In Chancery: The Genesis of Micro Caseflow Management

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Abstract

This article explores an early example of subordinate judicial practice in England and Wales in which we may see some issues that later appear in the relationship between informal justice initiatives (especially alternative dispute resolution) and the civil justice system. Broadly speaking, the paper looks first at the symptoms of systemic failure in the pre-1873 system which led to the creation of the Official Referee's office. It then considers the relevant recommendations of the Judicature Commissioners and the reasoning behind such recommendation, looking at both the macro- and the micro-levels, before exploring the referees' diverse jurisdiction which provided a creative foundation for the evolution of interlocutory innovation. The article argues that structural realignment of the court system by the Judicature Commissioners was not sufficient in itself to eradicate all its encumbrances, but it indirectly empowered the referees to eventually bring about revolutionary procedural changes.

Keywords: Official Referee, judges, macro-management, micro-management, procedure, rules

[A] MACRO-MANAGEMENT PROBLEMS IN THE CIVIL JUSTICE SYSTEM

The problem with the legal system which led to the judicature reforms of the 1870s in the early to mid-nineteenth century was endemic. The system was described by the Attorney General[2] on 9 June 1873 as:

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2 Sir Richard Baggallay (20 April 1874-25 November 1875).

> … having grown up during the Middle Ages, was incapable of being adopted to the requirements of modern times

and that:

> … it was beyond controversy, that in many instances our procedure was impracticable and inconvenient, for no one practically conversant with its details could deny that there were certain great defects in them which ought to be remedied. (HC Deb 9 June 1873, vol 206, cols 641)

The Attorney in the same debate spoke of the great waste of judicial power within the Common Law courts, with four judges on the same bench and the 'great defect' represented by the Terms and Vacations of the legal year (HC Deb, vol 206 col 642). The great defect he further described as the divide and conflict between the competing jurisdictions of equity and Common Law. This resulted in delay, duplication and contradictory decisions at first instance with separate appellate regimes for courts of Chancery and Common Law with single judges adjourning a question of law to a four-man court rendering two trials necessary (Gregory HC Deb, vol 206, col 669).

[B] JUDICIAL OVERLOAD AND BACKLOG

An analysis of *Returns of Judicial Statistics* in this period suggests systemic failure in the superior courts.[3] By way of example, consider the Court of Chancery. Here, the problem was acute. Proceedings in Chambers in the Chancery Court increased from a Cause List total of 28,083 in 1861 to 42,726 in 1870-1871; an increase of 152%, or an average yearly increase of 1,464 cases. Proceedings in Chancery as a whole increased from 69,008 in 1861 to 84,730 in 1870, an increase of 122%; or an additional 15,722 matters in Chancery as a whole (HC Deb 9 June 1873, vol 206, col 667).[4] Things were so bad that one solicitor had written to *The Times* to say that there were 507 cases in Chancery, and it would take three years to complete them (HC Deb 30 June 1873, vol 206, col 1587).[5] Clearly, backlog and judicial overload were a problem, and thus there was some justification for the promotion of a radical review of the civil justice system at that time.

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[3] The Courts of Chancery, Common Pleas, and Exchequer Chamber.

[4] As given in the Attorney General's speech to the House of Commons, quoting from *Judicial Statistics* 1860-1861 and 1870-1871.

[5] The Chancery Court dealt, however, with 1000 cases per year according to the Solicitor General.

As a 'Leader' in *The Times* (4 December 1872: 9) stated:

> The Exchequer Chamber sat 5 days in all; out of eight cases from the Queen's Bench Division, after two days sitting six were left in arrear; out of nine cases in the Common Pleas, six were left in arrear, after two days sitting. The last time the court sat was at the end of June, and it cannot sit again before next February at the earliest.

Further evidence of the problem is provided from the debate on the Judicature Bill in June 1873. The Bill was based upon the recommendations of the Judicature Commissioners[6] and their report published in 1869. Its remit focused on investigating the operation and effect of three aspects: first, the constitution of the courts in England and Wales; second, the separation and division of jurisdictions between the various courts at macro-level; and, third, the distribution and transaction of judicial business of the courts, and courts in chambers at micro-level. Additionally, the Commission considered whether there were sufficient judges and the position of juries.

In debating the Bill, the Attorney General, Sir Richard Baggallay, thought that the problem might be overcome if the judges extended their sittings by six weeks per year (HC Deb 30 June 1873, vol 205, col 1588).[7] He reported that the position may have been even worse on any given day in 1870, 1871,1872 and 1873, as there were respectively 302, 461, 431 and 536 cases pending in that court. Mr Morgan, a Chancery barrister, speaking in the same debate, said that 'there never was such a block in Chancery as at present … The judges were worn out with Court work before they went into Chambers.' (HC Deb 30 June 1873, vol 206, col 1590) He said that there had been a 123% increase in cases from 1,844 cases in 1863 to 2,275 cases in 1871. He also reported that some of the judges had 'completely broken down' under the strain. Clearly, relief for the judiciary was urgently required.

The problem as a whole was alarming. The *Return of Judicial Statistics* for 1866 discloses that there was a great increase in the business of the courts. As compared with 1859 (the year in which the number was lowest since the *Statistics* had commenced) the increase in 1866 amounts to

6 In September 1867 Queen Victoria appointed the Judicature Commissioners. They included: Lord Justice Cairns of the Court of Appeal in Chancery; Sir James Wilde a judge of the Court of Probate Divorce and Matrimonial Causes; Sir William Page Wood, a Vice-Chancellor; Sir Colin Blackburn, a judge of the Court of Queen's Bench; Sir Montague Smith, a judge of the Court of Common Pleas; Sir John Karslake, Attorney General; William Jones, Vice Chancellor of the County Palatine of Lancaster; Henry Rothey, Registrar of the High Court of Admiralty; Sir William Phillimore, a judge of the High Court of Admiralty; Sir Robert Collier and Sir John Duke Coleridge, as Solicitor General, appointed as Commissioners on the 25 January 1869.

7 At that time the court sat for 27 weeks of the year.

46,890, or 54%. As compared with the average of the eight years 1858-1865, the increase in 1866 was 28,475, or 27%. This influx of work overloaded an outmoded system, and its effect is demonstrated in Table 1.

Table 1: Rate of increase of actions

Year	Writs issued	% increase on previous year
1859	86,270[8]	
1863	100,042	16%
1864	113,158	13%
1865	119,097	5%
1866	133,160	12%

Sources: Returns of Civil Judicial Statistics 1859 and 1863, 1864, 1865 and 1866

Whilst 1866 may be regarded as the high-water mark of civil litigation, The *Return of Judicial Statistics* for 1869 states that there was a 'great decrease' in the number of writs issued in 1868 as compared to 1866 and 1869. See Table 2.

Table 2: Rate of increase of actions

Year	Writs issued	% increase on previous year
1868	82,876	
1869	83,974	1%

Sources: Returns of Civil Judicial Statistics 1868 and 1869

The percentage decrease as between 1866 and 1868 was 38%.

In 1875 there was a further decline after enactment of the Judicature Act 1873 with the number of writs issued numbering 68,950 (*Return of Judicial Statistics of England and Wales 1875*).

8 *Return of Judicial Statistics 1866* of which only 27.5% were contested; only 23,762 appearances were entered.

[C] FIRST REPORT OF THE COMMISSIONERS 1869

This Commission was chaired by two successive Lord Chancellors and former Attorneys General, Lord Selbourne (formerly, Sir Roundell Palmer) and Lord Cairns (formerly, Sir Hugh Cairns). Their report was first published in 1869 (Parliamentary Papers 1869). No evidence was published with the report, but we may conjecture that the Commissioners debated it in their meetings. Sir John Hollams wrote up the minutes of the meetings and then prepared a draft report.

