diversity of the purposes for which accounts ordered by the Court were required, no single form of account to cover all purposes could be devised; and further that there was no point in setting up an accounts branch as had been suggested. These general conclusions were communicated to the Law Society (with whose representatives we had a further meeting after Sir Richard Yeabsley’s report) and were accepted by them. On the question of rent accounts and receivers’ or receivers’ and managers’ accounts generally, it was also agreed that there was no advantage in amending the form of account now in use, but in appropriate cases there would be an obvious advantage in the grouping of certain items. The extent to which such grouping should take place must be a matter of common sense according to the circumstances of the particular case. We were informed that there was in fact no rigidity as to the extent of the detail but since it is possible that there may be, or may be thought to be, some divergence in the practice of the different chambers, it seems desirable that the general principles—including the latitude allowed in accordance with common sense—should be made known.

(c) This left only the question of the form of account to be used in answer to the requirements of a common administration decree. In order to comply with the requirements of the decree the executor or administrator has to prepare (so far as is material to the present point),

- (i) a schedule of the estate at the time of the death,
- (ii) an account showing the subsequent dealings with the estate,
- and
- (iii) a schedule of the estate outstanding.

Of these, under the existing practice (*i*) and (*iii*) are appended to the affidavit in answer and so are permanently recorded. The form of the account, which is separate from and exhibited to the affidavit, required by the Rules—see Appendix L to the R.S.C., Form No. 12—is admittedly of the simplest character and has been in use for a very considerable time. It was suggested that some alteration might be made whereby the two Schedules and the account could be embodied in one document, and in the course of the discussion the Law Society urged that there should be substituted for, or permitted as an alternative to, the court form in Appendix L the form of a cash and investment account illustrated in Chandler's well known text book on Trust Accounts. It was strongly represented to us that this form of account, if somewhat more elaborate in character, was one to the use of which all solicitors and their managing clerks were trained.

(*d*) As to the first point we think that it may be possible to effect an improvement by amending the form of affidavit verifying accounts and answering enquiries—Appendix L, Form No. 11—and we propose to give consideration to this when dealing with the subject of administration actions in general, as indicated in paragraph 64 hereunder.

(*e*) The second point led to considerable discussion and to divergence of view. Ultimately a meeting was had with all the Chancery Masters and their Principal Clerks (who are individually most intimately concerned with those who present accounts to the Court in answer to administration decrees and with checking such accounts). It appeared from the meeting that the Masters and their Clerks appreciated the desirability of giving consideration and, where proper, effect to suggestions on this matter put forward by such a body as the Council of the Law Society; but they were all of opinion that, on its merits, the existing Court form of account was both simpler and shorter and that accounting in the form suggested would not in fact save time in chambers. It seemed also clear that if the suggested form of accounts were to be officially accepted in substitution for, or as an alternative to, the existing form, the new form would have to be precisely specified in the Appendices to the Rules of the Supreme Court.

(*f*) At the end of the discussion it seemed to us that though weight must be given to the request, coming as it did from the Law Society, it had not been shown that (whatever its other advantages) the present proposal would save any costs. We do not, therefore, make any recommendation in regard to it. Our burden has been lightened by the knowledge that, if accounts are prepared in the form advocated by the Law Society, such accounts are in fact accepted in chambers though not strictly complying with the forms in the Appendices to the Rules of the Supreme Court. We suggest in the circumstances that if the Law Society feel strongly upon the matter—particularly if they feel, notwithstanding what is said above, that their proposal might save costs—they should approach the Chief Master with a view to further discussion with him and his colleagues and (if any new or alternative form is thought appropriate) agreement on the specimen form to be incorporated in the Rules.

(*g*) As already indicated we do not in all the circumstances feel it to be within our province to pursue the matter further.

(*h*) As regards the form of affidavit to be sworn by a receiver or to be sworn in answer to accounts and enquiries, we think, in view of what is said above in this paragraph, that there can be no change in

the essential characteristics of the affidavit ; but we agree that the receiver's affidavit could with advantage be appreciably shortened. The form should be one settled or approved by the Chancery Masters. As regards the form of affidavit in answer to accounts and enquiries, consideration is (as appears from the succeeding paragraphs) to be given to the form of administration decree, and the form of the affidavit must, of course, largely depend on the form of the order.

Administration proceedings

62. In the course of our considerable discussions on the form of accounts required in an administration action it became clear to us that the form of the administration decree itself was deserving of examination. The jurisdiction of the Chancery Court to administer estates—or to execute trusts—is a very useful one of ancient lineage. And in certain cases the making of an administration order is extremely useful. One effect is that—like a winding-up order in regard to limited companies—it enables the Court making the order to control and deal with all pending proceedings against the estate and thenceforward such actions may be stayed or transferred. Another great advantage is that it enables the Court by serving notices upon them to bind all members of classes of creditors or beneficiaries—which may be very useful.

63. On the other hand the making of the order suspends the powers of the executors, administrators or trustees, so that unless special orders of dispensation are made, for every subsequent transaction by the executors, administrators or trustees, the leave of the Court has to be obtained. Where, e.g. in a will, elaborate trusts are established, the result may be that an estate may be subject to strict administration by the Court for a long period of time. Things have undoubtedly much improved in this matter since Charles Dickens wrote *Bleak House* ; but there remains, in our judgment, room for further improvement. In particular it seems to us that once the main object for the making of the decree has been achieved, the administration proceedings should come to an end so as to restore all necessary discretion to the executors, administrators or trustees.

64. The question—having regard to the long history which lies behind it—is one of great complexity and highly technical. One of our members has undertaken to prepare a memorandum on this question including suggestions for amendment to this procedure ; and his memorandum will be submitted (after consideration by members of the Committee) to the Chancery Judges.

65. At this stage we can only note the matters above stated ; at present it does not appear that we can make any useful recommendations.

Documents submitted to the Court for construction

66. The following suggestion was submitted for our consideration :—

“ In the case of wills, deeds and other similar instruments submitted to the Court for construction, provided that the original is legible, it should not be necessary to furnish a copy as well as setting out *in extenso* the relevant extracts in the supporting affidavit. Either one or the other should be sufficient. If the relevant extracts are quoted in the supporting affidavit a copy of the whole document is unnecessary. If a copy of the document is furnished, it cannot be necessary to quote extracts from it in the supporting affidavit, and the practice of doing so should be penalised in costs.”

(a) In general we accept this view but desire to make two observations thereon:

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(i) The original of a document may not be a convenient one for the Judge to use. For instance an old deed may be engrossed on skin, or a photostat copy of probate may be produced. The Judge would find it difficult to make notes on such a document as he often desires to do.

(ii) Some actions, particularly in the Chancery Division, remain before the Court for many years, and there have been occasions when an original document is no longer in existence. In such cases the only record is in the extracts quoted in the affidavits which remain on the court file or in the Record Office. It would seem therefore that, in cases likely to remain before the Court for some considerable time, it would be an advantage to quote in the affidavits the material portions of the relevant documents. On the other hand, in a case dealing with a short point in a will or trust instrument, or where the estate is a small one, it should be sufficient to indicate in the affidavit the relevant paragraphs of the will.

(b) In the circumstances, it does not seem possible to frame a specific direction which will cover all cases. It seems to us that the proper course is to accept the proposal for general application and to say that *prima facie* the costs of copying into an affidavit documents or extracts from documents which are also exhibited should not be allowed; but to add a proviso to the effect that exception should be made to the general rule when the circumstances are such as those above indicated or as otherwise justify departure from the general rule.

District Registries of Liverpool and Manchester

67. In the memorandum submitted by the Association of County Court Registrars, certain points on Chancery practice were raised. These points were commented on in a memorandum prepared by the District Registrars of Liverpool and Manchester.

Payment out of Court

68. The Registrars point out that under Order XXXV, Rule 6A, an order for payment out of Court of a sum exceeding £50 in a Chancery action pending in their Registries can be made only by a Judge in chambers. In District Registry actions this causes considerable inconvenience and expense because all such applications have to be adjourned to the Judge in chambers in London. The Chancery Masters in London actions now have jurisdiction up to £1,000 and we have recommended that this jurisdiction should be made unlimited. We see no reason why the District Registrars should not have the same jurisdiction as the Chancery Masters in this respect (as they already have in most other respects). We recommend accordingly. It should follow that the District Registrars will be governed by any directions which the Chancery Judges may give pursuant to the power we have suggested in paragraph 59 (*ante*).

Adoption Act, 1950

69. Applications under this Act in the High Court are made in the Chancery Division and until the passing of the Adoption of Children Act, 1949, were dealt with exclusively by the Chief Master before adjournment to the Judge in person. As a result, the District Registrars say they were and are precluded from dealing with such applications, although County Court Registrars can deal with applications under the Act when brought in the county court.

70. We have inquired the reason why the cases were originally dealt with by the Chief Master and the answer is that the practice was due to historical accident and did not appear to rest upon any deliberate intention aimed at securing uniformity or based on the great importance of the cases from the point of view of adopters and the children adopted. The requirements of the Adoption of Children Act, 1949 (now repealed but re-enacted in the Adoption Act, 1950), are stricter and more extensive than theretofore and placed an increased burden on the Chief Master. By Direction of the Chancery Judges, cases are now divided between one Master of each of Groups A and B of the Chancery Division. It is considered better to limit the handling of the cases in this way. Otherwise the Official Solicitor, who under the Rules now normally acts as guardian *ad litem* to the infant concerned in High Court cases, would be put in considerable difficulty. If the District Registrars were empowered to deal with High Court applications, it is probable that the Official Solicitor would be unable to perform his functions, seeing that in the preliminary stages he or his representative would have to attend before the Masters and the various District Registrars.

71. There seems therefore no reason on the ground of saving costs or otherwise why the present practice should be changed. Moreover, we venture to think that the point taken by the District Registrars is based on a misapprehension. So long as the order for adoption has to be made by the Judge (and having regard to the nature and importance of the subject matter we think this is desirable) the case would necessarily have to come to London, so that there would be nothing gained, so far as we can see, in allowing the District Registrars to deal with the preliminary stages.

72. In connection with cases arising under the Adoption of Children Acts, another point was drawn to our attention by the Solicitors' Managing Clerks' Association, namely that the Official Solicitor required a personal undertaking by the solicitor for the applicant adopters before he would consent to act. It was objected that this personal liability ought not to be put upon the solicitors. Since the point was raised, the practice with regard to the appointment of a guardian *ad litem* has been altered by the Adoption of Children (High Court) Rules, 1950. Rule 5 provides that in all cases the Official Solicitor shall be the guardian *ad litem* of the infant if he consents to act and an undertaking to pay his costs is given by the applicant in Form 2 scheduled to the Rules. This Form is framed as a personal undertaking by the applicant's solicitor, unless the applicant is acting in person, in which event the applicant is himself required to sign. By Rule 6, if the Official Solicitor does not consent to act or if the applicant desires that some other person should be appointed to act as guardian, then the originating summons must ask for the appointment of a guardian *ad litem* and the Judge may then appoint such person as he thinks fit.

73. The Official Solicitor, who is responsible to the Treasury for his expenditure, has taken the view, and in our opinion quite properly, that he should not be put into a position whereby he might be compelled to take proceedings against the applicant to recover his costs. If the applicant's solicitors are not willing to give the undertaking, then the Official Solicitor requires a cash deposit before consenting to act and would in practice require this to be done in the event of the applicant acting in person. In our view there is no real hardship or objection in requiring the personal undertaking of the solicitor, who can always require his client to put him in funds to answer the undertaking or alternatively to make the deposit.

74. By reason of the requirements of the present procedure the costs of the Official Solicitor have been somewhat increased. We are informed by him that at the present time he estimates that, in an average case, his costs will be about £15 15s.

Construction summonses

75. Applications are frequently made to the Court for construction of a will. Such wills may be inartistically drawn, difficult questions of law may be involved and many possible interests may be affected. All these interests have to be represented in Court so that the Court's conclusion may have a sufficiently binding effect. As a result, five or six counsel may be engaged to argue on behalf of the interested parties although in many cases such arguments can have little hope of success. When the estate is small the total costs of an application such as this appear often disproportionate and are in effect borne by the residuary legatee, not uncommonly the widow or children. We have, therefore, given consideration to the possibility of avoiding this result in appropriate cases. We have considered the following scheme, which has met with the approval of those who have attended before us, and we recommend it accordingly :—

- (a) In the case of any will (or any other document) the executors or trustees, or any other interested person, should be entitled to issue a summons, raising the questions for determination—if by an executor or trustee, *ex parte*—if by any other person, then the executor or trustee shall be the only respondent.
- (b) The summons should be supported by an affidavit proving the material facts and should be accompanied by a copy of the will (or other instrument) and by any opinion of counsel obtained by the executors, trustees or other issuing party.
- (c) On the appointment before him, the Master would decide whether the case was one which ought to be adjourned into Court for argument in the ordinary way or whether it was appropriate for adjournment to the Judge in chambers under the proposed scheme.
- (d) In the former event the summons would be first adjourned for the necessary parties to be added, and for filing any evidence by them.
- (e) If the case was, in his opinion, appropriate for the purpose (*e.g.*, if the estate was a small one or the questions of a really simple character), the Master would adjourn the case to the Judge in chambers without the addition of any further parties.
- (f) The Master should be entitled to direct whether the case was one in which counsel should attend and whether on any particular point any other party should be served with the summons. The Master should also be entitled to adjourn under this proposal some only of the questions raised by the application.
- (g) On the summons coming before the Judge, the Judge would, if he thought the case a proper one for disposal under the present suggestion, make an order authorising the executors or trustees to distribute the estate or execute the trusts upon the footing of his decision as set out in the order.
- (h) In such a case the Judge would be empowered to make an order, operative immediately or at some future specified date, or he could postpone the making of or drawing up of the order. In any event he could (and, when it was known that there existed substantial interests liable to be adversely affected, he normally should) direct that such persons as he thought fit should be served with notice informing them of the order or proposed order. Such notice would provide that the persons served could (whether or not at their own risk as to costs) attend the adjourned hearing or, if the hearing was not adjourned, give notice to the applicant within a specified time of their desire to be heard in opposition to the order or proposed order. On receipt of such a notice the applicant would restore the summons to

the Master's list on notice to the parties including the persons giving notice of opposition. Meanwhile, the operation of the order would be suspended. In cases where such notice had been given to all the persons having an adverse interest, the final order could be made in the form of a declaration of rights binding on all persons interested.

(i) Alternatively, the Judge would be entitled to adjourn the case wholly or partly for the addition of parties or for argument in Court, or to make such other order as he thought proper in the interest of justice.

