

# Fordham Law Review

---

Volume 4 | Issue 2

Article 3

---

1935

## New Procedure for Old

John F. X. Finn

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>

 Part of the [Law Commons](#)

---

### Recommended Citation

John F. X. Finn, *New Procedure for Old*, 4 Fordham L. Rev. 228 (1935).

Available at: <https://ir.lawnet.fordham.edu/flr/vol4/iss2/3>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## New Procedure for Old

### Cover Page Footnote

Associate Professor of Law, Fordham University, School of Law.

# NEW PROCEDURE FOR OLD

JOHN F. X. FINN†

“Obviously, in our legal system there are greater forces and processes than rules of law and tribunals, judicial or administrative—the system sheds the outworn and incorporates the tried and useful, all to its continued efficacy and usefulness as a cherished institution.”—McFarland.<sup>1</sup>

In recent years the spotlight of legal thought has been focussed upon procedural problems incident to the administration of justice in large urban centers.<sup>2</sup> The more piercing the rays, the more vividly is revealed the imminent upheaval of “the firmest pillar of good government” by a formidable army of procedural ills spurred on by a triune Menace so insidious that every Attack upon it to date has failed of Victory.

## I

### *The Menace*

In the front rank, on the civil side, are “The Three Musketeers of the Law’s Delay”: the negligence action, the jury trial and the “settleable” case.<sup>3</sup> The fencing with these united foemen has at times been

---

† Associate Professor of Law, Fordham University, School of Law.

1. *Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations*, a prize winning essay (1934), 59 A. B. A. Rep. 326, 347.

The italics used throughout this paper have been inserted by the writer.

2. As early as 1921 Roscoe Pound wrote in *The Spirit of the Common Law*, at page 124, “It requires no great study of our procedure to enable us to perceive that many of its features, taking the country as a whole, were determined by the conditions of rural communities of seventy-five or one hundred years ago. . . . The demand for organization of justice and improvement of legal procedure comes from our cities. . . . To deal adequately with the civil litigation of a city . . . we must obviate waste of judicial power, save time and conserve effort.” Statistics tabulated at pages 36-40 of the First Report of the Judicial Council of the State of New York (1935) indicate delays as of June 30, 1934 in counties in or near New York, N. Y., of 38 months in the Supreme Court, 52 months in the City Court and 31¼ months in the Municipal Court as against *no* delays in the Supreme Court in 29 suburban or rural counties. See also the REPORT OF THE COMMISSION ON THE ADMINISTRATION OF JUSTICE IN NEW YORK STATE (1934) where it is stated, at page 13: “In some courts and in some counties the delay amounts to positive denial of justice. When a claim matures for litigation, sufficient time must thereafter elapse to give the defendant due notice, to give opportunity to settle the issues upon which to seek the court’s determination and to prepare and present the evidence, and to give time for the court to reach a decision. A delay due solely to congestion of the calendar of over six months in tort cases and over two months in commercial cases has been said by the Judicial Council of New Jersey to constitute a denial of justice. We concur in that statement, lacking any better general standard.”

3. It appears from the REPORT OF THE COMMISSION ON THE ADMINISTRATION OF JUSTICE IN NEW YORK STATE (1934), that (a) “Some 60 per cent to 75 per cent of the cases now on the calendars of the Supreme Court consists of negligence cases, in most of which a jury trial is demanded.” (pp. 23-24); that (b) “more than one-third of all law actions in the Supreme Court deal with motor vehicle injuries” (p. 951); and that (c)

listless,<sup>4</sup> but of late the thrusts have become more frequent and the blades more keen.<sup>5</sup> The renewed zeal of both judges and lawyers under the

"something like 74 per cent of all cases started in the Supreme Court are never tried, but that these 74 per cent, amounting to thousands of cases, remain on the calendars undisposed of until they are actually called for trial, which may involve a period of waiting extending from several months to several years." (p. 23). Note, with respect to the last group of "settle-able" cases, that a mere "General Calendar Call" is not really effective. The great bulk of such cases do not settle until they are "actually called for trial." Cf. the First and Second Reports of the Special Calendar Committee appointed by the Appellate Division of the N. Y. Supreme Court, First Dept. dated respectively, June 20, 1927, and June, 1928. These reports recommended an increase of filing fees to cut down jury trials and the institution of an "auxiliary judicial force" of emergency referees. They state that statistics from 1910-1926 show "unprecedented" increase in the number of cases on trial calendars, "largely due to tort actions growing out of automobile accidents."

4. See Finn, *Review of 2 Clark's Cases on Pleading and Procedure* (1933) 2 BROOKLYN L. REV. 328, 330: "New York, hoist by its concentration of population, and plagued by trial calendars two years or more behind, has clutched at every possible panacea to cure the law's delay. It has extended waivers of jury trial by statute and decision. It has increased the initial filing fee in a jury case from \$2 to \$37 and in an equity case from \$2 to \$25, so that the litigation of the 'Forgotten Man' is fast descending from obscurity to oblivion. Its legislature has just been considering increased fees in the lower courts. It has increased the number of its judges. It has experimented with summary judgment, declaratory judgments and statutory preferences, only to weaken the effectiveness of each one of such devices by judicial decision. [Summary judgment: *Actna v. National*, 230 App. Div. 486, 245 N. Y. Supp. 365 (1st Dep't 1930); *Dairymen's League v. Egli*, 228 App. Div. 164, 239 N. Y. Supp. 152 (4th Dep't 1930); though cf. *Irving Trust Co. v. Lefl*, 253 N. Y. 359, 171 N. E. 569 (1930). Declaratory judgments: *James v. Alderton*, 256 N. Y. 298, 176 N. E. 401; *Newburger v. Lubell*, 257 N. Y. 213, 177 N. E. 424 (1931); *Colson v. Pelgram*, 259 N. Y. 370, 182 N. E. 19 (1932). Statutory preferences: *Goldin v. Malone Dairy Co., Inc.*, 209 App. Div. 341, 204 N. Y. Supp. 401 (1st Dep't 1924); *Morse v. Press Pub. Co.*, 71 App. Div. 351, 75 N. Y. Supp. 976 (1st Dep't 1902); *Dooley v. Paget*, 38 Misc. 44, 76 N. Y. Supp. 906 (Sup. Ct. 1902); *Riglander v. Star Co.*, 98 App. Div. 101, 90 N. Y. Supp. 772 (1st Dep't 1904), *aff'd*, 181 N. Y. 531 (1905).] It is trying conciliation and arbitration. It has been introduced to the Sweedler experiment but fails to use it in its Supreme Court practice although the Special Calendar Committee of the Appellate Division in the First Department recommended a similar plan as early as 1927, over the signatures of Victor J. Dowling, Henry W. Taft, William Nelson Cromwell, Francis B. Delchanty, Bernard S. Deutsch, Jeremiah T. Mahoney, Joseph M. Proskauer, Peter Schmuck and Samuel Seabury." On March 26, 1935 the Senate of the State of New York passed the McNaboe bill providing for the appointment of emergency referees by the Appellate Division of the First and Second Departments whenever such Appellate Divisions determine that the courts are congested and behind in their work. While a step in the right direction, such bill may find objection because the referees must be compensated and the Judicial Council of the State has written "Until other expedients now under consideration have been tried, a sub-judiciary is undesirable in this state." First Report (1935) p. 47. The State Assembly also voted in March, 1935 to permit women to serve on New York juries. The enactment of this bill into law is problematical.