This was followed by two Judicature Bills introduced by Lord Hatherly in 1870 (HL Deb 13 February 1873, vol 214, col 334). These Bills failed to command support in the House of Commons and were sent down by the Lords to the Commons after heavy criticism from the judiciary and Members of Parliament. The scheme for the administration and organization of the courts incorporated in the original Bill was revised by Chief Justice Cockburn and his senior colleagues. This revision formed the basis of the reintroduced Bill in 1873 (HL Deb 13 February 1873, vol 214, cols 335-36).

[D] THE OFFICIAL REFEREE: REASONS FOR CREATION

Chancery and Common Law Practice

The Judicature Commissioners were aware of the practice in Chancery of a referral process. In their report the Commissioners stated:

> questions involving complicated inquiries, particularly in matters of account, are always made the subject of reference to a Judge at Chambers. These references are practically conducted before the Chief Clerk, but any party is entitled, if he think fit, to require that any questions arising in the course of the proceedings shall be submitted to the judge himself for decision. In such a case the decision of the judge is given after he has been sitting in court all day hearing causes. (Parliamentary Papers 1869: 13)

This was not ideal, and it was suggested to the Commissioners that the judges found this difficult because Chancery judges were too busy with other work (Parliamentary Papers 1869: 13).[9]

[9] There is no evidence cited at page 13 of the *First Report* as to who made that submission, but presumably members of the Bar.

According to Burrows (1940: 506), the reason why the Judicature Commission recommended the appointment of referees was the practice of the old Common Law and Chancery Courts.

These two macro-caseflow management processes were already developed. First, a process whereby the Master[10] or Chief Clerk would report to the judge or otherwise direct an issue to be tried by a Common Law judge sitting with a jury. In the former case, the report would be embodied in the judge's judgment. Second, Chancery matters could be referred to an expert who was not a lawyer (*Gyles v Wicox* 1740). This might well be the genesis of modern 'expert determination', although in the Chancery practice the expert's view was not final and binding but incorporated into the judgment.

Furthermore, under section 3 of the Common Law Procedure Act 1854, a judge could direct a reference of an account before trial or the taking of an account at trial under section 6 of that statute. He could direct that any preliminary question of law should be decided by way of special case or otherwise. Under this power the judge could decide the matter himself summarily, or order that it be referred to an arbitrator appointed by the parties, or to an officer of the court, or in country cases, to a county court judge. In such matters, the award or decision was enforceable as if it were the verdict of a jury (Burrows 1940: 504-13). Here, we have the genesis of the referee.[11] As Judge Fay wrote, the officers of the court in those times were Masters (Fay 1988: 17). The innovation was the reference to an arbitrator in the course of the proceedings (a compulsory reference in accounts cases). Fay says that it was Holdsworth who concluded that in respect of section 3 Common Law Procedure Act 1854:

> It was this extended use of arbitration by the courts which induced the Judicature Commissioners to recommend and the Judicature Acts to create the office of official referees. (Holdsworth 1964: 198)

Holdsworth may be right, but Sir Roland Burrows QC, who was Lord Birkenhead's former private secretary, wrote: 'The reason for the recommendation is to be found in the practice of the Courts of Common Law and of Chancery.' (Burrows 1940: 504) Whether the inducement was the practice of arbitration or litigation, a new model was created: a court officer and a subordinate judge with a referral jurisdiction to deal with

[10] The Common Law Courts also had power to delegate to a Master.

[11] According to Burrows (1940: 510), section 3 of the Common Law Procedure Act 1854 took into account the practice of the Court of Chancery of ordering reference to officers of the court or specially qualified persons to inquire and report, and the other the practice of making consent orders for arbitration.

matters of enquiry and report, reference for a preliminary issue, and the taking of an account.

The Commissioners also considered section 3 Chancery Practice (Amendment) Act 1858, which provided that the Court of Chancery could make provision for the assessment of damages or any question of fact arising in any action or proceeding to be tried by a special or common jury. Juries were not always appropriate in understanding complex scientific and technical issues, and this in the Common Law context influenced the Commissioners towards the use of the referee in such matters (Parliamentary Papers 1869: 10).

Interestingly, ten years before the Judicature Commission's *First Report*, Dr Clifford Lloyd, an Irish jurist, gave evidence to a similar commission. In his evidence on the working of the Irish Chancery Act he referred to the position of a referee and converting 'the office of Master from that of a referee to a judge with original jurisdiction' (Parliamentary Papers 1863). He concluded that the subordinate office of a referee was more akin to that of a Master. Section 172 of the Superior Courts of Common Law (Ireland) Act 1864 provided for matters of account to be referred by the judge to an arbitrator, or officer of the court, or to a referee who was empowered to make an award or issue a certificate effective as the verdict of a jury.

Experts

In their *First Report* (Parliamentary Papers 1869: 12), the Judicature Commissioners considered that there was a class of case unfit for jury trial, and in many cases the disputants were compelled to arbitrate.[12] This was an important part of their consideration, as was the recommendation of the Patent Law Commissioners (1864) regarding the judge trying such cases with assessors whom he selected, or alone without a jury unless the parties required. They considered it might be desirable to have the aid of scientific assessors during the whole or part of the proceedings (Parliamentary Papers 1869: 14, para 4).

The Commissioners also considered referrals under the Common Law Procedure Act 1854 where disputes had been referred to a barrister or an expert. Barristers could not be expected to give such matters the continuous attention they deserved. Experts were not recommended because they were unfamiliar with the law of evidence and rules of

[12] The parties could not, however, be compelled to do so until the enactment of the Common Law Procedure Act 1854 where the dispute related wholly or partly to matters of account under section 3 of the Act or where the parties had entered into a covenant to refer the dispute to an arbitrator.

procedure and because of the risk that they would allow irrelevant questions.

Juries

The Judicature Commission was critical of the role of the jury in some cases. It reported:

> The Common Law was founded on the trial by jury, and was framed on the supposition that every issue of fact was capable of being tried in that way; but experience has shown that supposition to be erroneous. A large number of cases frequently occur in practice of the Common Law Courts which cannot be conveniently adapted to that mode of trial. (Parliamentary Papers 1869: 5)

The Commissioners further concluded:

> there are several classes of cases litigated in the courts to which trial by jury is not adapted, and in which the parties are compelled—in many cases after they have incurred all the expenses of a trial—to resort to private arbitration (Parliamentary Papers 1869: 12).

The practical problem with the Common Law Procedure Act 1854 was that the referee had no authority over practitioners and witnesses, and this led to constant adjournments.

Arbitrators

Arbitration may have had an influence on the Commissioners, as Holdsworth suspected, because the Commissioners recommended that a party to an action could apply to a High Court judge for the appointment of a referee, or the judge himself appoint one (Parliamentary Papers 1869: 14). Under the Common Law Procedure Act 1854, the parties could be compelled to arbitrate the dispute where the matter related wholly or partly to accounts or where they had agreed in writing (Parliamentary Papers 1869: 12). But the Commissioners were also alive to the difficulties caused by arbitration, which they expressed as:

> The Arbitrator thus appointed is the sole judge of law and fact, and there is no appeal from his judgement, however erroneous his view of the law may be, unless perhaps when the error appears on the face of his award. Nor is there any remedy, whatever may be the miscarriage of the Arbitrator, unless he fails to decide on all matters referred to him, or exceeds his jurisdiction, or is guilty of some misconduct in the course of the case. (Parliamentary Papers 1869: 13)

There was also public disquiet about that alternative process, as *The Times* 'Leader' commented:

> The especial scandal of the Common Law—we mean the system of compulsory arbitration, so often imposed at the eleventh hour upon the unwilling suitor because the judge will not, or cannot, entertain his case—is to be removed, and official and other referees will act under the court. (*The Times* 22 April 1869: 8)

It was said that arbitrators regulated their own fees and that:

> The result is great and unnecessary delay, and vast increase of expense to suitors … Fees were large, adjournments frequent and erroneous results could not be rectified on appeal. (Parliamentary Papers 1869: 13)

The problem was exacerbated because counsel and witnesses were frequently involved in other matters necessitating adjournments (Parliamentary Papers 1869: 13).[13]

The Commissioners therefore sought to avoid references whether to an arbitrator, expert or barrister and compel parties to litigate before a referee.[14] They considered they had good reason to replace juries and arbitrators at that time because a common jury could not handle complex matters of fact, arbitration was costly and there was much delay. The Commissioners concluded that this caused 'great and unnecessary delay, and a vast increase of expense to suitors' (Parliamentary Papers 1869: 12-13). The referral to a referee would be compulsory and the referee would sit from day to day (Parliamentary Papers 1869: 14). In this way delays and appeals would be avoided and the referee would replace a special jury, an arbitrator, an assessor and an expert. In that respect, referees were an essential tool of more efficient macro-caseflow management.

