

3. RULES OF COURT

Rules of procedure

20.1 Two countries of the Commonwealth have recently replaced their rules of procedure, The Bahamas and New Brunswick. The rules of The Bahamas,¹²⁷ introduced in 1978, are based on the Rules of the Supreme Court of England, which previously applied, but in adapting them, some simplification has been achieved and references have been corrected, which should at least have the effect of saving a little time.

20.2 The new rules of court of New Brunswick¹²⁸ were published in November 1981. They owe much to the report of the Williston Committee of Ontario.

20.3 That committee was appointed by the Attorney General of Ontario to conduct -
"a thorough re-examination of the principles and policies upon which the Rules of Practice are based and an evaluation of individual rules"

with a view to simplifying as much as possible the procedure in civil actions, concentrating on the use of simple language and terminology and, among other purposes, producing more expeditious and less formal procedures.

20.4 The Committee prepared a draft new Judicature Act and new Rules of Civil Procedure. It would be inappropriate here in detail all the changes proposed, but mention should be made of the attempt to modernise the language of the rules, except where the committee felt there was a danger of losing precision; the attempt to abolish the concept of procedural nullities; the replacement of the writ of summons and the appearance by a statement of claim and a statement of defence; and the replacement of the specially endorsed writ by a general summary judgment procedure. It should perhaps be recorded that the writ of summons had already been abolished in Nova Scotia, Manitoba, Alberta and Prince Edward Island. Discovery and hearing dates are dealt with elsewhere.¹²⁹ The report has not yet been implemented.

20.5 In England, the form of writ was simplified in 1979¹³⁰ and a single composite form was introduced to replace the plurality of forms previously used. The form is expressed in language that is intended to be more easily understood than the archaic style of the old writ. The entry of appearance was abolished and replaced by an acknowledgment of service, in which the defendant is required to indicate whether or not he intends to contest the proceedings.

20.6 At county court level, completely new rules have been enacted in England.¹³¹ They are intended to simplify and modernise the procedure of the courts, and in the process they are assimilated, where appropriate, to the rules of the Supreme Court.

20.7 Prior to that, however, the procedure for undefended divorces had been so simplified that it is possible for the petitioner to present his or her own case. The petition is presented to the county court and the court serves it on the respondent, normally by post, together with a form of acknowledgment of service and notes for guidance. The respondent is asked to complete the form and to state whether it is intended to dispute the divorce or any claim ancillary to it or to make any claim against the petitioner. When the respondent confirms that the divorce will proceed undefended, the petitioner files a request for directions, supported by an affidavit proving the facts in the petition. This is considered by the Registrar and if he is satisfied, he gives a certificate that the facts have been proved and the case is set down in the special procedure list. The pronouncement of the decree nisi is formal, but where there are children, the court must be satisfied before making the decree absolute that the arrangements regarding them are satisfactory. This involves a hearing before a judge in chambers, when the proposed arrangements are closely scrutinised. Other ancillary matters, such as maintenance, may take longer. It is estimated that this simplified procedure saves the time of 12 to 14 circuit judges.

20.8 Recently, a new permanent body, the Supreme Court Procedure Committee, has been set up by the Lord Chief Justice with the approval of the Lord Chancellor. Its objects are to consider and recommend to the Rule Committee reforms in practice and procedure for

saving time and costs and which are considered to be matters of urgency, which should not await the more general review of procedure recommended by the Royal Commission on Legal Services. It will be chaired by a Lord Justice of Appeal and its members will be nominated by the Heads of the three Divisions of the High Court, the Senate, the Law Society, and the Lord Chancellor's Department. It will be served by three permanent sub-committees.

20.9 The Committee is not aiming at sweeping or spectacular changes but rather at minor changes that experience has shown can effect substantial improvements in simplifying the process of litigation and reducing delays.

20.10 In Scotland, an affidavit procedure for divorce causes has been introduced, and further procedural changes are envisaged. Generally, there is a continuous process of procedural reform based on the work of a Rules Council for the Court of Session¹³² and a Sheriff Court Rules Council for the Sheriff Courts.¹³³ In addition, the Scottish Courts Administration try to help local Sheriffs' clerks and where a prescribed procedure seems unduly cumbersome, representations may be made to the Sheriff Court Rules Council to see whether simplification and streamlining can be achieved. The need is felt for simplification of complex procedures but in practice it is found difficult to change procedures of long standing, particularly where legislation is required.

20.11 In New Zealand, a new code of civil procedure has been drafted by a revising committee and is now with Parliamentary counsel. It is not known when it will be published. Incidentally, the Revision Committee of the Rules Committee of the High Court has recommended the introduction of a summary judgment procedure similar to that of England, in place of the existing bill writ procedure.

20.12 In Victoria, a complete review of civil court practice and procedures, jointly sponsored by the Law Foundation and the Law Institute, is in progress. The civil procedure in the magistrates' courts was streamlined in the Magistrates' Courts (Civil Jurisdiction) Act 1979¹³⁴ but it is too soon to judge its success.

20.13 In Queensland, a Law Reform Commission is presently engaged in the preparation of a working paper on the Acts which relate to Supreme Court procedure, and is also studying the Rules of the Supreme Court.

20.14 In Fiji, the Judicial Department has begun to review and amend the rules of court both of the Supreme Court and of the magistrates' courts, principally in order to streamline the pre-trial procedure.

20.15 New South Wales in 1970 abolished the distinction between court and chambers,¹³⁵ in the belief that "it would simplify matters by eliminating the various difficulties that have been held to exist under the present system". This step was considered by the Law Reform Commission of Queensland but they did not think any substantial difficulties had arisen in that State and they recommended that no change be made.

20.16 The Isle of Man has just introduced changes of procedure,¹³⁶ including a new default procedure, with the object of reducing the number of formal appearances by advocates before the court.

20.17 Gibraltar, by practice direction, has eliminated the need for appearances on a summons for directions unless the trial judge otherwise directs, where the solicitors are in a position to file an agreed draft order.

20.18 Hong Kong is proposing to simplify the steps a defendant has to take on being served with a writ.

20.19 The procedure of the local courts is currently under review in Western Australia.

20.20 In some jurisdictions,¹³⁷ considerable use is made of practice directions to supplement the rules of procedure, while in others¹³⁸ they are not favoured. This is a matter of opinion. No significant change regarding their use has been reported.

Fees of Court

21.1 In England, the Supreme Court Fees Order 1975¹³⁹ reduced considerably the number of fees of court payable. The initial fee is intended to be a composite fee payable at the commencement of the proceedings but covering also various interlocutory matters.

21.2 Gibraltar followed the English example when introducing new fees of court in 1979.¹⁴⁰

21.3 South Australia is proposing to go even further, and to replace the 165 or more individual fees for particular services by one common fee to cover the life of a process.

21.4 The object of these changes is to reduce clerical work, the making out of receipts, the endorsement of documents, and so on, but there is an incidental advantage, in that if the initial fee is higher, it discourages the person who has no intention of going to trial but uses the issue of a writ as a means of applying pressure to enforce a claim.