76. As a note to the suggestions in the preceding paragraph we add the following :—

(a) In framing the above suggestions regard has been had to the general principle that orders declaratory of rights ought not to be made adversely to any person unless that person has had an opportunity of stating his case. On the other hand there can, we feel, be no doubt that if encouragement is given to everyone who has a possible or even spectral claim to come and argue that claim, the practical effect of what is suggested will be largely thrown away. It is doubted whether putting such a person in peril as to costs is likely to be very effective or (if so) very fair. It would not be right to prevent a claimant from preferring what might be a proper case for fear of costs (which fear in the class of case we have in mind might be very real); on the other hand, having regard to existing law and practice, it might be difficult, save in frivolous cases, to do other than order costs to be paid out of the estate.

(b) If the mischief to be remedied is to be effectively remedied, the step to be taken must be sufficiently far-reaching. It is necessary to emphasise that the typical case we have in mind is that of a really small estate, a will drawn inartistically and the point not difficult of solution but reasonably requiring the authority of a Court order. Where there are infants concerned, it is not practicable to achieve what we have in mind if those infants are to be bound by the intervention of guardians *ad litem*. Where, therefore, an order binding on all parties cannot be made, the effect of the order will be (in addition to substantial saving of cost) merely to protect the executors or trustees; a beneficiary who wishes to challenge the validity of what has been done can follow the assets into the hands of the actual recipient or (in the case of a will) may be able to sue the recipient personally for the return of the money paid to him.

(c) It is necessary to emphasise that the effectiveness of what we have suggested depends upon the good sense and judgment of the Chancery Judges who have had great experience in this class of case and who may be relied upon (we think) to exercise the jurisdiction properly and fairly. It should be added that the jurisdiction will, save in most exceptional cases, only be exercised in regard to questions presently arising, *i.e.*, it will not be exercised so as to answer in advance problems which may or will only arise in the future. Such problems can be dealt with when they do arise.

(d) It is appreciated that the number of cases in which an order would be made in effect on the *ex parte* application of the trustees would be small. On the other hand, those would be cases in which, as a result, a small estate would have been saved a considerable sum of costs which would otherwise have been incurred for no substantial purpose—or in which some point of no real difficulty would have been disposed of.

(e) It is also appreciated that a real burden would be imposed upon the Judges in reading such cases and perhaps looking up some law. To meet this, the necessary time would have to be afforded to them.

(f) In connection generally with the above it was agreed that, in so far as they do not do so, the Taxing Masters should discriminate in allowing fees between counsel engaged on points of substance and those engaged to argue isolated points involving comparatively little difficulty. (This suggestion is also made in paragraph 42(e), *ante*).

(g) In connection further with the above we have been impressed with the view that in some cases the general rule of throwing all the costs of the summons upon residue may involve hardship and unfairness to the residuary legatee—not infrequently the wife and children of the testator; e.g., where questions arise between persons competing for legacies, it appears to us that there may be a strong case, at least sometimes, for charging the costs of these questions to the legacies or the fund to provide the legacies. We recommend that this matter might usefully be considered by the Chancery Judges.

Distribution of estates

77. Section 27 of the Trustee Act, 1925, makes provision for the trustees of a settlement or of a disposition in trust for sale or personal representatives to give notice by advertisement in the *Gazette* and in certain newspapers of their intention to make conveyances or distribution amongst the persons entitled to any real or personal estate with which the trustees, *etc.* are dealing, and requiring any person interested to send particulars of his claim to the trustee, *etc.* within a certain time. At the expiration of the time fixed by the notice the trustee, *etc.* may convey or distribute the property having regard only to the claims of which he has received notice and shall not be liable to any person of whose claim no notice has been received. Although this section should enable a trustee to act without applying to the Court, it in fact directs that the advertisement shall be such "as would, in any special case, have been directed by a competent Court of jurisdiction in an action for administration." As a result, application is often made to the Court in such cases to ascertain what sort of advertisement the Court would direct in such a case, also asking the Court to fix the time within which claimants should give notice. These applications have given rise to a form of order which has to be made and which is usually known as a "*re Letherbrow*" order, *i.e.*, in effect, an order for an enquiry what advertisement would have been directed by the Court in an administration action (see [1935] W.N. 34). Certain suggestions have been made for amending the section to obviate the necessity for applications of this kind. There will be found in Appendix B to this Report the section of the Act and the suggested amendments which we consider would make the section of more value. The suggested proviso to sub-section (2) will, subject to safeguards, enable trustees or personal representatives to distribute an estate or trust funds not exceeding £2000, notwithstanding that there may be unknown or untraceable claimants and without the expense and delay of an enquiry by the Court.

Wards of Court

78. The difficult and long-standing problem of Wards of Court was considered by the Committee in the light particularly of the recommendations of the Denning Committee.* We had also the advantage of discussing the matter with the Senior Chancery Judge and agreed with him the changes in the law and practice that were desirable. There has since been passed the Law Reform (Miscellaneous

* Final Report of the Committee on Procedure in Matrimonial Causes (Cmd. 7024), para. 34 (ix).

Provisions) Act, 1949, section 9 of which, together with the new Rule (R.S.C. (No. 3) of 1949), has given effect, save in one respect, to these changes. The one outstanding matter for which we hope that provision will be made in some future legislation is that in our judgment the Court should have power in appropriate cases to order the child's mother to contribute to its maintenance. We think that the reason for giving such power to the Court in present-day conditions is obvious and requires no further exposition, and we recommend accordingly. We add that we are of opinion that the procedure of wardship in the Chancery Division can and does render most useful services to children—with the sanction that the Court has of committal for contempt—and should be retained.

Powers and duties of Chancery Masters

79. We considered a number of further suggestions with regard to the amendment of the powers and jurisdiction of the Chancery Masters and we had the assistance of the Senior Chancery Judge who gave evidence before us and expressed his agreement to the recommendations we make below.

80. It was suggested that some limitation should be placed on the right of a party to adjourn any matter from the Master to the Judge but the Committee was unanimously against any limitation. Such a change could not in our opinion be justified merely on the ground that in some cases the costs of an adjournment would be saved. It must be remembered that the Chancery Master, however important the functions he discharges, is always acting as a deputy for the Judge.

81. While we were against fettering the right of any party to adjourn a matter from the Master to the Judge, we feel that it would be possible to discourage unnecessary adjournments by instituting a stricter practice with regard to costs of adjournments than obtains at present. The present practice of the Court in relation to the costs of an adjournment is not uniform. It frequently happens, however, that a Master may make an order on an application and direct that the costs of the application be costs in the action. The unsuccessful party may ask for an adjournment to the Judge but on the hearing of the matter before him, though the Judge refuses to disturb the Master's order, he makes an order that the costs of the whole application (including the costs of the adjournment) be costs in the action. This practice encourages adjournments to the Judge by unsuccessful parties and even leads solicitors to ask for an adjournment in the belief that otherwise they have not done their best in the interests of their clients.

82. We believe something can be done to mitigate against unnecessary adjournments (though we recognise it will have very little effect in the heavier type of case) by altering the practice with regard to the costs of an adjournment to the Judge, so that normally the party asking for an adjournment, who is unsuccessful before the Judge, will have to pay the costs of the adjournment in any event. We think this could best be done by adding a Rule to the Rules of the Supreme Court to the effect that where a party asks for an adjournment to the Judge after the Master has indicated the order he proposes to make and he subsequently fails to disturb the Master's proposed order on the adjournment, he shall, unless the Judge otherwise orders, pay the costs of and occasioned by the adjournment. A Rule to that effect would fully preserve the Judge's discretion in any particular case while laying down the general practice.

83. It is to be observed that in many cases the matter is adjourned to the Judge without any previous decision on the merits by the Master. This may happen because in the opinion of the Master it is a matter which the Judge ought

to decide or sometimes because each party indicates that if he is unsuccessful he will ask for an adjournment so that the Master may feel it is better to adjourn the matter to the Judge without further argument. In suggesting the new Rule above, we are not intending in any way to cut down or alter this practice which in proper cases is both useful and cost saving.

84. There is one further alteration to the existing practice on adjournment from Master to Judge which appears to us could be usefully made. Under the present practice there is no time limit within which a party requesting an adjournment is bound to set the matter down for hearing before the Judge after adjournment into Court. These adjournments are sometimes requested solely for the purpose of gaining time. We accordingly recommend the following alteration to the present practice, *viz.*, that where, after argument before the Master, an adjournment is requested, the Master, if he adjourns into Court, should endorse his proposed order on the summons and if the person requesting an adjournment to the Judge fails to set it down within the prescribed time (we suggest five days) then the Master's proposed order should stand as the order, and the right to an adjournment to the Judge is lost. If, however, the Master decides that he ought to adjourn the matter to the Judge without argument he should endorse the summons and then either party should be at liberty to set the summons down for hearing before the Judge.

85. We may add that, if the practice be adopted in the Chancery Division whereby the Master endorses his proposed order on the summons, it will have this additional advantage that in dealing with costs of the adjournment under the proposed new Rule (see paragraph 82 above) the Judge will have before him in convenient form the exact order which the Master proposed to make; at present he has to rely on endorsements on counsel's briefs, which do not always agree, or on the recollections, sometimes differing, of the solicitors who appeared before the Master.

Extension of the Masters' jurisdiction in chambers

86. By Order LV, Rule 15, the Judges of the Chancery Division have power to order what matters shall be determined by their Masters, subject to the right of any party to bring any particular point before the Judge, except summonses—

- (a) for the determination of the construction of a document or any question of law;
- (b) for the appointment of a provisional liquidator;
- (c) for leave to serve out of the jurisdiction.

But this general power is limited by Rule 15A which is in the following terms:—

“ No order appointing a new trustee, or for general administration, or for the execution of a trust, or for accounts or inquiries concerning the property of a deceased person or other property held upon any trust or concerning the parties entitled thereto, and no vesting order or order appointing a person to convey any land or release a contingent right to which any land is subject or to make or join in making any transfer of stock or of a share in a ship registered under the Acts relating to merchant shipping shall be made except by the Judge in person :

Provided that this Rule shall not apply to an order for general administration in a creditor's action for administration when there is *prima facie* evidence that the estate is insolvent.”

87. It seemed to us that Rule 15A has, with the passage of years, become out of date and unduly restrictive and necessitates adjournments to the Judge in cases where the Master ought to be permitted to make an order. For example,

there are many cases where it is plain on the evidence that an administration order must be made or that the trusts of the settlement must be executed. We see no reason why in straightforward cases orders should not be made by the Master. Again, many applications are made to the Court every year for vesting orders where a trustee has gone abroad or is under disability, which could well be made by the Master. Nor do we see any reason why a Master should not make an order for the appointment of a provisional liquidator (if such cases now ever arise in the Chancery Division) or for leave to effect service out of the jurisdiction, a power already possessed by Masters of the King's Bench Division.

88. On the other hand, under the Rules as they stand the Master could make an order under section 57 of the Trustee Act, 1925, which is nearly always a matter of delicacy and some complication, or under section 169 of the Law of Property Act, 1925, now made obsolete by the Married Women (Restraint on Anticipation) Act, 1949, lifting the restraint upon anticipation annexed to a married woman's interest, which again is a difficult and complicated matter. In fact, the Masters never do make orders under these sections but invariably adjourn them to the Judge.

89. It must be remembered that the relationship between the Judges and the Masters is a close and personal one; the Master sees the Judge taking the non-witness list every Monday when the Judge is disposing of business in chambers, and we think that the Rules for the disposal of business in chambers should be made much more flexible. It is, in our view, impossible satisfactorily to define by Rule what business can be dealt with by a Master and what must be dealt with by a Judge. Some things obviously must be dealt with by the Judge in person, *e.g.*, matters affecting the liberty of the subject. We think the better plan is to leave it to the Judges of the Chancery Division to give directions from time to time to the Masters as to what matters can be dealt with by the Master and what must be referred to the Judge. Of course in any case of difficulty or doubt the Master, even though empowered to deal with the matter, would, as under the existing practice, refer the matter to the Judge.

90. The Senior Chancery Judge entirely agreed with the above views and pointed out that the Judges had complete faith in their Masters and could rely on them to refer matters to the Judge whenever desirable. He also approved the proposed amendment to Order LV set out below. We accordingly recommend that Order LV be amended as follows:—

(a) Substitute for Rule 15 the following:—

“ 15.—(1) In the Chancery Division the Masters shall, subject to the right of the parties to adjourn to the Judge in person without any fresh summons for the purpose, have full power to transact all such business and exercise such authority and jurisdiction as under the Act or these Rules may be transacted or exercised by a Judge at chambers, other than such proceedings or matters as the Judges of the Division may from time to time direct shall be heard and determined by a Judge in person:

Provided that summonses under Rule 3 of this Order, the object of which is to obtain the opinion of the Court or a Judge upon the construction of a document or any question of law, shall be brought before the Judge in person.

(2) Every order made in chambers which shall not have been made by the Judge in person shall bear upon it the name of the Master responsible for such order.”

(b) Delete Rule 15A.

(c) In Rule 35A delete the words “ in person ” after the word “ Judge ”.

Leave to serve notice of motion with the writ

91. Under Order LII, Rule 9, both in the Chancery and King's Bench Divisions, where it is desired to serve with the writ a notice of motion or a summons for some interlocutory relief, *e.g.*, an injunction, before the time limited for appearance by the defendant (eight days after service of the writ) has expired, it is necessary to obtain the leave of the Court. In the King's Bench Division this leave is obtained by application to the Judge in chambers. In the Chancery Division formerly the application was made to the Judge in open Court. In the year 1943 the practice was altered and the application is now made to the Master, thus saving the cost of appearance of counsel.

92. In our view there is little, if any, justification for the necessity to apply for leave at all where no *ex parte* relief is sought, and where it is not desired to serve "short" notice, *i.e.* a notice giving less than two clear days' notice of the day named for the hearing of the motion or summons. Such leave is almost invariably granted as a matter of course and the necessity for obtaining leave seems to us merely to increase costs without conferring any protection upon the defendant against whom the interlocutory relief is sought. It may be noted that even under the existing practice notice of motion or summons may be served without leave when the time limited for entering an appearance has expired.

93. The Senior Chancery Judge did not favour the suggestion that the necessity for obtaining leave should be abolished as he felt that abolition might lead to abuse. The Committee, however, considered that cases of abuse would be rare and such cases could be adequately dealt with by the Judge who heard the motion or application, as he would probably dismiss it with costs. At all events, we consider the possibility of abuse is insufficient to counteract the saving of costs, though admittedly small in each case, in the vast number of proper applications where leave is at present necessary and invariably granted.