The Judicature Reforms

The Commission had a dual purpose: to reconcile the rival systems of Common Law and Equity and to resolve technically complex cases where a jury of laymen had difficulty. Thus, the terms of reference of the Commission included an enquiry into the civil courts apart from the House of Lords, but including 'the operation and effect of distributing and transacting the judicial business of the courts, as well as courts in chambers' (Parliamentary Papers 1869: 4).

[13] Sometimes counsel appearing before the referees considered themselves equally senior.

[14] As Fay (1988: 13) says: 'The good was to be taken, the bad rejected.' In certain cases, it became compulsory for enquiry and report (section 56), or for complex factual scientific or technical questions, or any account (section 57).

Administrative reform

The background against which the office of referee was invented was momentous. The judicature reforms transformed the litigation landscape with equitable and legal remedies available in one Supreme Court of Judicature. Trial by jury had been the cornerstone of the civil justice system predicated on the supposition that every issue of fact was capable of trial in that way, but a large number of cases could not be adapted to that mode (Parliamentary Papers 1869: 5), and many suitors favoured arbitration because of 'the defects of the inadequate procedure' (Parliamentary Papers 1869: 6). There had to be a transfer and blending of jurisdiction of equity and law, a conclusion independently reached by two other judicial commissions enquiring into the Common Law Courts (1850) and into Chancery (1851). There was also the litispendence problem of concurrent actions in the Common Law and Chancery Courts producing different outcomes at first instance and in their separate appeal courts.

Thus, the Judicature Commissioners considered that:

> It seems to us that it is the duty of the country to provide a system of tribunals adapted to the trial of all classes of cases and be *capable of adjusting the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried.* (Parliamentary Papers 1869: 13, emphasis added)

They had in mind a more flexible system adapted to the needs of all types of cases. In the context of the referee it might be interpreted as justifying the 'Scheme'. The 'manner most suitable' inferred some flexibility in the process applied.

Procedural reform

Another objective of the Judicature Commission was to make recommendations for the 'more speedy economical and satisfactory despatch of the judicial business transacted by the courts' (Parliamentary Papers 1869: 4). In order to effect this, the Judicature Commission recommended:

> That as much uniformity should be introduced into the procedure of all Divisions of the Supreme Court as is consistent with the principle of making the procedure in each Division appropriate to the nature of the case, or classes of cases, which will be assigned to each; such uniformity would in our opinion be attended with the greatest advantages, and after a careful consideration of the subject we see no insuperable difficulty in the way of its accomplishment. (Parliamentary Papers 1869: 10-11)

The Commissioners decided to recommend that great discretion should be given to the Supreme Court as to the mode of trial and that any questions should be capable of being tried in any Division. They concluded that there should be three modes of trial: before a judge, jury or a referee (Parliamentary Papers 1869: 13).

It is interesting to note that the Commissioners also recommended the use of short statements,[15] as distinct from pleadings, to be called a 'Declaration', constituting the plaintiff's cause of complaint, and a similar statement from the defendant, constituting an 'Answer'. They warned, as Newbolt was to warn half a century later, about pleadings that were open to 'serious objection' (Parliamentary Papers 1869: 11). They went on to say:

> Common Law pleadings are apt to be mixed averments of law and fact, varied and multiplied in form, and leading to a great number of useless issues, while the facts that lie behind them are seldom clearly discernable.

They suggested the best system to be:

> one, which combined the comparative brevity of the simpler forms of Common Law pleading with the principle of stating intelligibly and not technically, the substance of the facts relied upon as constituting the plaintiff's or the defendant's case as distinguished from his evidence (Parliamentary Papers 1869: 11).

Regrettably, pleadings were not simplified because of the complexity of certain cases, but certainly Newbolt dispensed with them altogether in at least one action.[16] Despite the Commissioners' purpose a 'Judicature Commissioner' wrote anonymously[17] to *The Times* (16 August 1880: 11), stating:

> But I unhesitatingly assert that the present system of pleadings is often productive of enormous delay and expense, with little, if any corresponding advantage. I have now lying before me the pleadings in an action recently commenced which, although yet incomplete, have already reached the length of upwards of 2,500 folios. I have another case before me in which a statement of claim 260 folios in length has just been delivered. I could refer to other similar cases in my own experience, but I will content myself by mentioning one in which, although an action to recover the amount of two promissory notes, the pleadings extended to upwards of 200 folios in length.

[15] A Reply would be allowed, but not any further submissions, with 'special permission' of the judge.

[16] Sir Francis Newbolt and his reforms were described in detail in Reynolds (2008: chapter 3).

[17] Reputedly, Lord Bowen.

> It may be said these instances are exceptional and that they are taken from the Chancery Division; but few, I think will deny that prolixity is on the increase in the Common Law Division also.
>
> I think I may with confidence, assert that the Judicature Commissioners did not anticipate that these results would follow from their recommendation that the plaintiff and defendant should respectively deliver a statement of complaint and defence, which statements were to be 'as brief as the nature of the case will admit.'

[E] PIONEERS OF CASEFLOW MANAGEMENT: SELBOURNE AND CAIRNS

The principal pioneers of the referees' office were Lords Selbourne and Cairns as they were responsible for drafting the enabling legislation, as well as piloting that legislation through Parliament, and making the administrative arrangements. Both Lord Chancellors were classics' scholars: one from Oxford, the other from Dublin.[18] Both had served as Attorneys General. Lord Selbourne was a distinguished member of the Church of England, and Lord Cairns was described by Lord Chief Justice Coleridge as 'a person of severe integrity' (Steele 2011: 1-10).

Lord Selbourne, Lord Chancellor of England[19]

In 1872 Roundell Palmer became Lord Chancellor in succession to Lord Hatherly. He pioneered the Supreme Court of Judicature Bill that took effect in 1873. In his *Memorials Personal and Political 1865-1895*, he wrote:

> It was a work of my own hand, without any assistance beyond what I derived from the labours of my predecessors; and it passed substantially in the form in which I proposed it. (Selbourne 1898: 301)

He acknowledged support from Lords Cairns, Hatherly, Westbury, Romilly, Lords Justices Cockburn, James, Mellish and Bovill, Chief Baron Kelly, the Solicitor General and the Attorney General.

As to the *First Report* he says:

> Much as I profited by the experience and work of others, I might without presumption take to myself some credit for the initiative, advancement and completion of this work …. If I leave any monument behind me which will bear the test of time it may be this. (Selbourne 1898: 300)

[18] Lord Selbourne, Magdalen College; Lord Cairns, Trinity College.

[19] 1872-1874 and again in 1880-1885.

