The History of the Technology and Construction Court on its 150th Anniversary.

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CHAPTER 3

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RUDIMENTARY PROTOTYPES IN CASE MANAGEMENT TECHNIQUES (1919-1949)

In his treatise on *The Common Law* [2]Oliver Wendall Holmes stated that: 'The life of the law has not been logic: it has been experience.' In this chapter the contribution of Sir Francis Newbolt K.C. is considered and if any judgement can be placed on that it is that of Holmes. His work demonstrated that it was very possibly his procedural 'experiments' lost to history that gave birth to this distinct court and the innovative approach of its judiciary. In researching the story of the Official Referees' Court, I found that its particular procedural characteristics had been created through the experience of the judges and especially so by the creativity of Sir Francis Newbolt.[3] Thus in this chapter we explore by reference to the contemporaneous documentary evidence relating to the invention of a rudimentary form of case management techniques as practised by Sir Francis Newbolt in the 1920s.[4] Here we focus on micro-management aspects of Newbolt's 'Scheme' and the reasons for it; an assessment of its impact, and the extent to which it promoted earlier settlement and saved costs.

Sir Francis Newbolt

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[2] Little, Brown, and Company 1881 (1909), Boston, 1881.

[3] K.C. 1914; Hon. R.A.; J.P., M.A., F.C.S., A.R.E. Hon. Professor of Law in the Royal Academy. Publications included: *Sale of Goods Act 1893*; *Summary Procedure in the High Court,* and *Out of Court.* Official Referee 1920-1936.

[4] This chapter is based on my earlier doctoral research at the National Archives, the House of Lords Library, and the Library of the London School of Economics and also on my recent articles in *Amicus Curiae*.

Like Lord Selbourne, Newbolt came from a religious background being the second son of the Vicar of St Marys in Bilstone, born 21 November 1863. He was educated at Clifton, and later at Balliol College Oxford where he read Natural Science (Chemistry) obtaining honours in 1887. He read law with Sir Thomas Wilkes Chitty, his brother-in-law, and a leading authority on Common Law procedure. He was called to the Bar by the Inner Temple in 1890 and joined the Western Circuit. He remained in Wilkes Chitty's Chambers for 10 years but did not enjoy an extensive practice. He took Silk in 1914. While at the Bar he continued his interest in science and gave over 1,000 experimental science lectures in board schools. He became Recorder of Doncaster in 1916, and a Chancellor of the Diocese of Exeter and Bradford and Chairman of the Devon Quarter Session. He became a referee after Sir Henry Verey's resignation in 1920. He was President of the Norwegian Club from 1920 to 1926 and an honorary member of the Land Agents Society. He was also an accomplished etcher and the author of a number of books in law, art and literature.[5]

The court

The court Newbolt joined was established to alleviate some of the symptoms of systemic failure in the pre-1873 system as recommended by the Judicature Commissioners. The court adopted the old Chancery practice of reference to a master or chief clerk, or to an arbitrator under the Common Law Procedure Act 1854. It was also intended as a substitute for a lay jury. It was invented to overcome the deficiency in the Common Law Procedure Act 1854 of non-compulsory referral, and needless expense of referral back to the court to correct erroneous awards of commercial arbitrators. Newbolt's colleagues were Sir Edward Pollock, George Scott, Sir William Hansell – the last said to be very capable.[6]

Sir Edward Pollock

Sir Edward was one of 24 children of Lord Chief Baron Pollock born 1 February 1841.[7] In 1863 he became a member of the Royal College of Surgeons and subsequently a Fellow. He was called to the Bar by Inner Temple in 1872. He enjoyed a varied

[5] *The Times* 9 December 1940 p.7; Issue 48794: col. E.
[6] In post 1927-31.
[7] *The Times* Obituary 16 April 1930; p.16 Issue 45489; col C.

commercial practice and was responsible for the 8th Edition of *Russell on Arbitration and Award* published in 1900. He was a member of a Committee of Experts appointed by the Foreign and Colonial Office in 1910 to review the work of international commercial arbitration and to ensure that British commerce enjoyed the same privileges as foreign commerce in respect of enforcement of awards abroad.[8] *The Times* said that Pollock made an excellent referee and was remarkably quick in seizing on all the essential facts and figures of a case. His geniality made it a pleasure to appear before him. He was also a member of the Royal Institution and the Anglo Finnish Society.[9]