94. Accordingly we recommend that both in the Chancery and King's Bench Divisions where no *ex parte* relief is required and it is not desired to serve a "short" notice of motion, leave to serve notice of motion or summons with the writ should no longer be required. This could be achieved by a simple amendment to Order LII, Rule 9.

Procedure in the Court of Protection

95. The Master in Lunacy and the Secretary to the Lords Justices in lunacy matters attended before us and gave evidence as to the practice and procedure in the Court of Protection. By section 108 of the Lunacy Act, 1890, the jurisdiction of the Judge in Lunacy under the Act is exercisable by the Lord Chancellor or by such Judges of the Supreme Court as may be appointed by the Crown by sign manual. "Under the present practice the jurisdiction is exercised by the Lord Chancellor, the Master of the Rolls and all the Lords Justices. In addition, the Master in Lunacy has extensive powers under the Act of 1890, and under section 27 of the Lunacy Act, 1891, he may exercise the jurisdiction of the Judge in Lunacy as regards administration and management of the affairs of a lunatic.

96. In the result, the Master in Lunacy informed us that he and his Assistant Masters deal with more than 99 per cent. of the jurisdiction exercised by the Court of Protection. Of the matters remaining outside the jurisdiction of the Masters the most typical are applications for leave to commence divorce proceedings or to make settlements. Bearing in mind that the property and affairs of some 30,000 patients are now administered by the Court of Protection and that from the year 1941 when the present Secretary to the Lords Justices

was first appointed down to the end of March 1949 some eleven applications were made to the Judges in Lunacy exercising their original jurisdiction, it will be realised that the figure of 99 per cent. is probably an understatement.

97. It seemed to us that, having regard to our proposals to extend the powers of Chancery Masters, it would be appropriate to extend the powers of the Master in Lunacy to enable him to exercise the small residuum of jurisdiction of the Judge in Lunacy not already vested in him. This would require legislation, but in favour of such a change the following point of some theoretical importance arises. At present, the Secretary keeps a roster of Lords Justices to deal with lunacy matters, each Lord Justice doing duty for six weeks. Simple applications are dealt with after Court hours in the private room of the Lord Justice doing duty. He may feel, however, that the matter is too important for him to deal with alone and accordingly it is adjourned into Court and is probably heard, usually *in camera*, by the Master of the Rolls and two Lords Justices. This practice not only disrupts the ordinary work of the Court of Appeal (for the Court may have to be specially constituted) but greatly increases the costs, for counsel are engaged and three copies of the documents involved are required. On the other hand, in the seven and a half years mentioned above, out of the eleven cases which were originally referred to the Lord Justice on the roster, only three such cases have occurred, *i.e.* an average of less than one every two years. The Master in Lunacy was adverse to any change.

98. Having regard to the recommendation which we make in paragraph 101, namely, that the jurisdiction of the Judges in Lunacy should be transferred from the Master of the Rolls and Lords Justices to the Judges of the Chancery Division, who would accordingly deal with all matters of original jurisdiction at present exercised by the Master of the Rolls and the Lords Justices, we do not recommend any enlargement of the original powers of the Master in Lunacy.

99. Apart from exercising their original jurisdiction as described above, the Judge in Lunacy acts as a Court of Appeal from an order of the Master. Between 1941, then the present Secretary was first appointed, and 1949 there only three such cases.

100. This brings us to the point of principle that today it seems incongruous that the jurisdiction of the Judge in Lunacy either original or by way of appeal from the Master should be exercised exclusively by the Master of the Rolls and the Lords Justices. (The Lord Chancellor does not in fact exercise the jurisdiction owing to his many other duties.) As we have already pointed out, any Judge of the Supreme Court is eligible to be appointed under the sign manual to exercise the powers of the Judge in Lunacy. Judges of the High Court have been entrusted with jurisdiction over the property and person of infants and over the property of married women subject to restraints upon anticipation (now abolished) and it is difficult to see why they should not be entrusted with jurisdiction over the property and affairs of lunatics.

101. It was argued before us that the present system worked well and that as so few applications were made to the Judge in Lunacy no advantage would be gained in altering the practice. We have, however, consulted our Chairman in his capacity of Master of the Rolls and he has discussed the matter with the Senior Chancery Judge, who has in turn consulted his brother Judges of the Chancery Division and has informed us that he and his brother Judges see no objection whatever to the transfer to the Judges of the Chancery Division of the jurisdiction formerly exercised by the Master of the Rolls and the Lords Justices. With such approval, we recommend that the jurisdiction of the Judge in Lunacy be transferred from the Master of the Rolls and the Lords Justices to the Judges of the Chancery Division. Such change will in our opinion effect a saving of costs (at all events in cases where a hearing formerly

took place before two or more Lords Justices) and will also facilitate the ordinary working of the Court of Appeal. In making this recommendation it will be in view that we are not recommending any change in the present machinery of approach to the Judge in Lunacy, which appears to us to work well, but only in the persons to be appointed to fulfil that office.

Official Referees

102. Official Referees were established in 1873 by the Judicature Act of that year, and originally their duties consisted mainly in assessing damages after liability had been established at the trial, or in taking accounts. In recent years, however, the ambit of the matters referred to Official Referees has greatly increased and today a large variety of matters are tried before them, in particular, heavy and complicated cases involving matters of detail, e.g., cases arising out of building contracts, claims for possession of leasehold premises upon forfeiture for breach of covenant to repair and damages for breach, and claims for commission where a servant or agent is remunerated by commission.

103. After hearing the Senior Official Referee, as mentioned below, we are satisfied that in these and other special types of cases there may be considerable advantage to the litigant in having the matter referred to an Official Referee. The hearing is less formal and, due to the great experience of Official Referees in the special types of cases usually heard by them, more expeditious. Further, in necessary cases the Official Referee sits outside London in some court or room conveniently near the subject matter of the dispute so that a great saving of costs is achieved where there are a number of local witnesses.

104. In the year 1948, some 394 matters were tried before Official Referees (an increase of nearly 100 on the previous year) and the number of Official Referees was increased during the year from three to four. In the year 1949, the number of cases heard was 450. Persons eligible to be appointed Official Referees are barristers of not less than 10 years' standing and Masters of the King's Bench Division and Masters in Lunacy.

105. In view of the heavy and important work carried out by Official Referees the Committee considered whether it was desirable to recommend that they be constituted High Court Judges sitting in a separate Division to hear special types of case. The Senior Official Referee prepared a special memorandum on this point for the assistance of the Committee showing how this could be done, but His Honour was on the whole against any change and after a full discussion of the matter we agree with him. We are satisfied that the Official Referees fill a very useful function in particular types of case and that a change in their status or duties would bring about no advantages to the litigant and would not achieve any saving in costs. We, therefore, recommend no change in this respect.

106. The Official Referees prepared a memorandum for the Committee, putting forward certain reforms in relation to their office for the consideration of the Committee. The Committee's recommendations on these suggested reforms and on other matters which came before them incidentally are set out in the following paragraphs.

107. The powers and duties of Official Referees are now set out in sections 88 and 89 of the Supreme Court of Judicature (Consolidation) Act, 1925. Section 89 reads as follows :—

“ In any cause or matter (other than a criminal proceeding by the Crown),—
 (a) if all the parties interested who are not under a disability consent :
 or,

- (b) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation, which cannot in the opinion of the Court or a Judge conveniently be made before a jury or conducted by the Court through its other ordinary officers : or,
- (c) if the question in dispute consists wholly or in part of matters of account ;

the Court or a Judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an Official Referee or officer of the Court.”

108. The Official Referees suggested that the discretionary power conferred by section 89 to refer matters to Official Referees might be widened with advantage to litigants. We agree with this suggestion. We have no doubt that in many cases the jurisdiction to refer some classes of case to Official Referees could be extended with advantage to litigants as a whole and enable matters, now only referable by consent, to be referred to Official Referees. We recommend, therefore, that section 89 be altered so as to read as follows :—

“ In any cause or matter (other than a criminal proceeding by the Crown),—

- (a) if all parties interested who are not under disability consent : or,
- (b) if upon application by any party interested the Court or Judge considers that having regard to the nature of the case it is desirable (whether on the ground of convenience, economy, expedition or otherwise) in the interest of the parties ; or,
- (c) if the question in dispute consists wholly or in part of matters of account ;

the Court or a Judge may order that the cause or matter, or any question or issue of fact arising therein, be tried before a special referee or arbitrator respectively agreed on by the parties, or before an Official Referee or officer of the Court.”

109. The Official Referees further suggested that section 88 should no longer apply to them. That section provides that a Court may refer to an Official Referee or Special Referee for inquiry or report any question arising in any civil cause or matter. The Official Referees pointed out that this is an expensive procedure because after inquiry or report the matter is referred back to the Judge, before whom there is a further hearing, and they also pointed out that the procedure under section 89 was cheaper and more expeditious. They further stated that the procedure under section 88 was in any event seldom used in relation to Official Referees. We are unable to concur in this suggestion. The section, though little used in relation to Official Referees, is available to litigants and may occasionally be employed with advantage. We see no object in making the suggested change.

110. A suggestion was made by the Official Referees to facilitate transfer of cases between Official Referees which could then only be done by direction of the Lord Chancellor or Lord Chief Justice. The point was noted in the Committee's first Interim Report at page 36, paragraph 108, and the change to Order XXXVI, Rule 47C, embodying the Official Referees' suggestion has already been made by the Rule Committee (R.S.C. (No. 3) of 1949). The amended Rule expressly preserves the right of litigants by agreement to refer a matter to a named Official Referee and this practice, though difficult to justify on a logical basis, meets with the approval of litigants and there seems no object so far as the Committee is concerned in altering it.

111. The Official Referees pointed out that they had no power to order committal or attachment for failure to obey an order and suggested that such powers be conferred upon them. It was pointed out that where an order made by an Official Referee is disobeyed it is always open to the persons thereby aggrieved to apply to a Judge for an order for committal or attachment. This does not seem to us to be an answer to the Official Referees' suggestion. Application to a Judge for an order for committal or a writ of attachment involves expense and delay and this is accentuated if the Official Referee is sitting in the country and reference has to be made to the Judge in chambers in London for an order for committal if, for example, one of the parties refuses to obey an order to disclose a particular document. We recommend that power to commit or issue a writ of attachment be conferred upon Official Referees with a corresponding right of appeal from any such order.

112. The Official Referees in their memorandum also made a number of suggestions which seemed to us worthy of consideration but outside the terms of reference of the Committee. Principal among such suggestions was the desire for a change of name from "Official Referee". We agree that the title is not very satisfactory and a title which was more appropriate and easily understood would be an advantage. Another suggestion was that Official Referees by virtue of their office should be eligible to be named Commissioners of Assize, a suggestion which we think might well be considered by the appropriate authority. Other suggestions concerned the qualifications, appointment, number, tenure, salary and pensions of Official Referees and the question of appointing deputy Official Referees.

113. At present each Official Referee has his own method of arranging his list and fixing dates for trial. We recommend that a uniform system should be introduced.

Summary of Recommendations on Chancery Procedure, Lunacy Matters and Official Referees

114. We summarise our recommendations in this Part of our Report as follows:—

Representation orders

- (1) Order XVI, Rule 32, should be amended to include the saving of expense as a consideration in making a representation order. (Paragraph 42 (d) (i).)
- (2) Where several persons having the same interest are separately represented only one set of costs of the hearing should be allowed and divided between them unless circumstances justify separate representation. (Paragraph 42 (d) (ii).)
- (3) Consideration should be given to the possibility of combining Rules 9, 9A and 32 of Order XVI into a single Rule. (Paragraph 42 (d) (iii).)
- (4) On taxing costs on an originating summons the Taxing Master should freely use his discretion as regards the amount of the fees of the various counsel engaged, even though the brief fees have all been marked at the same figure. (Paragraph 42 (e).)

Form of originating summons

- (5) There should be only two forms of originating summons, *viz.*, one *inter partes* requiring appearance and one for *ex parte* applications and for other cases not *inter partes*, which do not require appearance. (Paragraph 43 and Appendix A.)

Summons for foreclosure

(6) The Court should in its discretion dispense with the Master's certificate of the amount payable in suitable cases. This would necessitate an alteration in the form of order at present used. (Paragraph 44.)

(7) Where an appointment for redemption of a mortgage is made, the place for redemption should be either at the office of the plaintiff's solicitor (if within a reasonable distance of the Royal Courts of Justice) or at the Courts, and the order should provide that the defendant should give 7 days' notice of intention to redeem. (Paragraph 45 (b).)

Inheritance (Family Provision) Act, 1938

(8) It was suggested that applicants under this Act should be free to join as parties not only the personal representatives but also one of the principal beneficiaries, and that the Court should thereupon make a representation order. The Committee considers that a review of the procedure and relevant Rules should be left to the discretion of the Chancery Judges. (Paragraph 46.)

Administration actions

(9) Where a receiver has to give security, an affidavit justifying the solvency of the surety should not be required if the surety is an insurance company of repute, subject to the Court having discretion to call for an affidavit. (Paragraph 47.)

(10) A certificate of fitness of a receiver, made by a reputable independent person who has known the proposed receiver for five years at least, should be accepted in lieu of an affidavit. (Paragraph 49.)

(11) Claim lists which at present are three in number should be reduced to two, viz., a list of claims sent in by persons claiming to be creditors, whether sent in pursuant to an advertisement or not, and a list of sums of money which may be due in respect of which no claim has been received. Each list should be in two parts as at present. Steps should be taken to make it clear that, where there are no claims, no list is required, a short affidavit stating that no claims have been received being sufficient. (Paragraph 50 (b).)

(12) There appears to be no need for alteration in the present procedure for proving claims. (Paragraph 51.)

(13) With regard to the costs of enquiries for a particular person or class of persons, it would not be desirable to introduce a general Rule authorising, without the authority of the Court, immediate distribution of shares on which no question arises and without regard to the facts affecting other shares. Practitioners should be made aware of the fact that under Order LXV, Rules 14B and 14C, application can be made for partial distribution, etc. The phrasing of the provision for the costs of an enquiry in Rule 14C of Order LXV should be brought into line with Rule 14B. (Paragraph 53 (c).)

Miscellaneous Chancery matters

(14) The provisions of Order XIVA should be extended to specific performance actions where the defendant has failed to appear or where the contract is an oral agreement supported by acts of part performance. (Paragraph 54.)