5. The extension of summary judgment procedure, so ably discussed by Justice Shientag in the preceding article herein, has proved a most effective weapon. Two constitutional amendments have also been approved by the Judicial Council and considered by the legislature for submission to the people, viz. one limiting trial by jury in civil cases involving \$250 or less and the other providing for a five-sixths jury verdict in civil cases. See also the

urging of Judicial Councils and Law Revision Commissions is perhaps evidence of a struggle to survive. In any event, it has become definitely apparent that unless legal practitioners swiftly "do something about it," they will inevitably find themselves in full retreat before the three embattled swordsmen. More robust than ever, they now relentlessly advance from day to day commanding their brigaded regiments of "administrative tribunals," "commissions," "arbitration boards" and similar quasi-courts.<sup>6</sup> At least one far-sighted statesman has already sounded the alarm to warn of an

---

"List of 13 Recommendations" printed at page 10 of the First Report of the Judicial Council (1935) and the "List of Subjects under Consideration" printed at page 11 thereof. *Cf.* in addition pp. 41-49 of said Report and pp. 10-11 of the Report of the State Law Revision Commission. The New York Supreme Court recently adopted a rule preferring most contract actions over tort actions on thirty days notice. Rule IV, Appellate Division, First Department, in effect Feb. 15, 1935. It has also ruled that service of amended pleadings no longer "breaks the issue" so as to require a new note of issue and loss of calendar position. Rule 150, as revised, effective March, 1935. The time in which to move to dismiss for failure to prosecute has likewise been shortened. Rule 156, as revised, effective March, 1935. Numerous "strike" actions have been abolished by statute, so that calendars will no longer be augmented by actions for alienation of affections, civil seduction, criminal conversation, breach of promise to marry. N. Y. CIV. PRAC. ACT. §§ 61 a)—61 i) inclusive, effective March 29, 1935, printed in the New York Law Journal of April 1, 1935, page 1642. In personal injury actions, commencing September 1, 1935, the testimony of hospital physicians and nurses as to damage is to be taken before a referee subject to the court's discretion. CIV. PRAC. ACT, § 354, as amended.

6. McFarland, *Administrative Agencies in Government* (1934), 59 A. B. A. REP. 326, 346: "As these agencies attain these characteristics in marked degree and when their work seems established as permanent tasks of government, they may be made courts in effect and in fact." Pound, *Justice According to Law* (1914) 14 COL. L. REV. 1, 26: "It is no accident that France, which was the first country to develop modern administration, is more and more turning its administrative tribunals into ordinary courts." Finch, *Progress in Procedure* (1934) 4 BROOKLYN L. REV. 1: "Progressive procedural changes must be more fundamental in the future—or the work of the lawyers will tend more and more to be transferred to administrative boards. . . . The Workmen's Compensation Commission in the State of New York and other states is one striking example. There is strong agitation now to follow with like manner in negligence litigation. Business men are endeavoring to set up arbitration courts to settle disputes through trade associations. In new fields like radio a department head is in control of the entire industry without any precedents or rules for guidance." See also the following: Report by the Committee to Study Compensation for Automobile Accidents; Report of Mass. Jud. Council (1932) 22; FRENCH, THE AUTOMOBILE COMPENSATION PLAN (1933); Clark and Shulman, *Jury Trial in Civil Cases* (1934) 43 YALE L. J. 867, 885; Message of Gov. Smith to the New York Legislature, dated Jan. 9, 1928, Legis. Doc. No. 53 (1928); Report of Special Calendar Committee of Appellate Division, First Dept. (N. Y.), dated June 20, 1927, p. 11. Dowling, *The Automobile Compensation Plan*, a summary, pp. 949-957 of Report of N. Y. Commission on the Administration of Justice (1934); Lowe, *How to Keep Litigation in the Courts* (1934), 18 J. AM. JUD. SOC. 90-91. The law business is slipping away from the lawyers and into the hands of boards and commissions which are not hog-tied and fettered by rules of procedure and practice. ". . . Delay is caused more by a Bourbon-like adherence to needless forms, ceremonies and archaic methods than any other thing. The litigant wants action. The business man wants a prompt decision. The state wants a prompt and speedy settlement of

"apparent tendency, arising from necessity, to get most of our important problems settled *outside the law* as a matter of expediency. I am very doubtful whether in the long run that is a desirable situation for a democracy."<sup>7</sup>

What, then, "to do about it?" Certainly, "institutions geared to the stage coach can hardly be suited to modern needs";<sup>8</sup> and practice and procedure of necessity must be "geared in high" to meet emergencies of calendar congestion, whether they be chronic or suddenly recurring. Of course, "Emergency does not increase granted powers or remove or diminish the restrictions imposed upon power granted or reserved."<sup>9</sup> Yet emergencies do present the occasion for the exercise of new powers by the "granting authority,"—the people—whose "reserved power" is Reserve Power writ large. The gauge of battle has been flung and the bench and bar must "call up the reserve" to meet the challenge. However harsh Tradition's touch, Right's rapier must maim the mace of Might.