Selbourne's Macro- and Micro-objectives

Selbourne introduced the referee into the wider public domain in his historic speech in the House of Lords on the second reading of a third Judicature Bill on the 13 February 1873 (HL Deb, vol 214, c 331). His predecessor Lord Hatherly had had difficulty in introducing two previous Bills: the High Court of Justice Bill and the Appellate Jurisdiction Bill. Both Bills were read a second time in 1870 but were lost in committee and withdrawn (*The Times* 14 February 1873: 7). Selbourne confirmed that this movement for reform came from Parliament and the judiciary itself.[20] The superior judiciary[21] appear to have been the most vociferous critics of the outdated legal system. He said that the reforms sprang from the advancement of society, the increase in legal business, and separation of the superior courts. The aims of the Bill were directed to more efficient macro-management in the unification of legal and equitable jurisdictions: a single undivided jurisdiction; provision as far as possible for cheapness, simplicity and uniformity of procedure; and an improvement in the constitution of the Court of Appeal.[22]

Under the new arrangements, cases could be transferred for the efficiency of business.[23] The emphasis here was clearly on efficiency, cheapness, simplicity, and uniformity. It was also on practicality.

Regarding the new officer of the court, the referee, he said:

> It is proposed to retain trial by jury in all cases where it now exists, except in one particular.
>
> Your Lordships know that there is a class of cases which the parties may take to the Assizes, and in some instances must take there, and which are yet totally unfit to be tried by a jury at all. The result is that the parties are compelled to take such cases out of court and submit them to arbitration; and as no provision has been made by law for the conduct of these arbitrations, the consequence is that very great expense frequently arises out of them. It was a very valuable recommendation of the Judicature Commission that public officers to be entitled 'Official Referees' should be attached to the court, to deal with cases of this kind, and to whom such cases should be sent at once without the useless expensive form of a jury trial.

[20] The Report was presented to Parliament in 1869.

[21] Description of senior judges in the pre-1873 system.

[22] The court being constituted by the enactment, there was concern about manpower.

[23] Although judges would be enabled to transfer cases to Official Referees, one referee could not transfer a case to another. In 1888 the Rules were changed to enable the Lord Chancellor and the Lord Chief Justice to transfer cases from one referee to another having regard to the state of business (RSC December 1888).

> The Bill proposes that such cases should be sent to reference, even if the parties do not consent, and it also provides for the appointment, where the parties may desire it of special referees. The proposal in the Bill is that they shall determine all questions of fact or account, leaving questions of law to be determined by Divisional Courts. I venture to think that will be found a valuable and important provision. (HC Deb 13 February 1873, vol 214, col 346)[24]

Selbourne thus recommended the creation of the referee.

Whilst this was a subordinate jurisdiction, it had the germ of a flexible process which provided an opportunity for caseflow management.

Selbourne and his successors' roles were critical here in relation to the new referees. Under section 83 of the Judicature Act 1873, he was responsible for referee appointments, qualifications and tenure in office, with the concurrence of the Heads of Divisions subject to Treasury sanction. The Treasury limited the number of referees to four. This created a tension with the judiciary at times when the lists were overloaded. This overload created a backlog further justifying Newbolt's 'Scheme'.

Lord Selbourne's objectives were echoed in the House of Commons by the Solicitor General speaking on 10 July 1873:

> Referees were to be appointed without the consent of the parties for conducting any enquiry which could not, in the opinion of the court, be conducted in the ordinary way. The Bill proposed as regarded documents, to continue the present practice of the Court of Chancery, and it was quite impossible that questions of detail should be examined in court except on appeal. Accounts in Chancery were never taken in court, but were referred to chambers in some way or other, and were taken by an officer termed a Chief Clerk. At Common Law such matters were referred to a master or to an arbitrator. They could not be taken in court at all. (HC Deb 10 July 1873, vol 217, col 174)

The Solicitor General went on to say:

> The intention of the clause (Clause 54-Power to direct trials before referees) was to prevent useless expenditure of that description, and that references should be made without the consent of the parties. Clients were often disgusted at finding that heavy expenditure incurred in the preliminary stages of a trial were thrown away, on their case going to arbitration.

The Lord Chancellor's and the Solicitor General's speeches confirm the objective of avoiding unnecessary cost through referrals to arbitrators, and also to relieve High Court judges of detailed factual examinations. They also confirm the reason for the creation of the office of the referee,

[24] The Hansard reports here are in indirect speech.

answering the first research question. They incidentally disclose an understanding of the difficulties of judicial macro-management. In many respects there is empathy between Selbourne, Baggallay and Newbolt in relation to delay and cost. All these concepts are relevant to what Newbolt and some referees attempted in later, years and the roots of what Newbolt developed have their origin in concept here.

A Judge without Jurisdiction

However, it is important to appreciate that the referees had no inherent jurisdiction, as Burrows stated:

> an Official Referee as such has no jurisdiction. He can only try such actions as by law can be and by order are referred to him and his decisions are not of authority for other cases. (Burrows 1940: 506)

In other words, the referee had no jurisdiction other than what was referred. The Commissioners designed a flexible role for referees whereby they could refer the matter back to the judge or resolve the issue themselves.

> The Referee should be at liberty, by writing under his hand, to reserve, or pending the reference to submit any question for the decision of the Court or to state any facts specially with power to the Court to draw inferences; and the verdict should in such case be entered as the Court may direct. In all other respects the decision of the referee should have the same effects as a verdict at *nisi prius*, subject to the power of the Court to require any explanation or reasons from the referee, and to remit the cause or any part thereof for reconsideration to the same, or any other Referee. The referee should, subject to the control of the Court, have full discretionary power over the whole or any part of the costs of the proceeding himself. (Parliamentary Papers 1869:14)

The fact that the judge could direct where the trial took place was a departure from the centralist policy of the courts being in one building in London. The referee was to investigate the case and report his findings to the High Court judge. He was also given power to hear the case *de die in diem* (from day to day) and to adjourn if necessary.

His primary task was to relieve the High Court judge of complex factual analysis and compile a report. Thus, where the parties consented, a matter could be referred. Where the parties did not consent to a referral, the judge could only refer the case to a referee if it involved a prolonged examination of documents, or accounts, or an investigation of scientific or local matters on a question or issue of fact or account (Judicature Act 1873, section 57). Section 83 of the Judicature Act 1873 provided that

the numbers and qualifications of the referees were to be determined by the Lord Chancellor and with the concurrence of the Heads of Divisions and the sanction of the Treasury.[25]

Rules of the Supreme Court

A greater appreciation of what Lord Selbourne was attempting is evident from his personal directions and orders to three lawyers who were employed with the task of drafting the first *Rules of the Supreme Court* (RSC) (Letter from Roundell Palmer 1866). In his general directions dated 25 November 1873, Selbourne set out the guidelines for the draftsmen:

> Substance of the Work
>
> … the object is now to frame one general system of procedure which shall be as far as possible uniform in every Division of the High Court and equally applicable to all kinds of actions and suits. In constructing this system, the utmost attainable degree of conciseness and simplicity is to be aimed at; all superfluous steps (such as applications for orders or praecipes of Court, when mere notice between parties might be sufficient) should be dispensed with; and all occasion for any unnecessary expense and delay, should, as far as practicable be cut off.

There is empathy here with Newbolt's 'Scheme' in eradicating unnecessary expense and delay. The draftsmen were also to adapt:

> to general use, in the High Court whatever is best, and most approved by experience, in the existing practice of the present Courts, with proper simplifications and improvements.

Selbourne's objective was clear: simple concise rules for all actions without any unnecessary or uneconomic steps. The lawyers were referred to Chancery practice and the Common Law Procedure Acts[26] and other states' procedures, for example, the New York Code of Civil Procedure and the Indian Procedure Act 1859 (Letter from Roundell Palmer 1866).

At the macro-level, the essence of the proposals was designed to bring about a fundamental reorganization of the courts and make them more efficient. A key part of the reform was the referral system relieving High Court judges of complex technical cases and avoiding lengthy jury trials. In that respect the referee's role was critical in alleviating cost and delay in complex factual cases. This was given expression in the rules regarding

[25] Referees were appointed under section 84 of that Act, and the Treasury determined their salary under section 85.