- (15) No recommendation is made for extending the scope of Order XV, which provides a summary method for dealing with applications for accounts. (Paragraph 55 (c).)
- (16) No recommendation is made with regard to the suggestion for abolishing summonses to proceed. (Paragraph 56 (b).)
- (17) Application for change of parties should be dealt with on an affidavit without a formal summons, with discretion to the Master to direct that a summons or notice should issue. (Paragraph 57.)
- (18) Application for a garnishee order *nisi* should be dealt with *ex parte* on an affidavit without a summons. (Paragraph 58.)
- (19) Masters can deal with applications by summons for payment out of Court only where the fund does not exceed £1,000 (with certain exceptions). This limit should be removed, but the Chancery Judges should decide what cases should be dealt with by the Judge in person. The provisions of Order LV, Rule 2 (1) and (2), should be amended accordingly. (Paragraph 59 (a).)
- (20) Solicitors should be allowed to prepare the engrossed copy of an order, and in appropriate cases to type the drafts after preparation by the Registrar. (Paragraph 60 (b).)
- (21) No alteration to the present method of accountancy and the form of accounts is recommended. It is suggested that the Law Society might pursue their suggestions in consultation with the Chancery Masters. (Paragraph 61 (f).)
- (22) The affidavit of a receiver in answer to accounts and enquiries should be shortened. (Paragraph 61 (h).)
- (23) In the case of documents submitted to the Court for construction, provided that the original is legible, it is recommended for general application that it should not be necessary to furnish a copy as well as setting out *in extenso* the relevant extracts in the supporting affidavit. Normally, either one or the other should be sufficient but there should be exceptions to this general rule. The costs of copying into an affidavit documents or extracts from documents which are also exhibited should not be allowed, except when circumstances justify departure from this general rule. (Paragraph 66 (a) and (b).)
- (24) The jurisdiction of the District Registrars of Liverpool and Manchester to order payment out of Court in a Chancery action, which is at present limited to a sum not exceeding £50, should be the same as that of the Chancery Masters. (Paragraph 68.)
- (25) It is not recommended that the present practice for applications under the Adoption Act, 1950, should be changed so as to enable the preliminary stages to be dealt with in the District Registries or otherwise. (Paragraphs 71 and 73.)
- (26) A scheme is recommended in small estates or trusts for a simplified procedure of application to the Court by executors or trustees, *etc.*, for the construction of a will or other document. The proposed procedure would obviate the necessity, in suitable cases, of costs being wasted by the appearance of a number of counsel before the Court on behalf of interested parties. (Paragraph 75.)
- (27) Section 27 of the Trustee Act, 1925, makes provision for enabling a trustee, *etc.*, to distribute an estate after advertising for interested persons who may wish to make claims. The wording of the section, however, often

results in the trustee making application to the Court for directions as to the form of advertisement, *etc.* The section should be amended to save such applications to the Court. (Paragraph 77 and Appendix B.)

(28) The Court should have power, in appropriate cases, to order the mother of a child who is a ward of Court to contribute to its maintenance. (Paragraph 78.)

(29) The suggestion has been made that some limitation should be placed on the right of a party to adjourn any matter from the Master to the Judge. This is not accepted, but there should be instituted a stricter practice with regard to costs of such adjournments. (Paragraphs 80 and 82.)

(30) A time limit should be imposed within which a party requiring an adjournment from the Master to the Judge should set down the matter for hearing before the Judge after adjournment into Court. (Paragraph 84.)

(31) It is considered that Order LV, Rules 15 and 15A, setting out the powers of the Chancery Masters, are out of date and unduly restrictive, and that it should be left to the Chancery Judges to give directions from time to time as to what matters can be dealt with by the Masters. It is suggested that Order LV, Rule 15, should be amended as indicated and that Rule 15A should be deleted. (Paragraphs 87 and 90.)

(32) Where no *ex parte* relief is required and it is not desired to serve a "short" notice of motion, leave to serve notice of motion or summons with the writ should be dispensed with, both in the Chancery and King's Bench Divisions. (Paragraph 94.)

Court of Protection

(33) It is not recommended that there should be any extension of the original powers of the Master in Lunacy. (Paragraph 98.)

(34) It is recommended that the jurisdiction of the Judge in Lunacy be transferred from the Master of the Rolls and the Lords Justices to the Judges of the Chancery Division. The present machinery of approach to the Judge in Lunacy should remain unchanged. (Paragraph 101.)

Official Referees

(35) It is considered that Official Referees fill a very useful function in particular types of cases and no change in their functions or duties is recommended. (Paragraph 105.)

(36) The discretionary power to refer matters to Official Referees conferred by section 89 of the Supreme Court of Judicature (Consolidation) Act, 1925, might be widened with advantage to litigants; a suggested amendment to section 89 is indicated. (Paragraph 108.)

(37) The Official Referees suggested that section 88 of the Act should no longer apply to them, but this is not recommended. (Paragraph 109.)

(38) Transfer of cases between Official Referees was dealt with in the Committee's Interim Report and the Rule relating to it has been amended by R.S.C. (No. 3) of 1949. The amended Rule preserves the right of litigants by agreement to refer a matter to a named Official Referee, which, though difficult to justify logically, meets with the approval of litigants, and no change in this practice is recommended. (Paragraph 110.)

(39) Official Referees have no power at present to commit or attach; it is recommended that such power should be conferred on them. (Paragraph 111.)

(40) The Official Referees suggested that they should, by virtue of their office, be eligible to be named Commissioners of Assize. It is thought that this suggestion might well be considered by the appropriate authority. (Paragraph 112.)

(41) Each Official Referee has his own method of fixing dates for trial. It is recommended that a uniform system should be introduced. (Paragraph 113.)

PART IV

THE ANNUAL PRACTICE

Introduction

115. This Part of the Report is concerned with questions affecting the form, method of publication and means of making and amending the Rules of the Supreme Court. The matter is one upon which (as later appears) the Hanworth Committee had expressed a strong view. In addition it is notorious that the present bulk of what is known as "The Annual Practice" (extending in its present form to three volumes and (excluding the Index volume) covering approximately 3,800 pages) has been a subject of strong criticism from many quarters. Writers of letters to the *Times*, for example, have asserted that this "enormity" is mainly responsible for the complexity and cost of litigation and have suggested that a ceremonial burning of all extant copies would be the most useful reform that could, at any rate initially, be made. Though we think this criticism is more facile than sensible, nevertheless we are satisfied beyond doubt that the present condition of the Rules is highly unsatisfactory. When originally drafted sixty-five years ago they were, we have no reason to doubt, a coherent unity. Since then they have received numerous additions to meet new statutory requirements and further accretions designed to deal with particular circumstances. These accumulations have been made without any attempt at any stage to revise the body of the Rules as a whole so that they now appear to suffer in some cases from over-elaboration; in other respects they are anachronistic, assuming as they do knowledge of the general rules of procedure as practised in 1883 to which in some instances express reference is made, though few persons, if any, can now be living who have any knowledge whatever of what that practice was.

Revision of the Rules of the Supreme Court

116. The case for general revision on the grounds above indicated is indeed so strong that we do not think it necessary to pursue it at length. There are added as Appendix C to this Report two lists, List I prepared for us by one of the present Editors of the Annual Practice and List II by a member of the Committee, of examples of the defects in the general Rules already mentioned. A complete re-drafting has the full support of both branches of the profession. In para. 32 of its first Interim Report the Hanworth Committee said:—

"It has been pointed out on many occasions and with great force that the practice and procedure of the Courts is laid down in an unnecessarily complicated form. We agree that it does not seem either necessary or desirable that the Rules of Court should, with the explanatory notes, be contained in a book of nearly 3,000 pages. A clear and consistent code of procedure seems to us to be urgently required to cheapen and facilitate the administration of justice, and we recommend that the Rule Committee should at the earliest opportunity appoint a small committee to re-draft and simplify the Rules of procedure."

117. We heard in the evidence of the Permanent Secretary to the Lord Chancellor given before us of the various accidents and events (culminating in the outbreak of World War II) which prevented effect being given to the suggestion of the Hanworth Committee that a complete revision of the Rules should be undertaken by the Rules Committee. We accordingly recommend in the strongest terms that a complete revision of the Rules be immediately put in hand. The absence of such a revision must in some degree stand in the way of any attempt to simplify procedure. The new Legal Aid legislation only emphasises the need for a modernisation and synoptic review of the Rules.

118. The formidable task presented is plainly one for a draftsman of experience and high qualifications. Though it would be quite wrong for us to fetter his discretion in any way, we venture to suggest for his consideration the claims of general simplicity against over particularity.

Practice Notes and Directions

119. In this connection a subsidiary problem of great difficulty arises. In addition to the Rules themselves great numbers of Practice Directions and Practice Notes have come into existence. These Directions and Notes have not of course the sanctity of the Rules themselves. In general they may be regarded as expressing the view for the time being of the Court of Appeal, or of the Judges of the appropriate Division of the High Court, of the proper or preferred way in which particular provisions of the Rules should in practice be interpreted. Thus the Judges of the Chancery Division have from time to time by this means indicated their requirements in regard to supporting evidence on applications for special purposes by originating summons; the recent experiment in fixed dates for witness actions in the Chancery Division was advertised and made effective by Practice Direction; the Court of Appeal in 1947 by Practice Direction indicated their view that applications for a stay of execution pending appeal, when such stay had been refused by the trial Judge, should be made by original motion and not *ex parte*.

120. It is plain that these Practice Directions and Practice Notes vary greatly in kind. Some (it is argued) should be made Rules of Court or not made at all. Others are intended (particularly in the Chancery Division) to secure uniformity in practice between all the Judges' chambers in matters where a rigid Rule would be inappropriate and to secure public knowledge of that practice.

121. In any case it is important that these Directions and Notes should be effectively brought to the attention of the public and (especially) practitioners; and this, as things are, is not always achieved. The Directions and Notes are sometimes (but not always) published over the name of the Master of the Rolls (in the case of the Court of Appeal) or of the Senior Judge of the Division concerned. They may generally be found somewhere in the law publications, the Weekly Notes, and somewhere in the Annual Practice. But their finding is by no means always an easy matter and they may persist unrevoked, long after the circumstances which gave rise to them have materially changed or ceased to exist; and the extent of their authority is always in some degree in doubt.

Practice Masters' Rules

122. In addition to the Practice Notes and Practice Directions to which we have referred above, there is also a very substantial body of "rules" known as Practice Rules issued—we were told, almost daily—by the King's Bench (Practice) Masters pursuant to their authority under Order LXI, Rule 2. The great majority of these "rules" owe their origin to the fact that the administration of the Central Office at the Royal Courts of Justice is subject to the

jurisdiction of the King's Bench Masters ; and the rules issued are in truth inter-departmental instructions with which, *prima facie*, the public would not be concerned. But this is not universally true ; for it is under this jurisdiction that there is prescribed from time to time (according to the availability and performance, *e.g.*, of the air mail service) the number of days allowed for appearance by a defendant served out of the jurisdiction in various places on the earth's surface from China to Peru. It is safe to say that no member of the public and very few practitioners could ever discover, still less challenge, the source of authority in the last named case.

123. We accept the view that the line must be drawn between those matters which the public ought and has a right to know and those matters of mere administrative detail with which the public is not concerned. There are many who object to Practice Rules, Directions and Notes (as opposed to Rules of the Court properly so called) altogether and in principle. Our present view, however, is that there are and may be many matters in which a Practice Direction—designed to advertise the Judge's views as to matters of practice and to secure uniformity—is useful and that in such cases amendment or addition to the Rules of Court would be unnecessary, cumbrous or inappropriate. But we think that whenever such a Direction or Rule is made which affects the public and should be drawn to public attention, it should if practicable appear over the signature of the Master of the Rolls or of the Senior Judge of the Division affected. However, final judgment on the matter should, we think, be suspended until the drafting of the Rules properly so called has been effected pursuant to our preceding recommendation ; for the power to make and the making of such Directions are *prima facie* matters which the draftsman must consider in framing his Rules. In any case we fear that the herculean draftsman must thoroughly clean and tidy out the Augean stables of existing Directions, Rules and Notes, and determine which of them should now be preserved and if so in what form, *i.e.*, whether as Rules of the Supreme Court or as Directions liable to be varied without an amendment of the Rules.

Publication of the Rules

124. We deal in this and the next four paragraphs with the way in which henceforth Rules of the Supreme Court and any Directions which should be public property ought to be published.

125. It is in our view a matter of criticism of our Supreme Court practice that no copy of the Supreme Court Rules can be obtained save in the Annual Practice. Thus a visiting lawyer from, say, one of the Dominions no less than an English citizen who is desirous of seeing the Rules must acquire for £5 15s. 6d. a treatise on practice published like other treatises by law publishers as part of their gainful trade. To say this is not to criticise the utility of the work or the skill or propriety of the Editors, but it seems to us indefensible that the Rules of the Supreme Court which have the force of statute and which are essential to anyone resorting to the Supreme Court are not made available at relatively small cost as an official publication. Some years ago the experiment was tried of publishing the Rules themselves without any notes. The Rules cover at present about 300 of the 3,800 pages of the Annual Practice, the remainder being substantially made up of notes. The experiment was not a success. In part, no doubt, the failure was due to the fact that the practitioner would require the notes as well as the Rules. In part, however, the lack of success was, we think, due to the fact that having regard to the frequency of amendments or additions, a volume of the Rules would become obsolete unless republished at frequent intervals.

Loose leaf publication

126. In any case and as a matter of principle we think that the Rules ought to be available—without notes—as a publication of H.M. Stationery Office. In order to meet the difficulty of obsolescence we think the publication should be available on a loose leaf principle so that upon payment of a moderate annual fee the possessor would obtain all revisions and additions. The publication would contain all forms or other appendices that are part of the Rules. We understand that the Stationery Office sees no reason why a publication in this form (*i.e.* available in a loose leaf form) should not be made. We have in fact seen a copy of the Consolidated Instructions for Allied Military Courts with Specimen Forms and Rules of Procedure which was officially published in this way by the Allied Control Commission in Italy.

Separate official publication of Practice Directions

127. As regards Practice Notes, Directions, *etc.*, whether these will be preserved and continue to be promulgated and if so in what form must depend upon the re-drafting and revision of the Rules themselves. Assuming however that they do continue and, following our earlier recommendation, that all such Notes and Directions which are matters of public interest are published over the name of the Master of the Rolls or of the head of the appropriate Division of the Court, then we think that there should be separate publication of these Notes and Directions by H.M. Stationery Office on lines similar to those we have indicated above in regard to the Rules themselves.