Two constitutional amendments have already been approved by the New York Judicial Council and considered by the New York Legislature for submission to the people. Both of them attempt to fell the strongest of "The Three Musketeers,"—the jury trial in civil cases. The five-sixths verdict will undoubtedly be approved. The limitation of jury trials in \$250 cases may run afoul of demagoguery and the age-old cry of "One law for the rich and another for the poor." Why not a third Constitutional amendment, not so drastic, aimed at all jury trials, subject to the discretion of the court and "*for emergencies only*," when emergencies are certified as such to the Governor by the Appellate Divisions of the respective departments?

Well, possibly. But how far do you want to go? The answer is something akin to a thought recently expressed by Presiding Justice

---

disputes. . . . We have heard much of late, of the proposed innovation of placing the 'rule-making power' back in the courts. Who ever took it away? What is needed is a set of rules of procedure under which the courts can function, speedily and without delay as required by the mandate of the constitution. Anything less than this is not carrying out the expressed will of the people, and is a subversion of the judicial power delegated by the people to the courts." A valuable symposium on the subject is found in Haines and Dimock, *ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION* (1935). It is there stated, at page 320: "Special administrative courts should be a means of dealing with administration more satisfactorily and of democratizing justice." A particularly valuable essay in the collection, printed at pp. 269-286, is entitled *The Inadequacies of the Rule of Law*.

7. Owen D. Young, as quoted by Judge Finch, *supra* note 6.

8. MILLER, *THE CONSTITUTION AND MODERN TRENDS* (1934), 59 Rep. of Amer. Bar Ass'n 348, 352.

9. Chief Justice Hughes, in the Minnesota Mortgage Moratorium Law case, *Home Bldg. and Loan Ass'n v. Blaisdell*, 290 U. S. 398 (1934).

Martin of the New York Appellate Division,<sup>10</sup> who is reported to have stated that he felt *we can do a whole lot with what we already have, if we will only do it intelligently,*<sup>11</sup> earnestly and honestly. If you prefer the language of a higher court, "All procedure is merely a methodical means whereby the court reaches out to restore rights and remedy wrongs. It must never become more important than the purpose which it seeks to accomplish."<sup>12</sup>

## II

### *The Attack*

It is the thesis of this article that crowded cities and states can profitably base a new procedure on the best elements of the present

10. New York Law Journal, February 8, 1935. Justice Martin is now a member of the Judicial Council of his state. Presiding over the busiest appellate court in the world, with supervision of the Supreme Court in what is procedurally the most congested area in the world, upon his shoulders has fallen the task of rousing the bench and bar from their lethargy. After personally observing him in action for many years, both New York lawyers and laymen have unqualified confidence in the leadership he has assumed. Note in passing, that at the general election to be held in 1936, the electors of New York will pass upon the question posited by their Constitution, "Shall there be a convention to revise the Constitution and amend the same?" N. Y. Const. Art. XIV, sec. 2.

11. Cf. Proskauer, *A New Professional Psychology Essential for Law Reform* (1928) 14 A. B. A. J. 121: "Workable law reform will not be accomplished merely by specific change in statute and rule. It must rest largely on a fundamental change in the group psychology of the legal profession toward its function." See also Fowler, *A Psychological Approach to Procedural Reform* (1934), 43 YALE L. J. 1254, 1270: "A statute that embodies the crux of the change in definite concise expressions of policy or method would seem to be preferable to a detailed, complex pattern that may overwork the habit breaking and forming apparatus and lose the meaning appeal by reason of its disseminated and unconcerted attack. The details of administration of the reform may be left to the discretion of the trial judge. . . . Any abuse of discretion . . . may be checked up by the appellate court, . . . legislatively, . . . or by a rule making power in the judges or some judicial council." Again, at page 1264: "When a legislature tears the printed pattern out of the statute books and inserts another, the reform is only begun. The substitution . . . is successful only if it replaces the old one *in the minds of those who use the patterns*. . . . The initial problem is to . . . determine whether the resistance . . . is apt to lie in inertia . . . or in an actual repugnance springing from an affirmative attitude or tradition. . . . The final phase of the problem is a determination of the rate of speed at which the mechanism can be manipulated to secure a proper and lasting result. . . . *By confining the use of the new system to a small field in its initial stages, and gradually widening its scope to all actions at law, the full measure of psychological effectiveness (is) achieved.*" This re-echoes HEBBURN, *THE DEVELOPMENT OF CODE PLEADING* (1877) 83 n. 12, where it is pointed out that if it is attempted to overturn in a day a deep-rooted procedural system: "The prejudices of thousands of practitioners must be disregarded and the habits of their daily lives reversed; the active opposition of many able men recognized as profoundly learned in the law must be overborne; a community accustomed, especially in such matters, to be led by their lawyers must be assured of safety in turning aside to follow a few reformers." There is always danger that inertia will cause a reform, improperly presented, to be called, as was the N. Y. Code of Civil Procedure, a "Brobdingnagian conglomeration of heterogeneous rules of law and practice."

12. Crane, J. in *Clark v. Kirby*, 243 N. Y. 295, 153 N. E. 79 (1926).

federal equity practice, the Virginia "Judgment on motion" and the English "New Procedure of 1932."

(a) *The Federal Equity Practice of Having Each Case Supervised by One Judge for All Purposes—The Present Trend in that Direction in the States.*

A federal equity rule<sup>13</sup> provides:

"In any suit in which a receiver is appointed, *the Judge* who appoints the receiver *shall retain supervision over the cause*; unless otherwise required by law or by rule of this Court, *all matters therein shall be heard by him* upon such notice to the parties and to the creditors as he shall prescribe. . ."

And a federal calendar rule<sup>14</sup> provides:

"Immediately after twenty days have elapsed since joinder of issue in all causes the Calendar Commissioner shall place each such cause or proceeding upon the calendar."