[26] Chancery Practice Amendments Acts 1850, 1852, 1858, and 1860. Common Law Procedure Acts were passed in 1852, 1854 and 1860.

referees. The RSC 1873-1875[27] provided for trials by the referee at first instance in accordance with sections 56 and 57 of the Judicature Act 1873.[28] RSC 1875 Order 36, rule 30, provided that the referee could hold the trial at, or adjourn it to, any convenient location, carry out inspections and view the site. RSC Order 36, rules 31 and 32, gave the referee power to conduct the trial as a High Court judge.

Lord Cairns 1874-1880

Whilst Selbourne may have been the architect of the legislation, it was Cairns who sustained the office of the referee. Arguably, without Lord Cairns' support the Judicature Bill would never have been passed by the House of Lords nor might the Treasury have been willing to support the appointment of four referees. Cairns had a particular concern as he chaired the Commission which authored the *First Report* and the creation of the referee's office.

Lord Cairns was the first Lord Chancellor to operate under the new court system. Whilst Selbourne and Hatherly were also instrumental in creating the concept of the referee, Cairns ensured its survival. He succeeded in macro-managing the unification of the courts of Equity and Common Law and codifying procedural law. In the particular context of this study, the referees owed their existence possibly more to him than any other Lord Chancellor. He shared the 'very strong' opinion of the Presidents of Divisions that referees should be substituted for arbitrators

[27] The rules 34 and 35 of the Rules of Procedure were appended in a Schedule to the Judicature Act 1875. They provided for proceedings before an Official Referee and described the effect of the referee's decision. See Preston (1873).

[28] **Section 56**

Subject to any rules of court and to such right as may now exist to have any particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice or before the Court of Appeal may be referred by the court or by any Divisional Court or judge before whom such cause or matter may be pending, for inquiry and report to any official or special referee and the report of such referee may be adopted wholly or partially by the court and may (if so adopted) be enforced as a judgment of the court.

Section 57

In any cause or matter (other than a criminal proceeding by the Crown) before the said High Court in which all parties interested who are under no disability consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, 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, the court or judge may at any time on such terms as may be thought proper, order any question or issue of fact or any question of account arising therein to be tried either before an official referee, to be appointed as hereinafter provided, or before a special referee to be agreed on between the parties.

(Graham 12 November 1875). His unequivocal support for the office is evident in the earliest correspondence commencing with his secretary's letter to the Lords Commissioners of HM Treasury:

> Nov 12th 1875
>
> Sir,
>
> I am directed by the Lord Chancellor to enclose for the information of the Lords of the Treasury the opinion and determination of the Lord Chancellor and of the Heads of the Divisions of the High Court of Justice as to the numbers, qualifications, and tenure of office of the Official Referees in pursuance of Section 83 of the Judicature Act 1873 and I have to ask the sanction of the Treasury … that these Official Referees should be substituted for arbitrators *pro hac vice*, that the number of Official Referees will not be sufficient and that a greater number will be required: but they (Presidents of Divisions) think that within first instance the experiment may be tried with four Referees, that is to say one for each of the four Divisions, Chancery, Queen's Bench, Common Pleas and Exchequer.
>
> The salary of these Official Referees has to be fixed under Section 85 by the Treasury with the concurrence of the Lord Chancellor.
>
> The Lord Chancellor is of the opinion that looking to the judicial character of the functions which these Referees will have to perform, to the circumstances that they will have to give up all private practice and that their work will be *ejusdem generis* with but certainly higher than that which the Masters who receive £1,500 a year now perform. The salary specified ought not to be less than £1,500 and competent men cannot be got for less, and this opinion is held very strongly by the Presidents of the Divisions.[29]
>
> The Lord Chancellor understands that upon references to Masters of the Common Law Courts of matters of account it has been the practice to charge a fee for each hour of the Master's time occupied, which fee went into the general revenue.
>
> The Lord Chancellor thinks it would be open to the Treasury to consider whether some charge should be made to the suitors to the reference for the time of these Official Referees that may be occupied and that this whole charge of the Official Referees may be lightened.
>
> The Lord Chancellor would be obliged to Their Lordships if they would give the subject of this letter their immediate attention as it is highly desirable that the Official Referees be appointed as soon as possible there being already cases which have been referred to them and are now waiting for trial before them.
>
> Yours
> G

[29] The salaries of judges in 1873 were: Lord Chancellor, £10,000; Lord Chief Justice, £8,000; Vice President of Division, £5,000; and a special allowance of 10 guineas per day for judges on circuit (Cairns 27 January 1873).

This letter underlines the uncertainty as to manpower resource. Lord Selbourne had thought three referees sufficient; Cairns four.

The Treasury reply (Laws 19 November 1875) acknowledged the referees' 'higher' status.

> Treasury Chambers
>
> 19 November 1875
>
> My Lord,
>
> In reply to Mr Graham's letter … I am directed by the Lords Commissioners of Her Majesty's Treasury to state that My Lords observe that it is proposed to appoint a referee for each of the four Divisions of Chancery, Queen's Bench, Common Pleas and Exchequer, but they also do not understand whether it is intended that the Referee shall be exclusively attached to the service of the Division to which he is appointed, or shall be available for duties in another Division if necessity should arise.
>
> With reference however to the present proposal and to the opinion which it is stated that the Presidents of the Divisions entertain that the number of four Referees will not be sufficient but that more will hereafter be required, my Lords would desire to submit to your Lordship some observations which it appears to them should be fully considered before their sanction to the present proposal is given.
>
> When the Judicature Act was before the House of Commons My Lords caused enquiries to be made of your Lordships predecessor as to the probable number of Official Referees whom it would be necessary to appoint, and were informed by Lord Selbourne that in the first instance he considered that three would be sufficient, only one for each of the second third and fourth Divisions of the High Court from which this class of references would come, the first or Chancery Division being already sufficiently provided for by the Chief Clerks in Chancery.
>
> As it is now proposed to appoint a Referee for the Chancery Division also, My Lords would be pleased to be informed whether the point has been considered as to the aid which the Chief Clerks might give in disposing of References from the Chancery Division or to what extent if a Referee is appointed for this Division in addition to the Chief Clerks, the labours of these latter officers might be lightened as to render some reduction of their number practicable.
>
> As regards also the appointment of Referees for the Queen's Bench, Common Pleas and Exchequer Divisions of the High Court and as regards the suggestion that a greater number than four of these may hereafter be required My Lords perceive with reference to the class of cases which will be heard by the Referees (See Section 57 of the Judicature Act 1873) that it is stated by your Lordship that their duties are ejusdem generis, although certainly higher than those which have hitherto devolved upon the Masters under the Common

> Law Procedure Acts the class of cases referred to the Masters is understood to have been so important in character, and the number of them to have been on the increase: but if the appointment of Official Referees would have a tendency to lessen the references hitherto made to the Master, the consideration will arise now for it will be necessary to retain the foremost number of the latter officer.
>
> The Legal Department's Commissioners have stated their opinion as your Lordship is no doubt aware that a reduction might be made of four out of the whole number of Masters, as vacancies arise, if this opinion appears to have been formed on grounds apart from any questions of the appointment of Official Referees.
>
> Your etc
> Laws.

This Treasury reply indicates that the office involved a compromise between Masters and referees, with acknowledgment of the referee's higher status, but with provision for the referees to have chambers and clerks themselves. Lord Cairns' reply on 24 November 1875 stated that he did not think there would be so many references from the Chancery Division as from other Divisions, so that the fourth referee might not be so fully occupied (Cairns 24 November 1875).[30] Lord Cairns based his view on estimates of references from the Divisions and asked the Treasury to note that the referee would operate under a compulsory reference different from the Common Law Act Procedure 1854. The referees would be sitting from 10 am until 4 pm, about 200 days per year on an hourly fee basis which in Lord Cairn's words 'would afford a wholesome check against any laxity of practice'.