Sir William Hansell

He was educated at Charterhouse and Christchurch Oxford and took honours in the Classical Schools graduating in 1880. He was called to the Bar by Inner Temple and devilled for Roland Vaughn Williams the future Lord Justice. He assisted Vaughn Williams with the textbook *Williams on Bankruptcy*. Hansell was the virtual author of its later editions. He became the leading authority on this branch of the law and took up a standing appointment as Counsel to the Board of Trade in bankruptcy matters. Hansell was a high churchman. He did some ecclesiastical work and had a good general practice. In 1917 he became Recorder for Maidstone. He took Silk in 1927 at the age of 71. A few weeks later on the retirement of Sir Edward Pollock (age 86) Lord Cave appointed Hansell to fill Pollock's vacancy. Hansell was in post until 1931 and a year later was appointed as a Commissioner of Assize for the North-eastern Circuit. In 1933 he was elected Treasurer of the Inner Temple. He died in 1937.[10] It may be significant that in Lord Sankey's time[11] Bosanquet sent a Memorandum compiled by Pitman[12] and himself (both appointed as referees by Sankey). That stated:[13]

> ……For many years the work of the Official Referees' Courts was of comparatively small importance but following upon the appointment of Mr (afterwards Sir) Edward Pollock in 1897, and later during the tenure of office of Sir William Hansell, the work of these Courts has steadily developed and increased in amount and importance.

[8] *The Times.* 6 June 1910.p.10.Issue:39291.col.D
[9] *The Times.* 15 December 1923.p.11.Issue:43525.col.B
[10] *The Times.* 20 April 1937 p.22. Issue: 47663.col.D
[11] 1929-35.
[12] Official Referee 1933-1945.
[13] National Archives LCO 4/152.

George Scott K.C.

George Scott served as a referee from 1920 to 1933 and is noted as being the inventor of the Scott Schedule.[14] This schedule was adapted from the surveying practice of dilapidations schedules and utilised for cases of defective work giving descriptive details of the works, the cost of remedy and description of the repair required.

For all of these referees, salary and numbers[15] remained a grievance as they saw these elements as dissuading more successful barristers from applying for such posts.[16] During the early part of his tenure Newbolt as Senior Referee was aware of this problem and corresponded with the Lord Chancellor, Lord Birkenhead, who was sympathetic to the challenges Newbolt and his colleagues faced.

Lord Birkenhead

It was the Lord Chancellor, F.E. Smith, Lord Birkenhead who appointed Newbolt and with whom Newbolt first corresponded about his 'Scheme'. Birkenhead was an energetic Lord Chancellor and scholar of Wadham College, Oxford. He is said to have been a model of 'sober correctness'[17] who never pretended knowledge which he did not have. Birkenhead supported the reform of civil procedure and land law. He attempted to reform the outdated circuit system undertaking some preliminary work on the Supreme Court of Judicature (Consolidation) Act 1925. He improved the tenure of county court judges paving the way for the County Courts Act of 1924.[18] His research assistant was Sir Roland Burrows who later wrote an article about the work of the referees in the *Law Quarterly Review*[19] in 1940.

Newbolt's 'Scheme'

[14] E Fay, *Official Referees' Business.* (London: Sweet & Maxwell, 2nd, ed, 1988) 70.

[15] Lord Cairns and the Heads of Divisions had considered that they would need at least four referees but the Treasury would not agree. LCO 4/152.

[16] Referees' salaries were then £1,500 and had not been increased since 1873. The number of cases referred had quadrupled after the First World War. When Lord Cairns wrote to the Treasury on 12 November 1875 to request the Treasury to suggest referees might be paid more than £1,500 the proposal was rejected by the Treasury.[HPIM 0445]

[17] R.F.V. Heuston *Lives of the Lord Chancellors 1885-1940* p.382 (Oxford: Clarendon Press, 1964)

[18] R Burrows, Roland *Official Referees* (1940) 56 LQR 504-513.

[19] n.18.

What caused Newbolt to invent a rudimentary form of case management was the outmoded trial system, the divergent remedies in different courts of separate jurisdiction, and the backlog of cases some of which involved complex factual matters of a scientific or technical nature. What facilitated this was the subordinate nature of the referee's office permitting Newbolt to adopt a more flexible and informal process in some areas. What he invented to overcome the delay and backlog in his list was a 'Scheme' which may be identified from his account in *Expedition and Economy in Litigation* [20] and from his reports to the Lord Chancellor.

The elements of his 'Scheme' may be identified more specifically as:

(a) Special procedures in chambers enabling informal referee resolution and early settlement;

(b) Judicial intervention at various stages of the process to effect settlement;

(c) The use and invention of the single joint expert/court expert;

(d) The use of a proportionate approach to costs so that the costs of the case should have some reasonable relationship to the value of the item in dispute;

(e) The invention of special forms of submission such as a Referees' Schedule;

(f) The formulation of preliminary issues or questions for the court;

(g) Flexibility as to the place of hearing at more economic locations and attendances on site.