The efficacy of the federal equity rules, of which the foregoing are typical, has received the approbation of high authority.<sup>15</sup> Under this

13. Rule IV of the Equity Rules of the U. S. District Court for the Southern District of New York is taken as illustrative.

14. The illustration is Rule VIII of the Calendar Rules of the United States District Court for the Southern District of New York, "Placing Causes on Calendars."

15. Clark and Moore, *A New Federal Civil Procedure—The Background* (1935), 44 YALE L. J. 387, 393: "New York is often pointed to as an example of the lack of success of the code system. But it is not actually one, for the crowded conditions in New York City, coupled with a multitude of different statutory enactments and diverse rulings of the court, have led to the unfortunate procedural uncertainty which exists there but does not exist throughout the state as a whole. The success of such widely divergent states as California, Minnesota and Connecticut indicates the real effectiveness of the procedure. . . . If ever there was efficacy in the division of law and equity certainly it is long gone. . . . The sensible course is to abolish the remaining formal vestiges for a completely unified system reflecting the best in English and American judicial procedure. . . . The Federal Equity Rules of 1912, in themselves an embodiment of this best practice, furnish the substantial model for the new Federal procedure of the future." Wickes, *The New Rule Making Power of the U. S. Supreme Court* (1934) 13 TEXAS L. REV. 1: "The historic method of approach to the problem of regulating practice and procedure in civil actions at law in the federal courts has been to provide in general that the practice in each federal trial court shall conform to the practice in the courts of the state in which that federal court is sitting, as that practice existed at some fixed time. . . . The Conformity Act has not proven satisfactory in operation. . . . As a result—a statute was finally enacted on June 19, 1934 (28 U. S. C. A. sec. 723 b, 723, c), giving the Supreme Court of the U. S. power to prescribe by general Rules the practice and procedure in civil actions at law for the district courts of the U. S. . . . The need for a modern scientific system of federal procedure is acute. . . . The new statute is also an important step in the substitution of rules of court for statutes in the regulation of judicial procedure." The Supreme Court now has the same power to make rules for the regulation of procedure in a civil action at law that it possessed with respect to suits in equity as early as 1792 (1 Stat. 276); Sunderland, *Grant of Rule-making Power to the Supreme Court of the U. S.* (1934) 32 MICH. L. REV. 1116; Shelton, *Progress of the Proposal to Substitute Rules of Court for Common Law Practice.* (1918) 5 VA. L. REV. 111; Jaureguy, *Improvement of Rules of Judicial Procedure* (1934) 14 ORE. L. REV. 20; Sunderland, *The Grant of Rule Making Power to the Supreme Court of the U. S.*



practice, if Judge Woolsey, let us say, has appointed a receiver of the Ambassador Hotels, Judge Woolsey hears every motion or proceeding of any kind that is ever brought relating to such Ambassador Hotels. Everything *apropos* is automatically referred to him under the rule.

Similarly, in New York State, the Supreme Court of New York County has a "Guaranteed Mortgage Certificate Justice" in the person of Mr. Justice Frankenthaler, and a "Condemnation Justice" on occasion is permitted to continue as such even while he continues with his work in other parts. The Supreme Court of Kings County has an "S. W. Straus Reorganization Justice" in the person of Mr. Justice Lockwood, a "Matrimonial Justice" for matrimonial cases during a given term, "when not otherwise engaged,"<sup>15a</sup> an "Incompetents' Estates Justice" for a given term, "when not otherwise engaged," and so on. In Surrogate's practice every motion relating to a given estate is usually referred to the Surrogate who initially dealt with such estate. Personal judicial supervision of a case or of "types of cases" grows apace.

New York also has a provision for "omnibus motions" in Section 117 of its Civil Practice Act, which long ago fell into "innocuous desuetude" but which, like the phoenix, is rising again under the influence of the Judicial Council.<sup>16</sup> The Judicial Council is also advancing with great force a proposal for an "Administrative Justice" in each judicial district.<sup>17</sup> The State Legislature, under the leadership of Senator Buckley, is heartily cooperating wherever possible.

(b) *The Virginia "Judgment By Motion."*

As pointed out by Mr. Justice Shientag, whatever New York's original reactions were to Rule 113 of its Rules of Civil Practice, it is now thoroughly accustomed to summary judgment on motion in many cases.<sup>17a</sup>

(1934), 32 MICH. L. REV. 1116; Clark, *Procedural Reform and the Supreme Court* (1926) 8 AMER. MERCURY 445; cf. Clark, *The New Illinois Civil Practice Act* (1933) 1. U. OF CH. L. REV. 209; Anderson, *Reform in Legal Systems* 10 AMER. POL. SCI. REV. 569; Forster, *Law Reform*, 9 AMER. POL. SCI. REV. 735; Crownover, Jr., *Procedural Simplification* (1934) 12 TENN. L. REV. 90; Hawley, *Present Tendencies in Judicial Reform* 9 AMER. POL. SCI. REV. 529; Whittier, *Controlling Court Procedure by Rules Rather than by Statutes* 20 AMER. POL. SCI. REV. 836.

15a. See Rule 15, Special Term, Kings County.

16. First Report of the Judicial Council (1935) 48. Cf. Senate Int. 2187 (1935). "It is proposed . . . to amend the Civil Practice Act to permit pre-trial appearance before a judge to settle the issues and eliminate issues." Cf. Ragland, *DISCOVERY BEFORE TRIAL* 227, where he discusses "Judicial Control of Pre-Trial Practice."

17. First Report, *op. cit. supra*, at 43. See also an exhaustive brief on the constitutionality of the plan, in view of art. VI, § 19 of the State Constitution, which provides " . . . the justices of the Supreme Court shall not hold any other public office or trust, except that they shall be eligible to serve as members of the Constitutional Convention." REPORT OF THE COMMISSION ON THE ADMINISTRATION OF JUSTICE (1934) pp. 419-494.

17a. Shientag, *Summary Judgment* (1935) 4 FORDHAM L. REV. 186 at 223.