128. On the basis of what is suggested above the Annual Practice would no doubt continue to be published and used as at present. It would be—as indeed it now is—the leading text book on practice. We have considered whether it would be right or practicable to suggest the abrogation of the English rules of precedent in regard to “adjectival law” but we have unhesitatingly rejected the suggestion, for it would, we think, be wrong in principle and impossible in practice. It is no doubt a matter of fair comment that the Rules of the Supreme Court have given rise to so substantial a burden of case law; but the criticisms based on the bulk of the Annual Practice as such are (if they are valid) criticisms of the complexity of the present Rules and of the rule of precedent rather than of the procedure of the Supreme Court. It has also to be remembered—

- (a) that the Annual Practice includes matters such as professional etiquette;
- (b) that as a result no doubt of the regularisation of matters of practice as recorded in the Annual Practice, out of 35,000 summonses dealt with annually by the King’s Bench Masters, only about 200 go to the Judge in chambers by way of appeal; and
- (c) that if the Rules of the Supreme Court are revised and re-drafted as we suggest a good deal of the material now in the notes can be discarded.

We feel indeed that the criticism of the bulk of the Annual Practice is largely bound up with the fact of its being the only publication of the Rules. Similar criticisms have not been made, so far as we are aware, of the Companies Acts or the Bankruptcy Acts and the Rules respectively made thereunder because writers on those subjects have added substantial notes by way of exposition of both statutes and Rules.

The Rule-making body

129. The conclusions at which we have so far arrived leave one further topic for consideration and it has caused the greatest difficulty of all, *viz.*, whether the present body constituted by the Supreme Court of Judicature (Consolidation) Act, 1925, as the Rule-making body is best designed to meet the end in view.

130. The Rule-making body (commonly known as the " Rules Committee ") is constituted by section 99(4) of the Judicature Act of 1925 which reproduced the similar provisions of the Act of 1873. The sub-section is as follows :—

" Rules of the Court may be made by the Lord Chancellor together with any four or more of the following persons, namely, the Lord Chief Justice, the Master of the Rolls, the President of the Probate Division, and four other Judges of the Supreme Court, two practising barristers being members of the General Council of the Bar, and two practising solicitors of whom one shall be a member of the Council of the Law Society and the other a member of the Law Society and also of a provincial Law Society.

The four other Judges and the barristers and solicitors to act as aforesaid shall be appointed by the Lord Chancellor in writing under his hand and shall hold office for the time specified in the appointment."

131. Two points may here be noted :—

(a) Though the Lord Chancellor may concur with the rest of the " Rules Committee ", he is not bound so to do ; in other words, he in effect has a right of veto which he may desire to exercise on grounds of policy. We accept that this " right of veto " is sound.

(b) In practice the drafting of the Rules is within the scope of the duties of the Lord Chancellor's Department—though the form of Rule or amendment proposed may be submitted to the Department from other sources, e.g. the Judges or Masters. This we also accept as sound in principle.

Criticism of existing " Rules Committee "

132. Our main difficulty in regard to the existing " Rules Committee " is that H.M. Judges have not generally speaking a close knowledge of the Rules or their working nor can they properly be expected to devote their time and attention to examination of the working of the Rules and their relationship *inter se*. It seems to us that the existing Committee though impressive in point of distinction is somewhat far removed from the workaday affairs of administration of the Rules. When the whole body of Rules is fairly recent and has been skilfully drafted as a coherent unity, the result may not greatly matter. But after time has grafted upon the original body an agglomeration of disparate growths the effect is (according to the evidence we have heard) that the distinguished members of the Rules Committee tend to confine their attention to those matters only which immediately affect the Division with which they are concerned and in respect of which they have been briefed. It seems to us therefore that the present condition of the Rules is in some degree due to the absence of a body effectively charged with the duty of keeping under constant review the Rules as a whole. We have heard evidence that amendments affecting (say) the Chancery Division have been passed without comment by the Committee, though the King's Bench Masters have (rightly or wrongly) regarded them as wholly unnecessary.

133. It has seemed obvious to us that the persons who are by far the best acquainted with the working of the Rules are the Masters (or their equivalent) rather than the Judges, and junior counsel and managing clerks who frequent the Masters' chambers rather than illustrious members of the Bar and Law Society who may be nominated to the Rules Committee as qualified to keep company with the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President and the nominated Judges. It is the present practice of the Rules Committee to meet once a term.

Suggested new Committee

134. In our judgment, what is wanted as a first requisite is a body composed of those best acquainted with the practical working of the Rules, charged with the duty of keeping the whole body of Rules constantly under review. And we would add a further duty, *viz.*, to keep under review the working of the whole machinery of the Law Courts in its bearing upon procedure and (consequently) the Rules of the Supreme Court. We would call this body "the Rules and Administration Committee" and we suggest its nucleus should be—

(a) a Chancery Master, a King's Bench Master and a Divorce Registrar, and

(b) nominees of the Bar and Law Society chosen with regard to their practical experience of the working of the Rules.

We suggest that the individual members might be selected by nomination on the part of the body they represent, *e.g.* the Chancery Master upon the nomination of the Chancery Masters generally—with the approval of the Lord Chancellor, who would make the appointments; and we suggest that they should have power to add to their numbers by co-opting others either for a specific period or a specific purpose, again with the approval of the Lord Chancellor. We have in mind that it might on occasions be desirable to add, *e.g.*, a Chancery Registrar, or a King's Bench Associate, or a representative of the staff of the Courts, or (again) the Admiralty Registrar or a representative of the Taxing Office. We think further that there might be advantages in providing that a particular individual should hold office for some period of time (say three years) but should not be then re-eligible, provision being made for the personnel not all changing at the same time. These are however matters of detail—the main point of the recommendation being that the Committee should be constituted at what, for convenience, we call the "Masters' level" and should be charged with the general duty we have defined.

135. There remains the question of the Chairman of this Committee, and since it is the opinion of some that a Committee such as we have suggested might not otherwise have sufficient prestige, we have come to the conclusion that a judicial chairman would be desirable. But to this view an obvious difficulty is at once presented, for if the Chairman be a High Court Judge attached, say, to the King's Bench Division, it may be claimed that there should also be appointed Judges from each of the other Divisions who will be more familiar with the work of those Divisions. Though we do not think such a consequence would be necessary, if it came about, one of the disadvantages of the existing Rules Committee (as we think) would be likely to be re-created. We think, moreover, that whoever is the Chairman should not be liable to be absent from London for long periods on circuit, for it is of the essence of our proposal that the Committee we suggest should keep the Rules and practice and the whole machinery of the Law Courts under *constant* supervision and the Chairman would necessarily have to acquire a close knowledge of these subjects. In the circumstances we believe that a member of the Court of Appeal would be the best qualified to act as Chairman—if one of them were willing to act. In the alternative, or if no member of the Court of Appeal were found willing to act, then we think that the Lord Chancellor would be able to find some former holder of high judicial office or some other person with knowledge of our procedure and able to give the Committee any necessary prestige.

136. If the Committee is constituted as we have suggested then we concede that it should not be the Rule-making authority. We conceive that the practice would be for the Committee to submit any amendments or additions which it thinks desirable to the Lord Chancellor's Department who would be

responsible for the final form of the draft and for submitting it to the Rule-making authority and who would also retain, of course, an independent right to prepare such amendments or additions to the Rules as the Department conceived necessary, e.g. under some new statute. In practice we see no difficulty at this point. In practice also it seems clear to us that the Rules Committee would discuss with the presiding or senior Judge of the Division of the Court affected (including in this phrase the Court of Appeal) any amendment or addition affecting that Division.

137. We add that in our opinion it would be very desirable that (if our suggestion in this part of the Report is accepted) the Committee we propose should be established immediately (as it could be without legislation), *i.e.* while the existing Rules Committee is still in existence, and before the work of revision begins, so that the draftsman charged with the work of revision would have available to him when required the benefit of the proposed Committee's advice.

Suggested new Rule-making authority

138. If our view so far is acceptable, then the remaining question is—who should be the Rule-making authority? It seems to us that it would be quite unnecessary and wasteful to retain the existing Committee. The conclusion at which we have arrived is that the Rule-making authority should be the Lord Chancellor himself but that it should be provided by statute that he should only act after consulting the presiding or senior Judges, *i.e.* (on the footing that the existing Divisions of the High Court remain) the Lord Chief Justice, the Master of the Rolls, the President and the senior Judge of the Chancery Division. Alternatively, the presiding or senior Judges (as we have defined them) could with the Lord Chancellor be the Rule-making body in lieu of that prescribed by section 99 (4) of the Supreme Court of Judicature (Consolidation) Act, 1925. In any case the Lord Chancellor's right of veto would be preserved.

139. Of the two alternatives posed at the end of the preceding paragraph we incline to the former. In any case we believe that the small numbers of those with whose assent the Lord Chancellor will act will assist the smooth working of the Rule-making machinery.

Summary of Recommendations on the Annual Practice

140. We summarise our recommendations in this Part of our Report as follows :—

- (1) A complete revision of the Rules of the Supreme Court, which is long overdue, should be put in hand at once. (Paragraph 117.)
- (2) After the redrafting, the Rules of Court should be published officially (without any notes) by His Majesty's Stationery Office and should be made available, upon proper terms, to subscribers upon a loose-leaf principle. (Paragraph 126.)
- (3) Subject to anything to the contrary in the newly drafted Rules, it should still be possible to issue Practice Notes or Directions. Whenever they affect the public, such Notes and Directions should appear over the signature of the Master of the Rolls or of the Senior Judge of the Division concerned. They should be the subject of an official publication separate from, but similar to, the publication of the Rules. (Paragraphs 123 and 127.)
- (4) In lieu of the existing statutory Rule-making machinery, there should be established a "Rules and Administration Committee", charged with the duty of keeping the Rules and practice and the whole machinery of the

Supreme Court under constant review and recommending such additions to or amendments of the Rules of the Supreme Court and the general body of Practice Notes and Directions as circumstances from time to time may require. The drafting of any such additions or amendments should rest with the Lord Chancellor's Department, who will retain the power to initiate any additions to or amendments of the Rules or the Practice Notes and Directions, as may be requisite. (Paragraphs 134 and 136.)

(5) The Rules and Administration Committee should be composed of Masters of the several Divisions of the Supreme Court (or their equivalent) and of representatives of the Bar and solicitors' profession (approved by the Lord Chancellor, who would make the appointments), with power to co-opt other persons (for a fixed period or limited purposes) subject to the Lord Chancellor's approval. The Chairman should be a Lord Justice or someone who has held high judicial office. (Paragraphs 134 and 135.)

(6) The Rules and Administration Committee should be established immediately and before the work of revision begins, so that the draftsman charged with the work of revision will have available the benefit of that Committee's advice. (Paragraph 137.)

(7) The Rule-making authority should by statute be the Lord Chancellor acting after consultation with the Lord Chief Justice, the Master of the Rolls, the President, and the senior Judge of the Chancery Division, or other the presiding or senior Judges of the Divisions of the Supreme Court (including for this purpose the Court of Appeal). (Paragraphs 138 and 139.)

PART V

COURT FEES

141. A number of individuals and organisations submitted memoranda containing the suggestion that all court fees in the Supreme Court should be abolished. Before we embarked upon consideration of this suggestion, it was thought right to consult the Lord Chancellor whether consideration of such a radical reform would be within the terms of reference of this Committee. In reply the Chairman received the following direction from the Lord Chancellor :—

“ The proposal that court fees should be entirely abolished would involve the abrogation of a principle which has been accepted by Parliament and the country for many generations, *viz.*, that suitors in the Courts are properly required to bear some proportion of the costs of the machinery of the administration of justice. The taxpayer already contributes a substantial proportion of the costs, and the transference of the whole financial burden of the machinery (which would have to be not only for the Supreme Court, but for all other courts of law) would, we feel, involve questions of public finance which are far beyond the scope of the Committee's enquiry. We think, however, that the question whether the present Supreme Court Fees Order governing the payment of court fees requires overhauling is clearly one for your Committee. The examination of this question might lead to recommendations involving the simplification of the present system, the abolition of certain fees and reductions or increases in others. Although a consequential reduction in the total revenue from court fees might result, that would nevertheless be a very different matter from the recommendation that they be entirely abolished.”

142. Having regard to this direction, although the view had been expressed that the imposition of court fees constituted a violation of the principle, at least as old as Magna Carta, that the subject should have the right of free access to the King's Courts, we have not thought it right to give further consideration to the suggestion that court fees should be totally abolished. Instead we confined ourselves to the question whether there is a case for giving the litigant some relief from the present burden of court fees, and, if so, to what extent, and in what respects. In the course of our enquiries we sought to find some easily formulated principle upon which we could found recommendations as to the amount which, and the manner in which, the litigant ought to contribute towards the expenses incurred on behalf of the public in the administration of justice. Our attention was early directed to the views expressed in 1922 by the Committee on Court Fees presided over by Mr. Justice Macnaghten, whose Report* contains the following statement :—

“ At the time when the Schedule to the Fees Order of 1884 was being prepared, it was authoritatively laid down that the salaries and pensions of the Judges ought to be paid by the State out of public funds, and that all the other expenses of the administration of Justice in the Supreme Court should be borne by the suitors. It has, we believe, been suggested that this principle is to be found in Magna Carta itself ; or it may be that, apart altogether from the provisions of Magna Carta, it was considered unseemly and improper that the fees paid by the suitors should provide even indirectly the remuneration of the Judges of the Supreme Court.

Another ground on which the principle may have been based has been suggested. The Supreme Court is not merely engaged in the work of dispensing Justice to the private suitors who resort there ; it administers public Justice not only in criminal cases but also in civil matters, such as proceedings on the Crown side of the King's Bench. For the cost of the administration of Justice, where the public itself is directly concerned, the State ought, it is suggested, to provide the necessary funds, since there can be no reason why the private suitors should do so. Though it would no doubt be difficult to calculate exactly how much of the expenditure of the Supreme Court is attributable to the administration of public, as distinguished from private, Justice, the salaries and pensions paid to the Judges may perhaps be taken to represent fairly that figure.”