All these elements contributed to a more effective and efficient mode of working and represented a form of judicial activism, sometimes interventionist, in order to accelerate the proceedings. By this means being a combination of formal and informal court processes Newbolt and his colleagues resolved certain types of complex technical disputes earlier saving time and cost. These elements of rudimentary case management and referee alternative resolution are examined in more detail subsequently to explain how and why all this came about in the 1920s in this court pre-dating notions of case management and proportionality as well as semblances of ADR by more than half a century.[21]

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[20] F Newbolt, 'Expedition and Economy in Litigation' (1923) 39 LQR 427.

[21] ADR did not really establish itself as an alternative to litigation until after 1976, regarded by some as a turning point in legal history. That was the year of the Pound Conference at St Paul, Minnesota on: *Perspectives on Justice in the Future* and Chief Justice Warren Burger's pejorative as to whether there was not a better way.

Events leading to the invention of case management and judicial settlement

The architects of the 1873 judicature reforms declared their intention to replace commercial arbitration with a court managed referee system. The referral of cases from the Queen's Bench and Chancery Divisions to referees was a form of macro-case management, realised through Section 3 of the Common Law Procedure Act 1854. Newbolt played a pivotal role in what may be described as a procedural revolution.

The philosophy underlying Newbolt's 'Scheme' was clearly set out in his seminal article and his concluding remarks in the *Law Quarterly Review*: [22]

> The true function of the Court, it is submitted, is especially in the commercial cases under consideration, not to conciliate or exhort the parties, as is sometimes suggested much less to hurry them, or to deprive them of a perfect freedom of action, but to use the available machinery of litigation to enable them to settle their disputes according to law without grievous waste and unnecessary delay and anxiety: and in particular to show them how this, if desired, may be accomplished. The only so called concessions which the parties can be said to make are made not only voluntarily, but in their own direct pecuniary interest. This has little, or nothing, to do with the common place saying of ordinary life that a man loses nothing in the long run by forbearance, fair dealing or generosity.

But the essence of this early evolution of case management lay in the function of the referee, his multi-function role being derived from: that of a master to whom matters were referred under the Common Law Procedure Act 1854; a judge of the High Court in terms of powers subsequently conferred after 1876; an arbitrator in terms of the referees' early use of directions after issue of the writ, and finally a juryman's role[23] where he would deal with trials of fact as 'a jury'. It may be argued that the utility of Section 3 Arbitration Act 1889 enabling parties to appoint a referee as an arbitrator by agreement[24] was decisive in terms of using consent as a means to extend the referees official formal power. By consent of the parties the *Rules of the Supreme Court* could be waived and by party agreement the referee could sit in chambers and informally resolve the case. This revolution is clearly demonstrated in Newbolt's correspondence

[22] n.20 p. 440.

[23] Eastham's notebooks for the period 1940-49 reveal numerous illustrations of case management features especially in the period 1944–48. Cases included matters of account, disputes as to matrimonial property, war damage claims, dilapidations cases, building and engineering cases and questions of costs. The entries also reveal that this judge frequently sat outside London and was requested on some occasions to exercise power 'as a jury'.

[24] To effect such appointment the arbitration agreement had to be lodged with the nominated referee's clerk and then entered in his list unless it was given a special appointment for hearing. The Award was published on payment of a court fee. Sched. 1, Section V, Supreme Court Fees Order 1924.

with Lord Birkenhead,[25] in particular, his reference to 'friendly business discussions' and in his article,[26] where he refers to 'an informal discussion in Chambers.' This was an extraordinary process for these times and quite unconventional because judges never entered the arena, believing that if they did so they would be perceived to prejudice their impartial and independent position. It was a high-risk strategy for Newbolt which caused Birkenhead some concern.

For present purposes it is only necessary to record what the development was and why it occurred in the context of the contemporaneous literature. In many respects the referee was a multi-functionary who bridged the void between a traditional Anglo-Saxon judicial culture based on the adversarial process, and the *laissez faire* business approach of the commercial man. The point was that adjudicating cases in a traditional manner was just not cost effective with the type of issues before the court and the voluminous evidence that referees had to analyse. What Newbolt worried about was the time spent on the case in proportion to its overall commercial value.