In Virginia, there is in force a statutory remedy for judgment *on notice of motion in lieu of an action at law*, which is available in any law action.<sup>18</sup> The success of this device has been evidenced by its frequent use and the approbation of the Virginia bar, so that a proposal has been made to extend it to all equity proceedings as well.<sup>19</sup> The procedure has also been adopted in West Virginia.<sup>20</sup>

(c) *The English "New Procedure of 1932."*

Prior to 1932 England attempted to expedite the process of justice by a system of "masters" or semi-official referees who supervised pre-trial matters relating to the framing of the issues to be tried. (*E.g.*, amendment of pleadings, bills of particulars, discovery and so forth.)

This system was chiefly objectionable for two reasons, *viz.*, first, because it was expensive to have a "sub-judiciary" to support; and second, because "masters" or "referees," who were not actually judges, were so remote from the trial that procedure before them readily lent itself to mere formality and delay. The English people themselves severely criticized their own device.<sup>21</sup>

In 1932 an innovation was instituted, known as the "New Procedure" of that year<sup>22</sup> and it has been functioning ever since. The purpose of such "New Procedure" was to achieve a speedy trial (or to settle the case), *before the judge who first heard any matters in connection with it*. Such procedure applies to actions assigned to the King's Bench Division, but does not apply to actions for libel, slander, malicious prosecu-

18. VA. CODE (1930) § 6046, succeeding VA. CODE (1916) § 6046 which was derived by extension from 4 VA. STAT. (Hening) 352 and 1 VA. STAT. (Hening) 297, the statute last stated being limited to actions against sheriffs because in 1644 "most of the sheriffs, as is conceived, have converted a great part of the eighteen pound of tobacco per pole to their private benefit."

19. 2 Va. Jud. Council Rep., Appendix; *Report of Committee on Legal Reform of Pleading and Practice* (1929) 36 W. VA. L. Q. 1, 67 *et seq.*

20. *Cf.* Millar, *Three American Ventures in Summary Civil Procedure* (1928) 38 YALE L. J. 193, 213-224.

21. Mullins, *IN QUEST OF JUSTICE* (1932); Greenbaum and Reade, *THE KING'S BENCH MASTERS AND ENGLISH INTERLOCUTORY PRACTICE* (1932); Ragland, *DISCOVERY BEFORE TRIAL*; McCormack, *Lights and Shadows in English Justice* (1932) 18 A. B. A. J. 603, *cf.* Rosenbaum, *Studies in English Procedure* (1914), 63 U. OF PA. L. REV. 105, 151, 273, 380, 505. 64, *id.* 357, 472, 583, and Sunderland, *The English Struggle for Procedural Reform* (1926) 39 HARV. L. REV. 725.

22. Order XXXVIII A, Statutory Rules and Orders (1932) No. 252 L. 7 Supreme Court England; *THE ANNUAL PRACTICE (The White Book)* (1933) p. 711 ff., p. 1751-1752; *ANNUAL SURVEY OF ENGLISH LAW* (1933) 307; *The New Procedure Rules in Operation* (1932) 174 L. T. 80, 101; Millar, *The "New Procedure" of the English Rules* (1932) 27 ILL. L. REV. 363; *cf.* Ball, *Practice and Procedure* (1935) 51 L. Q. REV. 13, 21:

"There can be no doubt that the new procedure has had effect to expedite the trial of a large number of actions. Of those which do find their way into this list rather more than half appear to be actions for negligence. It often happens that on the return to a procedure summons, Master or judge suggests a *via media* which leads to the amicable settlement of the action."

tion, false imprisonment, seduction, or breach of promise of marriage, nor to actions in which fraud is alleged by the plaintiff.<sup>23</sup> Any actions to which the new order applies may be made a new procedure action at the option of the plaintiff by marking the writ of summons with the words "New Procedure," and, if the plaintiff's solicitor, where "satisfied that the action is one to which this Order applies and that it is not by reason of its complexity or other circumstances unsuitable for the procedure prescribed by this Order," indorses on the writ of summons a certificate that in his opinion the action is fit for the new procedure. Other rules provide for a transfer to the new procedure list at the instance of the defendant or by order of the judge.

The rules then provide for a speedy filing of plaintiff's statement of claim, defendant's defense and counterclaim, and plaintiff's reply (at intervals of not over seven days), and that the plaintiff shall take out a summons for directions before one of the judges taking the new procedure list. On the hearing, the judge has extensive powers in his discretion as to ordering further pleadings or discovery or inspection of documents or trial as a new procedure action or transfer to the ordinary list or for trial at Assizes or for remission to a County Court or may

"(g) order the action or any issue therein to be tried with a jury or without a jury as, in his discretion, he may think fit;

"(h) order that no more than a specified number of expert witnesses may be called;

"(j) order that any particular fact or facts may be proved by affidavit or that the affidavit of any witness may be read at the trial on such conditions as the Judge may think reasonable or that any witness whose attendance in Court ought for some sufficient ground to be dispensed with be examined before a Commissioner or Examiner; provided that where it appears to the Judge that the other party reasonably desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit, but the expenses of such witness at the trial may be specially reserved;

"(k) record any consent of the parties either wholly excluding their right of appeal or limiting it to the Court of Appeal or limiting it to questions of law only.

"(3) The Judge may order that any question involving expert knowledge shall be referred to a special referee for enquiry and report, and in particular and without prejudice to the general power, the Judge may refer to a special referee for inquiry and report any question arising as to the nature, extent and permanence of any injury caused or alleged to have been caused by the negligence of a party on the terms (a) that the report when received shall be communicated to both parties with a view to ascertaining whether they are

---

23. If fraud is alleged subsequently, the action may be transferred to the ordinary list, and, if any party against whom fraud is alleged so desires, it shall be so transferred. The new procedure does not apply to actions proceeding in any District Registry other than the District Registries in Liverpool and Manchester.

willing before further expense is incurred to agree to accept the report in whole or in part; (b) that in so far as the report is not accepted by both parties it shall be treated as information furnished to the Court, and shall be subject to the criticism of any expert witness called at the trial, and shall be given such weight in deciding any question of difference between the expert witnesses as the Court shall think fit; . . .