Cairns succeeded in obtaining funds for four referees[31] against Treasury opposition (Laws 19 November 1875). On 18 February 1876, he confirmed the appointment of four Queen's Counsel to the Treasury: Mr J Anderson,[32] Mr G Dowdeswell,[33] Mr C Roupell[34] and Mr H Very,[35] albeit Lord Selbourne appointed Anderson in 1873 (Graham 12 November 1875). There had been some delay and cases had already been referred

30 The reason being the employment of the Chief Clerk of Chancery.

31 Lord Selbourne had suggested three referees with a referee appointed to the Chancery Division.

32 James Anderson QC was educated at Edinburgh University and was a member of the Faculty of Advocates of Scotland. He resigned as a referee because of bad health in 1886. He was a member of the Counsel of Legal Education, a Mercantile Law Commissioner, Examiner to the Inns of Court, Examiner in the Court of Chancery and stood as a Liberal candidate, contesting two Scottish constituencies in 1852 and 1868.

33 In post 1876-1889.

34 In post 1876-1887.

35 In post 1876-1920.

to the referees. On 24 February 1876, the Treasury agreed to Cairn's proposal that the referees could appoint their own clerks as clerks of the High Court commensurate with the duties of the clerks to the Chief Clerks. It was in this way that Lord Cairns secured the referees' position.

Importance of chambers business

As a postscript to the *First Report*, the *Selbourne Papers* contain a Memorandum from Colin Blackburn (Blackburn 31 March 1873), one of the leading High Court judges of those times. In the context of the referees' role it is significant.

He states:

> The new mode of pleading proposed will create a great deal of new and important business to be transacted at Chambers in settling issues or otherwise.
>
> Much of the success of the new Scheme must depend on how this is worked and it cannot therefore I think be properly delegated to Masters.
>
> I do not see how it can be satisfactorily disposed of unless these judges regularly attend at Chambers. It certainly would require more than one judge at Chambers …
>
> Required for sittings *in banc* 9 judges
>
> For *nisi prius* in London and Middlesex 6 judges
>
> For Chambers 3 Judges
>
> 18 judges altogether.
>
> The conclusion I draw is that the present number of 18 judges should not be diminished.
>
> Colin Blackburn
>
> 31 March 1873

Whilst referees are not expressly mentioned by Mr Justice Blackburn, the important issue here is that the new business would require a judge in chambers not a Master in chambers to settle issues.[36] This idea juxtaposes Newbolt's later conception of 'discussions in chambers' to resolve issues in some matters. Just what Mr Justice Blackburn had in mind is unclear but most probably not what Newbolt invented. However, the idea may well have been to deal with quite a number of issues that might otherwise have wasted time at trial.

[36] Prior to the Superior Courts (Officers) Act 1837, the Masters' work in chambers was carried out by the judges.

Legacy of the Commission

Despite Lord Selbourne's visionary objectives, and the careful deliberations of the Judicature Commissioners, there were subsequent problems. The intended results were not achieved in several respects. Writing anonymously to *The Times* on 10 August 1892, Lord Bowen regretted the drift of commercial work to arbitrators because it was quick and cheap, but not necessarily right in law. This had been one of the criticisms of the Commissioners and what they sought to avoid by creating the referee's office. Lord Bowen mentioned two fundamental considerations to men of business:

> The first is-money. 'How much is it likely at most to cost?'
>
> The second is-time. 'How soon at the latest is the thing likely to be over?'

He then wrote:

> The one supreme attraction which draws merchants and traders into the circle of such grotesque justice is that it is prompt, it is cheap, that there are (or were until Lord Bramwell spoilt the innocent pleasures of all arbitration rooms by his recent Act of Parliament) no Appeal Courts, no House of Lords in the background, 'no fresh fields and pastures new' of litigation, stretching in interminable prospect. (*The Times* 10 August 1892: 13)

Lord Bowen's reservation was concern about 'grotesque justice' practised by commercial arbitrators. The Commission's invention of the referee was intended to avoid that problem by the appointment of experienced Queen's Counsel exercising High Court judge powers. His other concern was the delay and cost of proceedings which Newbolt's 'Scheme' was designed to reduce.

However, apart from the criticism of Lord Bowen, we note from this material reviewed above:

1. a recognition that the provision of separate remedies in separate courts created unnecessary cost and delay, as well as duplicity and contradiction, in judgment at the expense of the litigant;
2. a further recognition that the pre-1876 court organization and machinery of justice could not cope with the influx of work on the 1866 scale where 133,160 writs were issued;
3. that the experience of Chancery practice and the Common Law Procedure Act 1854 suggested a possible solution to the backlog of cases;

4 that the disillusionment of commercial men with arbitration in the 1860s influenced the Commission in its invention of the referee's function and subordinate office;
5 that by the 1890s commercial men were disillusioned with the 1870 model;
6 that the referees would dispose of cases more efficiently than a jury;
7 that the referees could relieve the High Court judiciary of technically complex factual cases requiring a detailed enquiry or local investigation; and
8 that the Commissioners encouraged a more efficient process regarding cost and delay, as well as suggesting new instruments of micro-management, such as 'statements of issues' and Preliminary Issues.

It may be argued that, without the macro-reforms of the Commission (1867-1869) embodied in the Judicature Acts 1873 and 1875, Newbolt's 'Scheme' might never have been invented. At micro-, or referee, level, it was undoubtedly the flexible powers conferred on the referee that facilitated Newbolt's experiments in caseflow management and enabled a more activist approach.

[F] THE GROWTH IN REFERRAL BUSINESS

We may argue that micro-caseflow management was an inevitable development because of the rearrangement of business in the High Court and the unique jurisdiction that devolved on the referees as a result. Such jurisdiction, as described below gradually, evolved.

By reference to Table 3 below we find that in 1880 referee caseload increased by 52% on 1879 figures,[37] and that the 1890 caseload was more than four times the 1878 caseload, demonstrating a strong growth in business.

In 1880 most of the referrals were of values between £200 and £100 (*Return of Judicial Statistics of England and Wales 1880*), but by 1897 the *Returns* indicate that the referees had three cases of a value exceeding £5,000: the administration of an estate, a building case, and a sale of goods case. Such growth in business in the late nineteenth century may be illustrated by the Table 3.[38]

[37] The number of defended cases increased from 44 in 1879 to 76 in 1880: a 72% increase.

[38] See *Return of Judicial Statistics of England and Wales 1900* (Part 2 Civil Statistics) for data relating to the year 1898.

Table 3: Annual referrals 1876-1898[39]

Year	Referrals
1876-77	78
1877-78	70
1878-79	91
1879-80	139
1888-89	277
1889-90	313
1896-97	267
1897-98	262

Sources: Returns of Judicial Statistics 1876-1898

In the absence of contemporaneous judicial records,[40] the nature of the cases referred may be described by reference to categories of reported cases and archival material. From this analysis, a disparate jurisdiction becomes apparent.