143. The fees to be paid by litigants in relation to the various steps which may have to be taken in an action are prescribed by the Supreme Court Fees Order, 1930, as amended by subsequent Fees Orders. This Order is divided into twelve sections, covering the various Divisions of the High Court and the different phases of litigation, and prescribes no less than 154 separate fees which may become payable. It might be expected, having regard to the statement of principle by the Macnaghten Committee quoted above, that the fees prescribed by the Fees Order would be designed to produce sufficient revenue to cover the cost of the administration of justice, excluding the salaries and pensions of the Judges. In point of fact this is far from being the case, though the precise effect of the Fees Order—*i.e.* the amount actually collected annually by way of fees in respect of litigation—is obscured by the manner in which the annual accounts of the High Court and Court of Appeal are in practice presented. A copy of the accounts published in respect of the financial year 1949–1950 is appended as Appendix D to this Report, and from this it will be seen that the two principal items on the receipts side are described respectively as “ Court Fees taken in stamps ” and “ Court Fees taken in cash.” The former relate principally to fees taken in the Central Office in London and the Principal

* 1922, Cmd. 1565, para. 3.

Probate Registry in London ; the latter consist mainly of fees taken in District Registries and District Probate Registries. The fees taken in the Principal Probate Registry and in the District Probate Registries relate in the main to non-contentious business. Fees taken in respect of non-contentious probate business are not prescribed by the Supreme Court Fees Order, but by a separate Order called the Supreme Court (Non-Contentious Probate) Fees Order, 1928, as amended, and the fees prescribed do not in fact arise from litigation at all. The accounts do not show what proportion of the total fees received is derived from litigation and what proportion relates to non-contentious probate. A statement was, however, prepared for us by the Lord Chancellor's Office showing the estimated receipts from fees from all sources during the calendar year 1946, as well as the break-down of the total as between fees taken in litigation in the various Divisions of the Supreme Court and those derived from other sources. This statement is appended as Appendix E to this Report, and shows that out of a total of £1,056,353 9s. 8d. received in fees only £341,013 15s. 0d. was derived from litigation, while of the balance £648,834 8s. 8d. was attributable to non-contentious probate. Assuming that the year 1946 may be taken as substantially a typical year, it thus appears that, roughly speaking, only one-third of the fees appearing on the receipts side of the annual accounts of the Supreme Court are in fact attributable to litigation.*

144. The accounts for the financial year 1949-1950 (Appendix D) show an apparent excess of expenditure over receipts of £206,599. It will be seen, however, that the total of expenditure includes items described as "Grant in aid of the expenses of administering the Poor Persons Rules" and "Grant in aid in respect of Legal Aid", which together amount to £201,820. Without these items, therefore, the excess of expenditure would be under £5,000. In the financial year 1948-1949 the excess of expenditure, disregarding the grant in aid of the expenses of administering the Poor Persons Rules, was just over £50,000, while in the financial year 1947-1948 there was a small excess of receipts over expenditure. The expenditure shown in the annual accounts includes so much of the Judges' salaries and pensions as it considered to be attributable to civil litigation. This amounts on an average to about £200,000 annually. The figures seem to show, therefore, that apart from the cost of administering the Poor Persons Rules and the Legal Aid Scheme, the whole of the expense of the administration of justice, including the salaries and pensions of the Judges, so far as these are attributable to civil litigation, is in fact substantially covered by the fees received. In our view, the assistance of Poor Persons or assisted litigants should properly be regarded as an obligation assumed by the State, the expense of which can fairly be put upon the general body of taxpayers. It is wrong, we think, to take the expense of this service into consideration when comparing the cost of the administration of justice with the amount received in fees. The Legal Aid and Advice Act, 1949, has now replaced the previous provision for Poor Persons, and the general body of taxpayers assumes responsibility for the greatly increased assistance given to litigants coming within the Scheme.

145. It can be said, therefore, and has been said, that the actual result in practice of the working of the Fees Order is to violate the principle referred to by the Macnaghten Committee, seeing that the salaries and pensions of the

* It has not been possible to obtain a corresponding statement for the year 1949 but, so far as our investigations enable us to judge, the relevant figures for 1949 would not differ materially from those given in Appendix E. Thus, it has been possible to ascertain that out of the sum of £1,387,498 shown in Appendix D as the receipts (less credits) during the year ended 31st March, 1950, £722,939 was attributable to non-contentious probate. There seems, further, no ground to suppose that the amount of court fees per suit differs materially from the figures given below in paragraph 146.

Judges (excluding such proportion as is attributable to the administration of criminal justice) are in fact approximately covered by the receipts from fees and other Appropriations in Aid, and are not in practice being paid, to any material extent, by the State out of public funds. From this it has been argued that a case is made out for a reduction of the fees taken in respect of litigation by at least an amount equivalent to the salaries and pensions of the Judges. On the other hand, we had the advantage of hearing evidence given by the Permanent Secretary to the Lord Chancellor, who gave it as his opinion that it would be a mistake to regard the "principle" referred to by the Macnaghten Committee as having so binding an effect. Rather, he suggested, it should be regarded as a rough and ready rule to be borne in mind when considering the expediency of any proposed increase or reduction of fees. In our view there is considerable force in this argument. So long as the annual accounts are presented in such a way that the receipts from court fees constitute only a part (and by no means the major part) of the revenue to be set against the expenditure incurred in the administration of justice, it appears to us that the suggested principle referred to by the Macnaghten Committee is not really related to the facts. Moreover, if it were thought proper, as a matter of principle, to reduce the total revenue by an amount approximately equivalent to the salaries and pensions of the Judges, it would be necessary to consider not only court fees taken in respect of litigation but also the fees received in respect of non-contentious probate and the other minor sources of revenue shown in the accounts. The latter, however, lie outside our terms of reference, and we have not thought it our duty, nor have we attempted, to consider whether any case has been made out for a reduction of the fees in respect of non-contentious matters. In the circumstances it appears to us that the suggestion for a reduction of court fees taken in respect of litigation by an amount equivalent to the salaries and pensions of the Judges is not justified. The most that can be said, in our view, is that so long as the total of the receipts from all sources is substantially equal to the total expenditure incurred in the administration of justice, there is scope for some degree of relief, a proportion of which can properly be accorded in respect of court fees paid by litigants. In other words, some reduction of court fees taken in respect of litigation could be achieved without injustice to the general body of taxpayers.*

146. In these circumstances we have come to the conclusion that the question of court fees should be attacked from the other end, *i.e.* not by attempting so to adjust them as to bring about some preconceived over-all reduction of revenue, but by examining the particular fees charged in respect of particular steps in litigation, so as to remove anomalies and relieve hardships where these are shown to exist, always bearing in mind that the degree of relief which can be accorded is limited by the necessity of avoiding injustice to the taxpayer. It must be said at once that upon any view the amount of relief which can be accorded to the litigant must necessarily be small, because the amount taken in court fees usually forms only a small part of any bill of costs. The figures given in Appendix E show that the average amount taken in court fees is only about £3 13s. 0d. per suit. The figures for the different Divisions of the High Court differ, the average in the Chancery Division being £4 16s. 0d. per suit, that in the King's Bench Division £2 15s. 0d. and that in the Probate, Divorce and Admiralty Division £4 5s. 0d.† It is not possible to say what proportion of any bill of costs will be

* Since this Part of our Report was originally drafted, two other factors have arisen, so that there will be some additional charge on public funds by reason of the Administration of Justice (Pensions) Act, 1950, and of the increase in salaries given to a number of subordinate judicial officers under the recommendations of the Committee on Higher Civil Service Remuneration (Cmd. 7635). We mention these factors so that it should not be thought that they have been forgotten, but they have not affected our conclusions or the principles on which our conclusions have been reached.

† See footnote to paragraph 143.

accounted for by court fees, since the proceedings taken in different cases are almost infinitely various. Examination of a number of bills of costs shows, however, that in an average small action in the King's Bench Division, where the total bill of costs is in the neighbourhood of £200, court fees may be expected to account for about six per cent. of the total, about half of which will be attributable to the fee paid on taxation of costs. The latter fee is, of course, avoided where the bill can be agreed without taxation. In the case of larger actions, where the total bill of costs is greater, the percentage attributable to court fees is likely to be smaller, and in very big cases considerably smaller. It is obvious, therefore, that even the total abolition of court fees would bring no great relief to the litigant, and the degree of relief which we feel entitled to recommend can only be comparatively small. We cannot afford, however, to neglect any possible means of reducing the costs of litigation, by however small an amount, and being satisfied that some relief from court fees can be given to the litigant without injustice to the taxpayer we think that such relief should be given.

147. With these considerations in mind we have examined the provisions of the Supreme Court Fees Order, 1930, as amended, and have formed the opinion that it is undesirably complex, that it contains far too many trivial and in our view unnecessary items, and that in many cases there is an anomalous disproportion between fees charged in respect of kindred services. In our view the time is ripe for a completely new Supreme Court Fees Order, which will at the same time provide a greater degree of simplicity and afford a sensible relief of the burden which is at present imposed on the litigant. In particular we recommend that in preparing a new Supreme Court Fees Order regard should be had to the following considerations :—

- (a) Simplicity should be aimed at above all, the number of items being reduced to the minimum which will ensure that the litigant pays a fair fee for the services which are in fact rendered, and care being taken to see that there is no doubt as to the correct fee payable at any stage of the proceedings.
- (b) Generally speaking the imposition of a court fee is legitimate wherever its effect is likely to provide a salutary deterrent against frivolous litigation or frivolous abuse of the judicial machine.
- (c) Some relation should be preserved between the amount of any fee and the nature of the service in respect of which it is charged—though anything in the nature of an exact or mathematical relationship is quite impracticable.
- (d) To facilitate collection of fees, they should be imposed at such a stage in the action and in such a manner as will ensure that the service is not rendered unless the fee is paid, or, conversely, that the fee is paid if the service has in fact been rendered. To illustrate what is meant by this we give as an instance the fees payable under the existing Fees Order upon entering or sealing judgments and orders, which can be, and we understand often are, evaded by the simple expedient of not drawing up the order.
- (e) We have considered, but discarded, a suggestion that fees should be graded upon scales dependent on the amount at stake in the action. On the whole we have come to the conclusion that such a provision would introduce an unnecessary degree of complexity, and that it would be better to adhere to the present practice of requiring the same fee in respect of the same services, whatever the amount at stake. This recommendation does not include those special items in respect of which fees are now chargeable, and we think should continue to be chargeable, on an *ad valorem* basis.

148. We do not conceive it to be any part of our duty to embark ourselves upon the task of drafting a new Supreme Court Fees Order. Such a task should clearly be entrusted to a single draftsman, preferably one having experience of

the practical problems arising from the collection of fees. Nor do we desire to fetter unduly the discretion of the draftsman who will have to work out the details of any new Fees Order. Any figures given hereafter are intended, and should be taken, as no more than an indication as to the approximate size of the fees which the Committee would regard as appropriate. Subject to this qualification, however, we recommend that the imposition of fees in respect of litigation in the Supreme Court should be confined to the following headings :—

(a) *Initiating fee.* This fee would cover the initiation of proceedings as well as all interlocutory proceedings up to setting down. The same fee would be payable whether the proceedings were commenced by writ of summons, originating summons, or by any other means, including third party proceedings and appeals to the High Court from inferior courts. An additional fee of 50 per cent. would be payable on sealing a concurrent or renewed or an amended writ of summons, *etc.* No fee would be payable by the defendant or respondent on appearing, nor would there be any fee in respect of interlocutory applications or orders, nor in respect of examination of witnesses, *etc.* No additional fee would be required in the event of judgment being obtained in default of appearance, or upon summary proceedings under Order XIV. It is suggested that the initiating fee should remain at 30s. or, at most, be increased to £2.

(b) *Setting-down fee.* A further fee would be payable on setting down the action for trial. This fee would cover the trial of the action and all proceedings up to judgment, including the order of the Court. The same fee would be payable whether the action be set down for hearing in Court, or referred to an Official Referee, Master or Registrar (including reference to the Admiralty Registrar) for trial or inquiry. No separate fee would be payable in respect of the judgment, decree or order. The fee would be payable, once for all, upon setting-down, whether the hearing was before a Judge or an Official Referee, and would consequently be the same whatever the length of the hearing might be. The suggested setting-down fee would be £2 in the case of actions for trial with witnesses, or £1 in the case of originating motions, special cases, short causes, actions for trial without witnesses, *etc.* In the case of hearings before Official Referees outside London, no further fees would be payable in respect of the travelling and subsistence expenses of the Official Referee or his clerk. In our view, bearing in mind the provisions of section 125(4) of the Supreme Court of Judicature (Consolidation) Act, 1925, these expenses should properly be borne by the State.

(c) *Execution.* A fee would be payable as now on sealing a writ of execution (see Fee No. 36 in the Supreme Court Fees Order).

(d) *Taxation of costs.* A single fee would be exacted in respect of taxation of a bill of costs, whether as between party and party or as between solicitor and client. This would be payable on completion of taxation. In this case it would probably be desirable to retain the practice of charging a fee based on the amount of the bill, but it is considered that the amount now chargeable (*viz.*, 2½ per cent. on the amount allowed) is too high. It might be thought desirable to base the fee rather upon the amount disallowed, on the footing that this would more fairly reflect the service rendered by the Taxing Master. If it is thought better to continue charging on the basis of the amount allowed, we consider the percentage should be reduced by one half.

(e) *Filing documents.* The fee now payable (Fee No. 101) on filing an affidavit or any other document in any office of the Supreme Court should be retained, and we consider that the present charge (*viz.* 2s. 6d.) is reasonable. The differential fees payable on filing documents in the Admiralty

Registry (Fees Nos. 83 to 87) should be abolished ; only the standard fee of 2s. 6d. should be charged.

(f) *Searches.* We see no reason to recommend any alteration in the fees now chargeable in respect of searches, etc. (Fees Nos. 102 to 105).

(g) *Copies of documents.* We make no recommendation in respect of the fees chargeable for copies of documents (Fees Nos. 106 to 110), except that the amounts charged should be kept constantly under review, so as to ensure that so far as possible the amount of the fee charged fairly represents the actual cost of making the copy.

(h) *Special fees in the Chancery Division.* The special *ad valorem* fees chargeable in respect of the sale, mortgage or purchase of land, taking of accounts, inquiries, etc., should be preserved, and the percentage now payable is in our view reasonable. Most of the other fees covered by Section II of the Supreme Court Fees Order appear to fall within the recommendations contained in sub-paragraphs (a), (b) and (d) above. Where they do not do so, consideration should be given to their abolition.

(i) *Special fees in the King's Bench Division.* The fees payable on taking a receiver's account (Fee No. 68) and on sealing a writ of habeas corpus (Fee No. 70) we think should be retained. Fee No. 66, in respect of an application by a Justice of the Peace to take the oath, appears to have no reference to litigation, and we make no recommendation thereon. Otherwise the special fees prescribed by Section III of the Supreme Court Fees Order appear to be subject to the recommendations contained in sub-paragraphs (a) and (b) above.