"(4) In addition to the powers conferred by this Rule, the Judge shall have all the powers which a Court or Judge has in respect of an action in the ordinary list, and in exercising those powers he shall have special regard to the desirability of saving time and expense and to the power of transferring actions from the new procedure list to the ordinary list.

"(5) There shall be no appeal from a decision of the Judge under this Rule without the leave of the Judge."

Rule 9 is as follows:

"(1) The Judge may fix a day for the trial of any new procedure action, and the action shall, as far as possible, be tried on that day.

"(2) The action shall, as far as possible be tried by the Judge who heard the summons for directions."

The latest report from England indicates that this "New Procedure" has been thoroughly successful in operation.<sup>24</sup>

Its chief innovation is the abolition of civil jury trials. In emergencies at least, it would seem that that is good policy,<sup>25</sup> although the

24. Ball, *Practice and Procedure* (1935) 51 L. Q. REV. 13.

25. Davies, *The English New Procedure* (1933) 42 YALE L. J. 337, 383: "In a New Procedure Action the question whether or not there shall be a jury is left entirely to the discretion of the Judge. When an action involves difficult questions of fact, he will naturally welcome the assistance of the 'twelve good men and true' but in a great number of cases the questions are such that he will be fully able to answer them himself without any such assistance. Thus Macnaughten, J., when taking the New List is reported to have stated that in street accident cases he was prepared to grant a jury where the amount of damages had to be assessed but that it was better that the trial should be without a jury where the issue was one of negligence only. . . . That (the New Rules) have shortened the preliminary proceedings and simplified the trial is already apparent. The Lord Chief Justice has given as an example of the expedition with which an action can be disposed of under the New Procedure, the case of a man who came from East Africa in March, and returned with the award in his pocket in October, although he only commenced proceedings in July. . . . The New Procedure cannot do everything but it is an important step towards providing a more satisfactory method of obtaining legal redress." Ball, *Practice and Procedure* (1935) 51 LAW QUART. REV. 13, 21: "With regard to mode of trial, there has been a radical change within the last few years. Until recently, there was a right to trial by jury in all pure common law actions. Now however, the question 'jury or no' is in the discretion of the Court or judge, except in actions for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage and certain cases involving fraud. The *New Procedure* is, of course, open to one criticism. It makes a continual demand upon the services of two of His Majesty's Judges who sit to hear new procedure applications and causes *de die in diem* during the term. This necessarily has effect to delay the hearing of actions in the ordinary list; for the number of Judges available to sit at *nisi prius* is by no means unlimited." Cf. Shelton, *The Drama of English Procedure* (1931) 17 VA. L. REV. 215, where it is stated that a device for pre-trial supervision of actions, "recommends itself strongly for large American cities where many courts are

debate as to its advisability as a permanent measure still continues.<sup>26</sup> The most recent development in the discussion is Dean Clark's statistical survey of jury trials in the Superior Court of New Haven County.<sup>27</sup> It is interesting to consider, in conjunction with that study, that in some jurisdictions lawyers have fought to establish the principle that there is a right to be tried before the court *without a jury*, even in *criminal* cases, as is done in Maryland, California, Connecticut and Michigan.<sup>28</sup> New

*necessary*. It means much for reducing the time of jury service, which alone is a feat of merit. It ought to be tried out beneficially in New York, Cleveland and Chicago." Anyone who, while waiting for trial, has witnessed the picking of six or more juries simultaneously in the Central Jury Part of the New York Municipal Court has undoubtedly reflected that perhaps a non-jury trial during periods of calendar congestion might be more desirable after all. Cf. note 30a, *infra*.

26. Clark and Shulman, *Jury Trial in Civil Cases* (1934) 43 YALE L. J. 867; McLemore, *An Argument against Jury Trial in Civil Cases*, 20 VA. L. REV. 708; Corbin, *The Jury on Trial* (1928) 14 A. B. A. J. 507; Sweet, *The Jury on Trial: A Reply* (1929) 15 A. B. A. J. 241; Elder, *Trial by Jury; Is It Passing?* (1928) 156 HARPER'S 570; Lummas *Civil Juries and the Laws Delay* (1932) 17 MASS. L. Q. 4; Wigmore, *A Program for the Trial of Jury Trial* (1928) 12 *id.* 137; Wilkin, *The Jury* (1930) 13 J. AM. JUD. SOC. 154; Green, *Why Trial by Jury?* (1928) 15 AM. MERCURY 316; Duane and Windolph (debate) *Should the Civil Jury Be Abolished?* 80 FORUM 489, 498; Molique, *Jury of Less Than Twelve Men* (1934) 10 NOTRE DAME LAWYER 61. Harris, *Is the Jury Vanishing?* (1930) 4 CONN. BAR J. 73; Carpenter, *The Jury Trial Will Pass off of Its Own Accord* (letter) (1929) 15 A. B. A. J. 581; McCook, N. Y. L. J. March 2, 1928 at p. 2643; Wherry, *A Study* (1931) 8 N. Y. U. L. Q. REV. 396, 640.

27. Clark and Shulman (1934) 43 YALE L. J. 867, 884: "Whatever the political, psychological or jurisprudential value of the jury as an institution may be, its use in the civil litigation covered by this study is certainly not impressive. The picture seems to be that of an expensive, cumbersome and comparatively inefficient trial device employed in cases where exploitation of the situation is made possible by underlying rules. *Persuasive reasons are found in the facts set forth for the definite limitation of the right of jury trial* to the role of safety valve; and for the greater use of the summary judgment in the debt cases; the requirement of substantial jury trial fees and the reduction in the number of jurors required for a petit jury to nine or even six."