Property Cases

Here, the reports confirm that matters adjudicated comprised: boundary disputes (*Lascelles v Butt* 1876); enquiry into damages for breach of a lessor's covenant to supply a specified quantity of water per day (*Turnock v Sartoris* 1889); an enquiry as to quantum of damages for interference with ancient lights (*Presland v Bingham* 1888); action for damages for breach of covenant to repair (*Proudfoot v Hart* 1890); enquiry into assessment of damages for value and quantity of minerals taken from farm and compensation as way leave for use of roads and passages (*Phillips v Homfray* 1883); assessment of damages for failure to carry out tenant's repairs under repairing covenant (*Tucker v Linger* 1898); assessment of balance due following a decree for successive redemption of mortgages (*Union Bank of London v Ingram* 1882); action by landlord against tenant and by tenant against sub-tenant in respect of dilapidations (*Hornby v Cardwell; Hanbury (Third Party)* 1881); direction for an account of minerals taken from property (*Jenkins v Bushby* 1891); action for damages for breach of covenant to deliver up premises in repair (*Joyner v Weeks* 1891); action for account on a mortgage (*In re Piers* 1898);

[39] *Return of Judicial Statistics of England and Wales 1880.*

[40] No records exist of court files prior to 1944 in the National Archives save file J141/326 *Official Referees: Directions by the Senior Master* which is referred to subsequently.

matters of account in disputes between spouses as to property rights (*In re Married Women's Property Act 1882*);[41] damages for breach of repairing obligation regarding assignment of reversion expectant on determination of tenancy (*Cole v Kelly* 1920); damages for illegal distress (*Davies v Property and Reversionary Investments Corporation* 1929); partitioning of joint family property (*Anantapadmanabhaswami v Official Receiver of Secunderabad* 1933);[42] claims for damage to leasehold property (*Davies v Property and Reversionary Investments Corporation* 1929); and a claim for damages by mill-owners for loss of riparian rights taking water from a river for the purpose of driving condensing low-pressure steam engines (*Ormerod and Others v The Todmorden Joint-Stock Mill Company (Ltd)* 1882).

Commercial Cases

Referrals also comprised commercial cases consisting of: actions for accounts on money-lending transactions (*Burrard v Calisher* 1878); assessment of damages for breach of agreement to purchase machinery on the expiry of a lease (*Marsh v James* 1889); assessment of damages for value of goods sold by enemy alien during war (*Jebara v Ottoman Bank* 1927);[43] inquiry into damage for cost of repair of taxi-cabs (*Albemarle Supply Company Ltd v Hind and Company* 1928); action for an account on money-lending transactions (*Burrard v Calisher* 1878); trial determining whether goods of merchantable quality (*Jackson v Rotax Motor and Cycle Company* 1910); enquiry into quality of hops from Pacific Coast (*Biddell Brothers v E Clemens Horst Company* 1911); questions as to damages for breach of commercial agreement for Anglo-American trading partners (*Rose and Frank Co v JR Crompton and Brothers* 1923);[44] value of goods not returned under bailment (*Rosenthal v Alderton & Sons* 1946); assessment of damages for conversion of goods disposed of through

[41] See also per Scrutton L J *In re Questions between W A Humphrey and H A Humphrey* (1917: 74), questioning whether Ridley J, a former referee, could delegate matters under section 17 to the referee where it was not a matter of account and neither party would consent to that course. Cozens-Hardy MR considered that Ridley J had exceeded his powers in so referring the whole matter to a referee.

[42] Whilst not an English case but a Madras High Court case, it confirms that the Official Referee was also a judicial office in British India at the time. They had similar jurisdiction.

[43] Appellant claimed sterling payment for goods under Article 84 Treaty of Lausanne and Treaty of Peace (Turkey) Act 1924 for goods sold by Ottoman Bank in Beirut during war at the exchange rate before the war and not at fluctuating piastres (Ottoman currency) rates.

[44] In this action, order was made by the Master that the action be transferred to the Commercial List and that all questions of damages that became material would be transferred to an Official Referee.

fraud (*Beaman v ARTS* 1949);[45] and an assessment of damages for delay in supply of plant for laundering and dying works (*Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* 1949).

Ecclesiastical Cases

Amongst cases referred, there is reference to an action for an account to recover arrears of pension under the Incumbents Resignation Act 1871 (*Gathercole v Smith* 1881).

Business Law

Some evidence is found of references of a business nature, such as: a partnership action determining distribution of partnership property on dissolution (*Potter v Jackson* 1880); an action for breach of agreement transferring stock of a railway company and transfer of engineering sub-contract for the construction of a railway line (*Miller v Pilling* 1882); and an assessment of damages due to company agent for breach of agreement by company (*Reigate v Union Manufacturing Company (Ramsbottom) Ltd and Elton Cop Dyeing Company Ltd* 1918).

Chancery Matters

These included: an action on an account in relation to administration of an estate (*Lady de la Pole v Dick* 1885); action by executors to recover monies paid by testator to defendant and assessment of monies due to executors (*Baroness Wenlock v River Dee Company* 1887); a direction to take an account of monies due to beneficiary from trustee of Ceylonese estate (*Rochefoucald v Boustead* 1897); and an action by an art dealer against an estate in respect of 24 pictures (*Rowcliffe v Leigh* 1876).[46]

Tort Actions

These included an assessment of costs due to a plaintiff in respect of a defendant's unlawful action in maintaining an action through a common

[45] Appeal against Denning J upheld. Trial limited to question of damages referred to Official Referee.

[46] One of the first cases to be referred where the Vice Chancellor of the Chancery Division ordered the case to be tried before an Official Referee as distinguished from the related action of *Leigh v Brooks* (1876) regarding the sale by the defendant to her testator of 130 pictures for prices amounting in the whole to £50,000 with an allegation of fraud. Because of the fraud question the matter was referred to a High Court judge to deal with in open court.

informer (*Bradlaugh v Newdegate* 1883)[47] and an assessment of damages in respect of embezzlement and conversion of sawdust (*Rice v Reed* 1900).

Construction and Engineering

The referees gradually assumed specialist jurisdiction over what High Court judges loosely termed 'bricks and mortar' cases.[48] This work encompassed: a declaration as to conclusiveness of surveyor's certificate (*Richards v May* 1883); action for moneys due under building contract and counter-claim for defective building works (*Lowe v Holme and Another* 1883); assessment of damages in respect of contractor obstructing highway with temporary electric tramway (*T Tilling Ltd v Dick Kerr & Co Ltd* 1905); reference determining delay in delivering possession of site for building works (*Porter v Tottenham Urban Council* 1915); and time in which to complete building works after practical completion (*Joshua Henshaw and Son v Rochdale Corp* 1944).

Employment

This included a reference for the ascertainment of a fair wage (*Hulland v William Sanders & Son* 1945).

Marine

There are references enquiring into circumstances causing delay in the unloading of a vessel in port (*Kay v Field & Co* 1882) and an assessment of damages for repairs to a schooner in collision with barge (*Rockett v Clippingdale* 1891).

Patents

Patent matters referred related to: an enquiry into damages for infringement of a patent (*American Braided Wire Company v Thompson* 1890);[49] assessment of damages for infringement of patent (*Cropper v Smith* 1884); a determination of the novelty of patented specification

[47] Where Coleridge LCJ ordered the defendant, an MP, to pay the plaintiff's costs arising through the MP's maintenance and champerty of an informer's action against Mr Bradlaugh who refused to take the oath in Parliament.

[48] Anecdotal evidence given to the author by a TCC judge.

[49] Mr Justice Kekewich, at the trial of the action, held that the plaintiffs' patent was invalid; but his judgment was reversed by the Court of Appeal, which directed an inquiry as to what damages had been sustained by the plaintiffs by reason of the infringement of the patent by the defendants, and this decision was affirmed by the House of Lords. The inquiry as to damages was by consent referred to an Official Referee.

concerning interlocking apparatus for railway points and signals (*Saxby v The Gloucester Wagon Company* 1881); and the determination of costs as a result of Crown infringement of patented inventions (*In re Letters Patent No 139, 207; In re Carbonit Aktiengesellschaft* 1924).

This diverse workload is further illustrated in the Appendices to my thesis *Caseflow Management: A Rudimentary Official Referee Process 1919-1970* (Reynolds 2008) which contain schedules describing the types of case referred and, in certain cases, the element of the 'Scheme'.[50] In 1947, Eastham (28 January 1947) sent a Memorandum (n.d.) to Lord Jowitt, then Lord Chancellor, confirming that the referees also dealt with claims for forfeiture, breaches of repairing covenants, injury reversion, injunctions, fraud and conspiracy, damage by enemy air-raids,[51] subsidence of coal mines,[52] pollution of rivers and fishing rights, costs of plant and machinery, public works, defective machinery, and conflicts of evidence between architects and surveyors (Eastham n.d.).