(j) *Special fees in the Probate, Divorce and Admiralty Divisions.* We have no recommendations to offer in respect of the probate fees prescribed, some of which appear to arise mainly in connection with non-contentious work ; nor do we offer any recommendations in respect of fees charged in divorce proceedings, which fall outside the terms of reference of this Committee. The fees payable in the Admiralty Registry have already been dealt with under sub-paragraphs (a), (b) and (e) above. Those payable in the Marshal's Office (Fees Nos. 89 to 93) should in our view be retained, and we see no reason to recommend any alteration of the basis on which they are to be ascertained.

(k) *Fees in the Court of Appeal.* We recommend that one fee only be chargeable, viz., that on filing notice of appeal or notice of cross appeal (Fee No. 97 or 98)—which would cover the hearing of the appeal and the order made on appeal. We see no reason to recommend any alteration in the amounts prescribed in Fees Nos. 97 and 98, but the remaining fees prescribed in Section VI of the Supreme Court Fees Order should be abolished.

(l) *Other matters.* The fees prescribed in Section XI of the Supreme Court Fees Order, relating to litigation in respect of companies, should be carefully considered by some person having experience of this type of litigation. At present we do not feel able to offer any recommendations thereon. The fees prescribed in Sections VIII, X and XII relate to matters which do not commonly arise in ordinary litigation, and beyond saying that the opportunity should be taken to consider them when a new Fees Order is being prepared, we have no recommendations to put forward.

149. It is believed that the foregoing recommendations cover all the ground now covered by the existing Supreme Court Fees Order. If carried into effect they would result in a new Fees Order of far greater simplicity. Not only would the Order itself be simplified, but (what in our view is more important) the

operation of the machinery for exacting fees would be greatly simplified, and their collection rendered more certain. In a typical action in the King's Bench Division (*e.g.*, a "running-down" case of the ordinary type) the number of fees to be collected would probably be reduced to at most four, *viz.*, the initiating fee, the setting-down fee, the fee payable on filing an affidavit (if any), and the fee payable on taxation of costs. As pointed out in paragraph 146 hereof, the actual money saving resulting from the reduced fees payable would be comparatively trifling compared with the amounts now payable. But it is thought that an appreciable, though intangible, economy would result from the saving of the time now spent by the solicitor's clerk in paying numerous fees for the stamping of documents, *etc.*, generally of quite trifling amount. This, it is true, would not amount to much in the course of any one case, but the relief gained over the whole range of litigation would, it is thought, amount to something not inconsiderable. It is believed that the loss to the revenue resulting from the suggested abolition and simplification of fees would not be great, and that the average amount of fees taken in respect of an action (as set out in paragraph 146 hereof) would not be greatly affected. At any rate we are satisfied that the measure of relief to the litigant, which we have recommended above, is such as ought to be accorded and can safely be accorded without injustice to the general body of taxpayers.

150. We attach, as Appendix F, an abstract prepared by a member of the Committee from the Annual Accounts of the "Receipts and Expenditure of the High Court and Court of Appeal", showing the salaries and pensions of the Judges, the expenses other than salaries and pensions of the Judges, the total expenses, and the receipts from fees for the years 1886-1939 and 1947-1950, excluding the expenses of the Poor Persons Department, which we have excluded for the reasons given in paragraph 144, but including the expenditure attributable to criminal business.

Summary of Recommendations on Court Fees

151. We summarise our recommendations in this Part of our Report as follows:—

- (1) As the accounts of the High Court and Court of Appeal show that the total expenditure incurred in the administration of justice (excluding the cost of administering the Poor Persons Rules and the Legal Aid scheme) is approximately covered by the receipts from all sources, there is scope for some reduction in court fees without injustice to the general body of taxpayers. (Paragraphs 144 and 145.)
- (2) The reduction should be achieved, not by attempting to bring about some pre-conceived over-all reduction of revenue, but by examining the particular fees so as to remove anomalies and relieve hardships without causing injustice to the taxpayer. (Paragraph 146.)
- (3) The Supreme Court Fees Order, 1930, is undesirably complex and should be replaced by a simpler and less burdensome Fees Order on the lines suggested in this Part of our Report. (Paragraphs 147 *et seq.*)
- (4) There should be an initiating fee to cover all proceedings up to setting down. (Paragraph 148 (a).)
- (5) The setting-down fee should cover the trial of the action and all proceedings up to judgment, including the order of the Court. (Paragraph 148 (b).)

(6) There should be a single fee in respect of taxation of a bill of costs. (Paragraph 148 (d).)

(7) The fees payable in respect of filing documents, searches and taking copies of documents, as well as certain fees for special services in the respective Divisions of the High Court, should be retained, but a number of small fees should be abolished. (Paragraph 148 (e) to (j).)

(8) Only the fee on filing notice of appeal or cross appeal should be charged in the Court of Appeal. (Paragraph 148 (k).)

(9) The fees in companies matters should be considered by some person having experience in this type of litigation. (Paragraph 148 (l).)

(Sgd.) RAYMOND EVERSLED, M.R. (*Chairman*).

G. JUSTIN LYNSKEY.

GORDON WILLMER.

T. J. BARNES.*

G. P. COLDSTREAM.

GEOFFREY CROWTHER.

ARTHUR J. DRIVER.

ERIC G. M. FLETCHER.

C. N. GALLIE.

GERALD GARDINER.

C. J. GEDDES.

D. I. GIBBON.

A. L. GOODHART.

ARNOLD B. GRIDLEY.

J. HANBURY-WILLIAMS.

A. P. HERBERT.

T. H. MARSHALL.

GEOFFREY MOSELEY.

GILES NEWTON.

W. CHARLES NORTON.

GERALD R. UPJOHN.

W. T. WELLS.

M. G. WILLMOTT.

R. E. YEABSLEY.

R. C. L. GREGORY, (*Secretary*).

20th February, 1951.

* Subject to the Reservation on page 61.

RESERVATION ON COURT FEES**By SIR THOMAS BARNES**

I agree with the above Report, subject to one small reservation which I desire to make on one of the recommendations in Part V (Court Fees). Paragraph 147 contains recommendations as to the considerations to be taken into account in preparing a new Supreme Court Fees Order. With these I entirely agree. In paragraph 148, however, it is stated that the task of preparing a new Supreme Court Fees Order should be left to a draftsman having experience in the practical problems of the collection of fees. With this I also agree. That paragraph, however, proceeds to recommend certain headings to which the imposition of fees should be confined and in certain cases suggests the actual fee to be paid. I am not myself satisfied that the headings are appropriate to cover all cases, nor am I satisfied that the fees suggested are based upon the considerations set out in paragraph 147. I myself would prefer to leave both these matters to be worked out by the experts upon the basis of the recommendations set out in paragraph 147.

APPENDIX A

ORIGINATING SUMMONS

Proposed combination of Forms Nos. 1 G and 1 H of Appendix K.

No. 1 G.

Originating Summons under Order LIV, Rule 4F, or *Ex Parte* Originating Summons under Order LIV, Rule 4B.

In the High Court of Justice,
Division

In the matter of [A.B. a Solicitor] [*Re* Taxation of Costs *etc.*]
[A.B. an Infant] [*or,*
as may be]

Let all parties concerned attend [*if in the Chancery Division*—before Master at the Chambers of the Judge, Room No. ,] [*if in the King's Bench Division*—the Judge [or Master] in Chambers, Central Office], Royal Courts of Justice, Strand, London, W.C. [*if in the Probate Division*—at the Probate Registry] or [*if in the Admiralty Division*—at the Admiralty Registry] on day, the day of 19 , at o'clock in the noon, on the hearing of an application on the part of that (*state relief sought*).

[And that the respondent do pay the costs of this application to be taxed.]

Dated, 19 .

This summons was taken out by
of in the county of
[agents for of in the
county of] solicitors for the applicant, who resides at
in the county of

* This section to be omitted in the case of an *ex parte* summons.

* To the respondent [s]
of

Note.—It will not be necessary for any person named as a respondent to enter a formal appearance in the Central Office or the Probate or Admiralty Registry but if a respondent does not attend either in person or by his solicitor, at the time and place above mentioned, such order will be made and proceedings taken as the Court or the Judge may think just and expedient.

APPENDIX B

Section 27 of the Trustee Act, 1925, as amended by the Law of Property Act, 1926

27 (1) With a view to the conveyance to or distribution among the persons entitled to any real or personal property, the trustees of a settlement or of a disposition on trust for sale or personal representatives, may give notice by advertisement in the Gazette, and in a newspaper circulating in the district in which the land is situated, and such other like notices, including notices elsewhere than in England and Wales, as would, in any special case, have been directed by a court of competent jurisdiction in an action for administration, of their intention to make such conveyance or distribution as aforesaid, and requiring any person interested to send to the trustees or personal representatives within the time, not being less than two months, fixed in the notice or, where more than one notice is given, in the last of the notices, particulars of his claim in respect of the property or any part thereof to which the notice relates.

(2) At the expiration of the time fixed by the notice the trustees or personal representatives may convey or distribute the property or any part thereof to which the notice relates, to or among the persons entitled thereto, having regard only to the claims whether formal or not, of which the trustees or personal representatives then had notice and shall not, as respects the property so conveyed or distributed, be liable to any person of whose claim the trustees or personal representatives have not had notice at the time of conveyance or distribution ; but nothing in this section—

(a) prejudices the right of any person to follow the property, or any property representing the same, into the hands of any person, other than a purchaser, who may have received it ; or

(b) frees the trustees or personal representatives from any obligation to make searches or obtain official certificates of search similar to those which an intending purchaser would be advised to make or obtain.

(3) This section applies notwithstanding anything to the contrary in the will or other instrument, if any, creating the trust.

Proposed amendments

1. Delete from sub-section (1) the words " as would in any special case have been directed by a court of competent jurisdiction in an action for administration ".

2. Provide that where the trustees of a trust instrument or personal representatives in execution of the trusts or administration of the estate convey or distribute any real or personal property upon the footing of a declaration made in proceedings in the High Court such trustees or personal representatives shall not be liable to any person who was not a party to those proceedings and whose interest in the trust property or the estate reasonably appears to the trustees or personal representatives to be identical with the interests of some other person who was a party to the proceedings in which the declaration in question was made.

3. Add a proviso to sub-section (2) as follows :—

That where the estate or the trust funds available for distribution do not exceed the sum of £2,000, the knowledge of the trustees or personal representatives that there may be a person who would be interested as claimant, shall not be deemed to be a claim or notice of a claim for the purposes of this section if the trustees or personal representatives have made enquiries and searches to an extent and cost which, having regard to the value of the interest involved are reasonable, and have in addition caused to be inserted advertisements for such person in a newspaper or newspapers circulating in the country, district or place where, according to the information available to the trustees or personal representatives, the person in question was believed to be residing or to be found at the time he was last heard of, and no claim is received by the trustees or personal representatives within a reasonable time of the appearance of the advertisement or advertisements.

APPENDIX C

EXAMPLES OF UNSATISFACTORY RULES

LIST I

- (1) Order III, Rule 6. Amended 1902, 1929, 1933 and 1937.
- (2) Order XIX, Rule 10. Last two lines are obsolete.
- (3) Order XXII, Rule 17. List of stocks requires revision.
- (4) Order XXXI, Rule 9, and Order LXVI, Rule 7, and many others concerning printing require revision.
- (5) Order XXXI, Rule 19, as to copyhold tenant.
- (6) Order XXXVI, Rule 9A, as to grand jury.
- (7) Order XXXVI, Rule 10(a), *et seq.* as to associate of circuit.
- (8) Order XXXVI, Rule 11, provides for notice of trial and Rule 11A makes it inapplicable to King's Bench actions.
- (9) Order XXXVII, Rule 59, refers to India and needs revision.
- (10) Rules referring to Criminal Proceedings Act appear in various places.
- (11) Rules as to service might well be collected together and dealt with shortly.
- (12) Matrimonial Causes Rules might well be made an Order.
- (13) Prescribed forms are part of Rules, and many are obsolete.

LIST II

(The page references are to the 1949 Annual Practice)

- (1) *Rules with no numbers.*
Printed after Order XXXV, Rule 6A, page 612.
Printed after Order LXI, Rule 29, page 1428.
- (2) *References to revoked Rules.*
At the bottom of page 611.
- (3) *References to Officers of the Court who no longer exist.*
Order LXI, Rule 12, page 1422.
Order LXI, Rule 23, page 1425.
- (4) *Rules which are spent in whole or in part.*
Order LX, Rule 1, page 1413.
- (5) *Obvious mistakes, or Rules which are said in the Annual Practice not to mean what they say.*
Order XXVII, Rule 10, page 470.
Order LV, Rule 5, page 1197.
Order LV, Rule 31, page 1238.
- (6) *Unnecessary Rules*
Order LXIII, Rule 11, page 1448.
- (7) *Incomprehensible Rules*
Order XVI, Rule 9, page 268.
- (8) *Rules which obviously ought to be altered.*
Order XVI, Rule 9, page 268.
Order XXVII, Rule 15, page 477 (see *Spira v. Spira*, [1939] 3 A11 E.R. 924, C.A.)