28. Frank, *"Trying Criminal Cases Without Juries in Maryland"* (1931) 17 VA. L. REV. 253. "Maryland has been trying criminal cases without a jury, on the election of the accused for over three hundred years. In 1924 a Judiciary committee of the State of Maryland actually reported a bill unfavorably because no man should be deprived of his right to be tried without a jury trial. The doctrine that a man must be protected in his right to be tried by the court without a jury may sound as though it were one of the ravings of Alice's Mad Hatter in Wonderland. Yet in Maryland that right is a fundamental one, as carefully fostered and protected, if not by constitutional edict, at least by deep rooted sentiment and whole-hearted reverence and support, as is the correlative right to a jury trial, if demanded." California approved a device similar to Maryland's after a study by its Judicial Council. CAL. CONST. art. 1, § 7. So did Connecticut and Michigan. Cf. BOND, THE MARYLAND PRACTICE 11, n. 2:

"The trials are usually less formal than trials before a jury and of course quicker. There is no delay in the selection of the tribunal, often opening statements are omitted as unnecessary, the evidence is more direct and concise, and there are fewer objections or other interruptions. The judges as they go along ask questions to clear up matters for themselves. They may, without inconvenience, interrupt a trial and hold it open for days

York's Judicial Council is now considering a procedural device similar to that of Maryland.<sup>29</sup>

What of New York and other crowded jurisdictions in *civil* cases? There follows an adaptation of the suggested plan of attack to congested tribunals in American urban centers.

### III

#### *The Victory*

Whether the "New Procedure" will prove of value in the United States remains to be seen. In order that we may really understand it, let us visualize the course of an ordinary contract case or personal injury action in the Supreme Court of New York County.

We first assume that a majority of the justices of the Appellate Division, First Department has certified to the Governor that a calendar emergency exists and that the "New Procedure" will be deemed in force in that department pending further order of the court.

1. (a) The *Summons and Complaint* are served, with a certificate of plaintiff's attorney of record to the effect that the case is in progress under the "New Procedure"—Defendant has seven days to answer—

(b) *Answer* containing a counterclaim is served—Plaintiff has seven days to—

(c) *Reply*—(Issue is therefore completely joined twenty-one days after the action began).

2. *Note of Issue*—must be served and filed seven days after issue is first joined—case receives a calendar number and starts to work its way up. A marked copy of the pleadings must be simultaneously filed with the calendar clerk.

3. *Assignment to a Justice for Supervision of Pre-Trial Manoeuvres*—Calendar clerk forwards the pleadings and a notation of the "New Procedure" issue to the justice presiding at Trial Term, Part 2, who designates a justice of the court as "Supervisory Justice" for each particular case. (Probably no other justice will ever have to read the pleadings in the case, as will be hereinafter indicated.) The justices initially chosen for "Supervision" are those sitting in the trial parts of Special Term and Trial Term. Ultimately, however, all the justices of

---

until other witnesses they might like to hear are hunted up. They may hold it under advisement for days, after all the evidence is in, to reflect upon it. Sometimes the examination of witnesses suggests the excellence of additional evidence which may go right to the point of final difficulty in the judge's mind. Where the evidence may be on the side of the accused the judge is especially careful to bring it into the case—Arguments on the facts are often omitted." Maryland contends, moreover, that judges are less free from public clamor, race prejudice, and "trial by newspapers." They are more susceptible to an argument on the law. The judge's experience is frequently wider, more helpful, and so forth.

29. First Report, p. 11, (1935).

the court will have "supervision" of an equal number of cases. Lists of the justices and of the cases under their "supervision" are permanently kept at Trial Term, Part 2, in order to provide "balance"—*i.e.* to keep an equal number of cases in the hands of the respective justices of the court for "supervision." Such lists would be kept somewhat as follows:

## LIST 1

*Actions Supervised Under New Procedure*

<i>Case</i>	<i>Justice</i> <sup>29a</sup>
Abbott v. Doane	Black
Ader v. Blau	Cohn
Akely v. Kinnicutt	Cotillo
Bernstein v. Kritzer	Church
Brill v. Tuttle	Dore

## LIST 2

*Justices Supervising New Procedure Actions*

<i>Black</i>	<i>Justice Cohn</i>	<i>Cotillo</i>
Abbott v. Doane	Ader v. Blau	Akely v. Kinnicutt
Eaton v. Reich	Eames v. Prosser	Epstein v. Gluckin
Exton v. Home	Everson v. General	Farmers v. Winthrop
Fonseca v. Cunard	Farrow v. Wilson	Fokine v. Shubert
Glanzer v. Shepherd	Grundt v. Shenk	Graf v. Hope

The case now becomes "Justice Blank's case" for all pre-trial purposes and for trial if he feels that he has not been prejudiced by participation in the pre-trial proceedings. If he feels that he has become prejudiced, he remits the case to Trial Term, Part 2, for assignment for trial in the normal way.

4. *Directions from the "Supervisory Justice" as to Pre-Trial Manoeuvres*—A. Thirty days after the case is made "Justice Blank's case for

---

29a. The names here used are taken, in alphabetical order, from the Trial Term assignment list for May, 1935. It is probable that for "supervision" purposes the First Judicial District would have to be treated as a unit, since the Justices therein sit in both Manhattan and the Bronx from time to time. Mr. Justice Cohn's name is used in the text to get the benefit of alphabetization in demonstrating that the Bronx justices are to be considered in the parcelling out of cases for "supervision." It would probably be unfair to Mr. Justice Cohn to assign him cases for supervision at the very outset, since he is simultaneously holding Special Term, Part 1 and Trial Term, Part 2 in May, 1935. The ultimate objective is to have all of the justices "supervising" an equal number of cases, leaving it to them to regulate their personal "supervision" calendars. If the "Administrative Justice" recommended by the Judicial Council duly functions, the problems of cooperation between the counties and of equalization of judicial work will undoubtedly be speedily solved. In the meantime, the Presiding Justice of the Appellate Division is of course available for consultation and suggestion.

supervision," Justice Blank issues a call for counsel. All counsel in the case appear before him at a given time. He has analyzed the pleadings and now receives the following: *a.* Demands for Bills of Particulars; *b.* Notices of Examination before Trial; *c.* Notices of Discovery and Inspection; *d.* Notices to Admit; *e.* Motion papers on motions to amend or dismiss; *f.* Summary judgment motion papers; *g.* Motion papers for judgment on the pleadings; *h.* Papers for other motions. If the papers are not complete at this conference all pre-trial manoeuvres are waived (except motions for judgment on the pleadings, a motion to dismiss for lack of jurisdiction or to dismiss for insufficiency) unless Justice Blank extends time for good cause shown, and on such terms as may be just. If Justice Blank requires it, counsel must also furnish: *i.* A confidential list of witnesses for the supervisory justice and a terse statement of what the party expects to prove by such witnesses. *j.* A confidential offer of settlement for the consideration of the justice at Trial Term, Part 2, to be disclosed to the other side only on consent, so that conciliation and settlement may be attempted without prejudicing the Supervisory Justice. (The justice in Trial Term, Part 2, might be given the power to fix and file in a sealed wrapper a settlement figure at which a party should settle in his opinion after considering all the circumstances, such wrapper to be opened after verdict. If it develops that the party proceeded to trial without justification, then treble the damages if the defendant lacked justification or reduce the verdict to one-third the amount of the recovery if the plaintiff was unjustified.<sup>29b</sup> If that is too severe, then tax very substantial costs in such event, *e.g.* the amount of the winner's reasonable attorney's fees.)