We may infer from this that, whether the referees were dealing with questions of riparian rights or fixing an exchange rate of Ottoman currency, the pressure of a diverse and increasing caseload necessitated the pioneering of new judicial techniques.

[G] CONCLUSIONS

Conclusions at Macro-level-general

Here, we have explored the question as to why and how the office of referee came about and how, perhaps unintentionally, it facilitated a form of what we now may recognize as caseflow or case management.

The office was created against a background of fundamental procedural reform; codification and unification of the procedural and administrative system, some calling it revolutionary. The Judicature Commissioners attempted to provide for the more speedy economical and satisfactory despatch of the judicial business transacted by the courts. In that they realigned the jurisdiction of the courts and made provision for equitable remedies in the courts of Common Law and abolished the Courts of Common Pleas and Exchequer, replacing Exchequer Chamber with the

[50] Michael Reynolds, 'Caseflow Management: A Rudimentary Referee Process, 1919-1970' (Thesis, LSE 2009, ProQuest Dissertations ISBN: 978-1-321-35703-5).

[51] Pitman (9 December 1943) confirms numerous war-damage claims referred to Official Referees.

[52] This case involved 130 pages of pleadings.

Court of Appeal, they succeeded in streamlining the system. Whilst *The Times* (22 April 1869) was correct in its 'Leader' in saying:

> The report of the Judicature Commission, to which we recently drew the attention of readers, will, we are confident, mark the beginning of a new period of legal history. The influence which it is destined to exercise is not to be measured by the force with which the inconveniences of the present system are portrayed, nor even by the specific recommendations which it contains. It is the sanction of the high official authority which it possesses that constitutes this document a powerful lever of reform.

Undoubtedly, the 'high authority' provided 'a powerful lever of reform', which included the creation of the referee. But an anonymous former member of the Judicature Commission, reputed to be Lord Bowen, wrote:

> Recent legislation has, without doubt, effected many most important and valuable improvements; but the system, as administered, amounts to a denial of justice to all prudent persons as respecting claims for a moderate amount, and in all cases causes expense, uncertainty and delay most disappointing to at least one .
>
> MEMBER OF THE JUDICATURE COMMISSION
>
> London, August 10.1880. (*The Times* 16 August 1880)

Whilst structurally this was transformative and provided a more streamlined system it failed to reconcile the practical procedural problems of delay and expense. It was this failure, like that of many other procedural reforms, that became the catalyst for Newbolt's procedural innovations.

Conclusions at Macro-level-specific

More specifically, we may conclude from the above review that the overall objective in the words of the Judicature Commission was:

> The duty of the country to provide tribunals adapted to the trial of all classes of cases, and capable of adjusting the rights of litigant parties in the manner most suitable to the nature of the questions to be tried. (Parliamentary Papers 1869: 13)

We also found that the office of referee was created to avoid the problems posed in certain cases of referrals under the Common Law Procedure Act 1854, as explained by the Lord Chancellor and the Solicitor General in 1873, which caused the 'scandal' of complications and delay under the Common Law Procedure Act 1854. We have also discovered how the referee was inspired to some extent by the work of arbitrators and a need to restore confidence in commercial dispute resolution. Here, we saw the

germ of a judicial office that bifurcated the functions of a puisne judge and an arbitrator in the context of subsequent procedural innovations. Today's Technology and Construction Court (TCC) is the result of the evolution of that process.

We may also consider that the conception of the office was significant in that it marked acknowledgment of the industrial age and more technically complex cases where a judge would perhaps more readily understand complex facts than lay jurors. Indeed, it would be difficult to envisage how juries could deal with so many referrals of such a nature at that time with the dramatic increase in actions in the 1860s and, in the Attorney General's words, a system founded in the Middle Ages that 'was incapable of being adapted to the requirements of modern times' (HC Deb 9 June 1873, vol 206, col 641). If the earlier system had been retained, then the 'scandal' of the increasing backlog would have caused much greater difficulty. Fortunately, that was not the case and processes, such as that of enquiry and report by a referee were compulsory under section 56 of the Judicature Act 1873, undoubtedly facilitated a better caseflow, as did the procedural improvement introduced by Lord Selbourne in the Judicature Bill 1873. This enabled the transfer of cases from one court to another. This had particular utility in the case of the referees because without this process the new system would have run into difficulty with heavy technically complex cases before High Court judges clogging the lists. Such referrals also enabled a group of referees to gain expertise in these matters.

Perhaps, also, we might reflect that the particular statutory powers conferred on these officers of the court included powers of investigation and report. In that context they acquired some traits of a more interventionist court at interlocutory stage.

Conclusions at Micro-level

We may also conclude that this process was innovative because, as the Judicature Commission recommended, a court system with three modes of trial was capable 'of adjusting the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried'.[53]

[53] Order 36, rule 2, RSC 1875 provided for five modes of trial by: one or more judges; a judge with assessors; a judge and jury; an official or special referee with assessors and a referee alone.

This gave them a certain amount of discretion which Sir Francis Newbolt KC[54] was able to use to the advantage of users 'in the manner most suitable to the nature of the questions to be tried'. That 'most suitable' manner implies that the traditional judicial approach may not have been appropriate in all cases where subordinate judicial officers were working on heavy factual cases. The words imply a more flexible approach, and, if that hypothesis is right, then some of the argument of traditionalists, that judges must not be involved in settlement, might be subject to question.[55] This also involved alertness in managing an application or a trial: keeping counsel on the point as time was limited. Certainly, the way Newbolt interpreted his role as a referee questions the idea of a detached judge unconcerned with settlement or the management of the trial. The thrust of the Commissioners' Report here tends to suggest that a passive as opposed to an activist approach runs counter to the central objective of the Commission to procure 'the more speedy economical and satisfactory despatch of the judicial business transacted by the courts' (Parliamentary Papers 1869: 13). Further support for such a wider interpretation of the referees' role is to be found in the provision the Judicature Commission made in respect of referees visiting the scene or the site. This was a considerable departure from the judge in the courtroom and led to many cases being settled or issues narrowed after such visits. It is significant that this element of micro-caseflow management was invented by the Commission itself and put to excellent effect by Newbolt, Sir Tom Eastham QC,[56] Sir Walker Carter QC[57] and Sir Norman Richards QC.[58]

In other ways such an interpretation of their role may be seen as harmonizing a disciplinary diffusion of relationships between referees as judges, experts and assessors. As a result of this, Newbolt devised better ways of using experts in a case-managed role and acting to give what today we would recognize as an expert evaluation. We see a similar effect in terms of submissions and pleadings which were the subject of heavy criticism by the Commissioners. They wanted greater clarity recommending 'a statement of issues for trial' (Parliamentary Papers

[54] KC 1914; Hon RA, JP, MA, FCS, ARE, Hon Professor of Law in the Royal Academy. Publications included: *Sale of Goods Act 1893*; *Summary Procedure in the High Court* (London: Sweet & Maxwell 1893); and *Out of Court* (London: P Allan & Co 1925). Official Referee 1920-1936.

[55] This is principally the argument advanced in support of the view that judges must not intervene to encourage settlement. See, for example, Fiss (1994).

[56] In office 1936-1954.

[57] In office 1954-1971.

[58] 1963-1978.

1869: 13). This, if necessary, would be settled by the judge. In a number of referee cases on preliminary issues there are to be found instances of referee intervention facilitating the formulation of preliminary questions in keeping with this recommendation.

We may therefore conclude that, what the Commissioners sought to achieve at macro-level, Newbolt and his colleagues subsequently sought to achieve at micro-level through a process of subordinate judicial activism or micro-caseflow management. Arguably, they portended the civil justice reforms of the late twentieth century.

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