APPENDIX D

HIGH COURT AND COURT OF APPEAL (CIVIL BUSINESS) ACCOUNT for Financial Year Ended 31st March, 1950

RECEIPTS				EXPENDITURE			
				£	£	£	£
<i>Appropriated In Aid of the Vote for the Supreme Court of Judicature(a):</i>							
Court Fees taken in stamps:							
Judicature Fee Stamps				725,803			
Court Fees taken in cash:							
Crown Office				2,230			
Probate Registry				5,142			
District Registries				184,742			
District Probate Registries				375,092			
Court Fees payable out of Funds in Court:							
Percentage under the Lunacy Acts				28,806			
Fees of Taxation, etc.				470			
					29,276		
Brokerage, etc., Fees					18,017		
Official Solicitor's Costs					44,117		
Fees for Arbitration Rooms, etc.					727		
Miscellaneous					1,852		
Prize Court: Fees on proceedings					500		
						1,387,498	
Credit (Allied Service): Amount credited towards cost of Bankruptcy department							21,587
Credit: Representing interest on funds formerly belonging to the Court of Chancery							34,622
Total Receipts						1,443,707	
Consolidated Fund Charges:							
Judges' Salaries:							
Court of Appeal				46,000			
Chancery, King's Bench and Probate, Divorce and Admiralty Divisions (b)				141,334			
Judges' Pensions (c)							187,334
							25,092
							212,426
Vote for the Supreme Court of Judicature (d):							
Salaries, Wages and Allowances:							
Royal Courts of Justice and Probate Registry				558,748			
Lord Chancellor's Department and Crown Office				33,675			
Bankruptcy Department				21,487			
Judges' Secretaries and Clerks (estimated proportion)				25,480			
							639,390
Shorthand Reporting (estimated proportion)							16,640
Circuit Allowances and Expenses (estimated proportion)							13,806
Salaries, District Registries							85,180
Salaries, District Probate Registries							102,824
Official Solicitor's Expenses							13,843
Travelling Expenses, etc.							3,328
Incidental Expenses							6,565
Jurors							569
Commissioners of Assize (estimated proportion)							29,298
Grant in Aid of the Expenses of administering the Poor Persons Rules							178,820
Grant in Aid in respect of Legal Aid							23,000
							1,113,263
Allied Services:							
Cost of Audit (Vote Class I, 9)							2,924
National Debt Office (Vote Class I, 14)							235
Law Charges (Vote Class III, 11)							287
Buildings Maintenance, Furniture, etc. (Class VII)							92,625
Rates (Vote Class VII, 11)							46,000
Stationery and Printing (Vote Class VII, 12)							48,169
Superannuation (Vote Class VIII, 4)							100,000
Postage and Telegraphs (Revenue Vote 3)							24,032
Cost of collection of stamps (Revenue Vote 2)							10,345
							324,617
Total Expenditure						1,650,306	

(a) Excludes Lands Tribunals Fee Stamps	569
(b) Excludes (1) salary of Lord Chancellor, who sits regularly in the House of Lords and Privy Council	6,000
(2) estimated proportion attributable to criminal business*	31,666
(c) Excludes (1) pensions of Lord Chancellors	15,000
(2) estimated proportion attributable to criminal business*	2,918
(d) Excludes salaries and expenses—	
(1) attributable to criminal business*	75,366
(2) of Pensions Appeals Tribunals	114,098
(3) of the Department of the Judge Advocate General	55,911
(4) of the Lands Tribunals	3,738
Total excluded	£305,266

* See Criminal Business Account below

HIGH COURT AND COURT OF APPEAL (CRIMINAL BUSINESS) ACCOUNT for Financial Year Ended 31st March, 1950

EXPENDITURE		£	£
Consolidated Fund Charges:			
Judges' Salaries:			
King's Bench Division (estimated proportion)		31,666	
Judges' Pensions (estimated proportion)		2,918	
			34,584
Vote for the Supreme Court of Judicature:			
Officers' Salaries and Expenses:			
Court of Criminal Appeal:			
Salaries		4,264	
Shorthand Writing and Transcripts (estimated proportion)		23,356	
Travelling and Incidents (estimated proportion)		4,260	
		31,880	
Commissioners of Assize (estimated proportion)		4,515	
Judges' Secretaries and Clerks (estimated proportion)		4,576	
Circuit Officers (estimated proportion)		12,798	
Circuit Allowances and Expenses (estimated proportion)		21,597	
			75,366
Total Expenditure on Criminal Business			£109,950

APPENDIX E

TABLE SHOWING THE VOLUME OF BUSINESS TRANSACTED AND THE FEES TAKEN IN THE APPELLATE COURTS,
COURTS OF FIRST INSTANCE, ETC. DURING THE CALENDAR YEAR, 1946

(1) Courts	(2) Classes of Business	(3) No. of original proceedings for each class	(4) Totals for each Division etc.	(5) Totals for Court of Appeal, High Court, etc.	(6) Fees taken for each class of business in Col. (2) £ s. d.	(7) How fees taken and to which Vote credited	(8) Fees taken in each Division, etc. £ s. d.	(9) Totals of fees in Court of Appeal, High Court, etc. £ s. d.	(10) Average amount of fees from proceedings (a) £ s. d.
<i>Appellate Courts</i>									
Judicial Committee of the Privy Council			104	104		Cash—Privy Council Vote	4,691 7 0	4,691 7 0	45 0 0
House of Lords			45	45		House of Lords Stamps—House of Lords Vote	1,111 0 0(b)	1,111 0 0	25 0 0
<i>Courts of First Instance</i>									
Court of Appeal	(i) Chancery—Companies—Bankruptcy (ii) K.B.D.—Official Referees (iii) P.D. & A. (iv) County Courts (v) Lancaster & Durham Chancery Courts	42 236 75 214 1	568	1,140	206 0 0 1,463 0 0 360 0 0 599 0 0 7 0 0	J.F.S.—S.C.V. (c)	2,635 0 0	3,126 0 0	4 12 0
High Court of Justice (Appeals and Special Cases from Inferior Courts)	(i) Chancery Division (ii) K.B.D.—Commissioner of Taxes (iii) K.B.D.—other cases (iv) P.D. & A.—Divorce	5 64 348 155	572		3 2 6 Nil 488 0 0 Nil		491 0 0		0 17 0
High Court of Justice, Chancery Division.	(i) Chancery Division— Writs Originating Summonses, etc. Proceedings begun in District Registries	1,250 2,498 625 4,373	5,140		17,206 17 6(d) (1,000) (d)		23,547 3 11 (1,000) (d)		4 16 0
King's Bench Division	(ii) Companies Court (iii) Bankruptcy Court (i) Prerogative Writs (ii) General Proceedings in London (iii) Proceedings begun in District Registries	541 226 162 (g) 24,707 15,176	40,045	89,056	2,966 3 8(e) 3,374 2 9(f) 106 0 0 71,029 12 1 (39,000) (d)	J.F.S. and cash—S.C.V.	71,135 12 1 (39,000) (d)	241,679 3 3 plus estimated sum of :— 80,000 0 0(d)	2 15 0
Probate, Divorce and Admiralty Division.	(i) Probate Contentious business (ii) Divorce London District Registries (iii) Admiralty London District Registries Prize Court	184 23,424 19,968 123 21 151 43,392 144 151	43,871		2,392 9 1(h) 134,992 6 2 (40,000) (d) 1,390 0 0 9,611 12 0		146,996 7 3 (40,000) (d)		4 5 0
Assizes	Fees paid to associates on entering for trial (j).			90,196				906 0 0 £325,711 3 3	3 13 0
Official Referees Supreme Court, Taxing Office.	References from K.B.D. only Bills taxed		181 4,463			(g) J.F.S.—S.C.V. Mostly in J.F.S.—S.C.V.	948 3 11 13,259 6 4	948 3 11 14,354 7 10(k)	
Lord Chancellor's Jurisdiction in Lunacy.	Estates brought in during year	4,422	4,422			About half in J.F.S. and half in cash—S.C.V.	66,505 6 0	66,505 6 0	
Principal Probate Registry	Non-contentious business				311,554 8 8			648,834 8 8	
District Probate Registries					337,280 0 0			£1,056,353 9 8	
<i>Total Fees (all classes of business) taken in Supreme Court during Calendar Year 1946</i>								£1,056,353 9 8	

- (a) This figure is somewhat unreal since it relates the number of original proceedings to the total amounts taken in fees at all stages of proceedings. It may, however, be of some use in showing the average amount taken per proceeding and in making a comparison between these figures for different classes of business.
- (b) Plus £303 11s. 0d. on taxation which is included in the taxation figures below.
- (c) J.F.S. denotes Judicature Fee Stamps. S.C.V. denotes Supreme Court Vote.
- (d) Estimated fees taken in cash in District Registries.
- (e) Plus £343 1s. 0d. on taxation which is included in the taxation figures below.
- (f) Plus £267 12s. 0d. on taxation which is included in the taxation figures below.
- (g) Includes 95 transferred from District Registries.
- (h) The fees for non-contentious probate business in the Principal Probate Registry amounted to £307,542 8s. 8d. taken in stamps plus £4,012 taken in cash and in the District Registries £337,280. These figures are included in the table below. £180 17s. 6d. on taxation, see (k).
- (i) Fees in respect of business at Assizes are normally paid in London or to the District Registries. The fees included here are fees paid to the associates on entering causes for trial when the party was too late to pay in the normal way.
- (k) This figure includes the amounts paid on taxation and referred to in notes (b), (e), (f) and (h) above.

APPENDIX F

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AN ABSTRACT FROM THE ANNUAL ACCOUNTS OF THE "RECEIPTS AND EXPENDITURE OF THE HIGH COURT AND COURT OF APPEAL" FOR THE YEARS 1886-1939 AND 1947-1950 EXCLUDING THE EXPENSES OF THE POOR PERSONS DEPARTMENT BUT INCLUDING THE EXPENDITURE ATTRIBUTABLE TO CRIMINAL BUSINESS

A	B	C	D	E	F	G
Financial Year ending 31st March	Salaries and Pensions of the Judges	Expenditure of the Supreme Court other than Salaries and Pensions of the Judges	Total Expenditure (B+C)	Receipts from Fees, etc.	Surplus (+) or Deficit (-) of E over C	Surplus (+) or Deficit (-) of E over D
	£	£	£	£	£	£
1886 ..	168,005	514,093	682,098	530,210	+ 16,117	- 151,888
1887 ..	179,762	508,392	688,154	527,474	+ 19,082	- 160,680
1888 ..	179,693	496,883	676,586	534,187	+ 37,304	- 142,399
1889 ..	179,539	489,924	669,463	527,280	+ 37,256	- 142,183
1890 ..	174,000	490,944	664,944	510,299	+ 19,355	- 154,645
1891 ..	177,257	488,586	664,843	515,602	+ 27,016	- 150,241
1892 ..	183,542	479,577	663,119	538,828	+ 59,251	- 124,291
1893 ..	183,542	459,577	663,119	539,522	+ 79,945	- 123,597
1894 ..	184,500	466,572	651,072	513,375	+ 46,803	- 137,697
1895 ..	180,347	447,555	637,902	489,649	+ 12,094	- 148,253
1896 ..	175,571	448,928	634,499	497,739	+ 48,811	- 136,760
1897 ..	169,822	448,692	618,514	481,048	+ 32,356	- 137,466
1898 ..	169,037	439,191	608,228	498,073	+ 58,882	- 110,155
1899 ..	174,972	456,573	631,545	503,589	+ 47,016	- 127,956
1900 ..	173,718	452,526	625,244	521,072	+ 69,546	- 104,172
1901 ..	170,770	491,521	622,291	502,307	+ 10,786	- 119,984
1902 ..	173,427	442,189	615,616	499,026	+ 56,837	- 116,590
1903 ..	179,500	445,700	625,200	512,621	+ 66,921	- 112,579
1904 ..	177,949	444,928	622,877	508,121	+ 63,193	- 114,756
1905 ..	178,851	449,006	627,857	511,655	+ 62,649	- 116,202
1906 ..	183,012	443,805	626,817	503,580	+ 59,775	- 123,237
1907 ..	195,230	454,166	649,396	499,863	+ 45,697	- 149,533
1908 ..	197,153	457,771	654,924	504,467	+ 46,696	- 150,457
1909 ..	192,781	453,749	646,530	492,296	+ 38,547	- 154,234
1910 ..	193,251	456,373	649,624	489,466	+ 33,093	- 160,158
1911 ..	206,172	478,020	684,192	481,433	+ 3,413	- 202,759
1912 ..	211,366	488,497	699,863	483,119	- 5,378	- 216,744
1913 ..	208,882	483,793	692,675	483,799	+ 6	- 208,876

APPENDIX F—continued

A	B	C	D	E	F	G
Financial Year ending 31st March	Salaries and Pensions of the Judges	Expenditure of the Supreme Court other than Salaries and Pensions of the Judges	Total Expenditure (B+C)	Receipts from Fees, etc.	Surplus (+) or Deficit (-) of E over C	Surplus (+) or Deficit (-) of E over D
	£	£	£	£	£	£
1914 ..	204,279	449,034	653,313	489,778	+ 40,744	- 163,535
1915 ..	208,063	432,967	641,030	466,568	+ 33,601	- 174,462
1916 ..	208,255	429,050	637,305	465,600	+ 36,550	- 171,705
1917 ..	203,578	424,430	628,008	477,227	+ 52,797	- 150,781
1918 ..	217,069	438,230	655,299	448,420	+ 10,190	- 206,879
1919 ..	209,526	466,966	676,492	458,100	- 8,866	- 218,392
1920 ..	205,474	566,242	771,716	548,303	- 17,939	- 223,413
1921 ..	208,769	740,612	949,381	596,207	- 144,405	- 353,174
1922 ..	249,575	743,737	993,312	712,890	- 30,847	- 280,422
1923 ..	211,992	622,716	834,708	834,243	+ 211,527	- 465
1924 ..	207,204	598,097	805,301	822,181	+ 224,084	+ 16,880
1925 ..	205,331	599,179	804,510	822,169	+ 222,990	+ 17,659
1926 ..	178,496	702,545	881,041	848,413	+ 145,868	- 32,628
1927 ..	167,618	682,273	849,891	820,512	+ 138,239	- 29,379
1928 ..	167,219	689,385	856,604	866,172	+ 176,787	+ 9,920
1929 ..	172,432	692,172	864,604	840,004	+ 147,832	- 24,600
1930 ..	164,170	694,486	858,656	918,998	+ 224,512	+ 60,342
1931 ..	157,553	694,391	851,944	917,516	+ 223,125	+ 65,572
1932 ..	151,067	665,911	816,978	904,034	+ 238,123	+ 87,056
1933 ..	135,421	646,475	781,896	944,054	+ 297,579	+ 162,158
1934 ..	137,151	657,897	795,048	894,443	+ 236,546	+ 99,395
1935 ..	147,291	663,880	811,171	902,610	+ 238,730	+ 91,539
1936 ..	168,649	716,634	885,283	946,066	+ 239,432	+ 60,78.
1937 ..	172,698	719,257	891,955	946,299	+ 227,042	+ 54,344
1938 ..	169,024	732,423	901,447	977,796	+ 245,373	+ 76,349
1939 ..	177,275	768,630	945,905	984,884	+ 216,254	+ 38,979
War ..						
1947 ..	195,484	1,014,908	1,210,392	1,276,279	+ 261,371	+ 65,887
1948 ..	196,458	1,202,199	1,398,657	1,329,306	+ 127,107	- 69,351
1949 ..	209,063	1,309,944	1,519,007	1,368,317	+ 58,373	- 150,690
1950 ..	212,426	1,346,010	1,558,436	1,443,707	+ 97,697	- 114,729