Justice Blank is deemed to be holding "Special Term Part A" for purposes of supervision, to avoid constitutional complications.<sup>30</sup>

B. After due consideration, either simultaneously or from time to time the Supervisory Justice passes on all of the following

"Fourteen Points"

1. Judgment on the Pleadings.
2. Summary or Partial Judgment.
3. Motions to strike out causes of action or defenses, to clarify or amend pleadings and add or drop parties and other "prompt" motions.
4. Bills of Particulars.
5. Discovery and Inspection; Depositions.
6. Examination before trial of parties or persons in the nature of parties.
7. Preference.

---

29b. Cf. N. Y. PENAL LAW, § 1433; N. Y. PUB. OFF. L., § 67.

30. See note 17, *supra*.



8. Limitation of number of expert witnesses or provision for experts to be employed by court on consent and at expense of both parties equally.
9. Order that certain incidental questions of fact may be proved by affidavit.<sup>30a</sup>
10. Order the examination before trial of witnesses other than parties if
  - a. The Supervisory Justice personally superintends such examination.<sup>31</sup>
  - b. The Supervisory Justice designates such witnesses from his confidential list and states in what order they shall be examined.<sup>31a</sup>
  - c. The Supervisory Justice enumerates the matters about which such witnesses may be examined.
11. If he feels that the case is a "short case" or that the interests of expediting justice require it, he dispenses with a jury and orders the case tried before himself, or via the Justice at Trial Term, Part 2. This of course requires a constitutional amendment and the rule would obtain only during emergencies, the existence of which are certified to the Governor by a majority of the Justices of the Appellate Division in each particular department.
12. If he feels that although the case is technically a "New Procedure" case, it is not readily adaptable thereto, he orders it tried on the regular calendar in its regular order or otherwise. In his discretion he orders that all subsequent pre-trial manoeuvres be referred to him.
13. He determines whether appeals may be taken from any or all of his pre-trial orders. If he denies leave to appeal, application

---

30a. Cf. Civ. Prac. Act § 354, as amended to take effect Sept. 1, 1935, providing that the testimony of hospital physicians and nurses in an ordinary negligence case is to be taken before a referee, subject to the discretion of the court. This amendment would seem to be an inroad on the constitutional right to a jury trial unless it is to be interpreted somewhat as was Rule 108 of the Rules of Civil Practice in *Herzog v. Brown*, 217 App. Div. 402, 216 N. Y. Supp. 134, 136 (1926); and *Perloff v. Kelmenson*, 233 N. Y. Supp. 861 (App. Div. 1929). Is the testimony taken before the referee to be limited by section 304 of the Civil Practice Act so that it cannot be read in evidence if the witness is available for subpoena?

31. Cf. Report of the Joint Committee of N. Y. City Bar Ass'ns dated March 15, 1934, "A witness with no financial or other interest in a case should not be torn from his business or employment at the whim of opposing counsel. Such witnesses should not be subjected to a preliminary cross-examination conducted in an obscure corner of some unused court room or in the office of the attorney conducting the examination, *nor without supervision or control.*"

31a. Recall that section 288 of the Civil Practice Act already lends statutory sanction to the examination of witnesses other than parties where "other special circumstances" render it proper that their depositions should be taken. This language is so broad that it would seem an obvious invitation to the rule-making power to use its discretion if the ends of justice require it.

may be made to the Appellate Division for such leave. In no event may an appeal be taken from a pre-trial order without leave.

14. He determines whether for any reason the action should be taken from the "New Procedure" list. The "New Procedure" is not to be applicable to cases involving libel, slander, malicious prosecution, false imprisonment, or fraud—*i.e.* it is to be used principally in personal injury actions, contract actions and equity actions.

#### *Conclusion*

The foregoing has been written with the dreamy eye of an academician and the forlorn hope of an active lawyer that it may spell the death of the law's delay in congested communities. The plan suggested undoubtedly has many inadvisable features and it is not expected that it will be fully approved or that any part of it will be acclaimed as a panacea. The central idea is worthy of thought, however, since it is based on the wisdom of our federal courts, the Virginia legislature, and the British Crown. The writer has brooded over it for two years<sup>32</sup> and has advocated it orally before the New York Judicial Council, with favorable reactions from many lawyers. Criticism and discussion are healthy things and successful procedural devices have frequently evolved from the creative activity of many minds. Something must be *done* to bring to the interminable delay of civil litigation the simple and ordered guidance of divine common sense. With the advent of Judicial Councils, the storm and the deluge of calendar congestion have appreciably abated and the thunder of litigants, bound hand and foot with procedural red tape, has been somewhat stilled. Of course "There is still some heat lightning, even today. Yet . . . there is always the certainty that true fundamentals cannot be disturbed for long. . . . The very test of our law is that it never lives wholly apart from ideas and manners. That is why we have it, why we cannot do without it. . . . Changes can be expected and should be hopefully received; but never an alien system, nor yet the spirit that always denies. . . . Our history justifies the confidence that while the bad cannot last, the good will remain."<sup>33</sup>

---

32. (1933) 2 BROOKLYN LAW REVIEW 328, 330: "The English New Procedure of 1932 . . . will be copied in New York within the next two years."

33. GLENN, LIQUIDATION (1935) 878.