In the twentieth century the referees' role became more clearly defined. Their status was slightly increased by the acquisition of the non-jury list, and the abolition of rights of appeal on matters of fact. The referee's multi-function role was self evident from Sections 88 and 89 Judicature Act 1925.[27] A considerable increase in referrals occurred in the 1880s and 1890s as may be seen from the following table Table T.1.

Table T. 1. Annual referrals 1876-98

Year	Referrals
1876-77	78
1877-78	70
1878-79	91
1879-80	139

[25] Letter: *Newbolt to Lord Birkenhead's Secretary Sir Claude Schuster. 15 February 1922*. LCO 4/152.

[26] n.20 p. 438

[27] Section 88 provided that where any case was to be tried with a jury the court could refer the matter to an Official or Special Referee for enquiry and report. Any question arising in any cause or matter other than a criminal proceeding by the Crown and further the report of an Official or Special Referee could be adopted wholly or partly by the court or judge and if accepted could be enforced as a judgment or order to the same effect. Section 89 Supreme Court Judicature Act 1925 applied where any cause or matter other than criminal proceedings could be tried by a referee, officer of the court, special referee or arbitrator if the cause or matter required any prolonged examination of documents or any scientific or local investigation.

1888-89	277
1889-90	313
1896-97	267
1897-98	262

Source: Returns of Judicial Statistics 1876-98

The abolition of a right of appeal from referees to the Divisional Court also added to their status as a court of first instance. Opportunity was afforded for case management at an early stage of the proceedings because referees had developed the practice of giving directions on an early summons for directions taken out after the issue of the writ and before close of pleadings. Crucial to this development in the early 1920s was the acquisition of the non-jury list from the Queen's Bench Division which radically increased referee workload by 65 per cent in the years 1919 to 1922.

Newbolt's Invention

It is argued that the introduction of this rudimentary form of case management in the 1920s coupled with referee encouragement for settlement positively affected the outcome of referrals. It is probable that were it not for Newbolt's approach and that of his colleagues there would have been much delay in the trial of cases and higher cost. If it is the case that Newbolt practised case management, the question has to be asked whether that accounts for the apparent effect on caseflow in the period 1919-36. If it survived Newbolt's era, does it have any marked effect in the period 1947–70 for which periods judicial statistics are available?[28] If we consider the 18 years (inclusive) of the Newbolt period, the average percentile of disposals and settlements from 1919 to 1936 was 28 per cent of the referrals. If we take a similar period after the war 1947-64 the average settlement and disposal rate before trial is 19 per cent of the referrals. What these results tend to suggest is that the Newbolt era was a more activist time in terms of settlement and the post war period less activist.

[28] MP Reynolds *Case Management: A Rudimentary Referee Process, 1919-70* Appendix Civil Judicial Statistics Analysis: Official Referees: 1919-70. (Thesis: London School of Economics, 2008).

A further detailed study and analysis of these periods, and the Minute Book analyses 1959-62 and 1965-67, confirm that there was a marked difference as a result of these measures in the respective periods.[29]

It is strange perhaps that whilst there is clear direct contemporaneous evidence from the Lord Chancellors' files, the judges Minute Books and the judges notebooks at the National Archive as to the existence of this phenomenon and the effects of it, there is no corroborative evidence in the most likely place – the *Rules of the Supreme Court* themselves save what maybe inferred. The *Annual Practice* of 1930 at pages 640-641 headed *Notes on the practice before the Official Referees* states:

> Once an order for reference to an Official Referee has been made the Solicitor's clerk shall enter the case with the Official Referees Clerk with the Writ and the Order for reference from the Queen's Bench Division or the Chancery Division. Directions will be given by the Official Referee and *all interlocutory proceedings given by him in his Chambers* [30] including the issuing of Summonses, drawing up and dealing with orders and filing of documents. Summonses and applications will be heard by the Referee at 10.30am each day. Appeals against Interlocutory Orders will be referred to a Judge in Chambers.

Whilst there is no reference to any form of rudimentary case management process the note confirms that the referee was master of *all interlocutory proceedings*.[31] That being the case the referee would have had every opportunity, in theory and in practice, for bringing some order to the case and encouraging a time and cost-saving timetable as well as a process tailor-made for the particular case. In the absence of any express reference to Newbolt's 'Scheme' in the RSC discussed here reliance may be placed upon the contemporaneous reports made by Newbolt and Sir Tom Eastham to Sir Claude Schuster K.C.,[32] the Lord Chancellor's Permanent Secretary, and Eastham's surviving notebooks.[33]

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[29] n.28. 155-208.
[30] Author's italics.
[31] Author's italics.
[32] Sir Claude Schuster K.C. was appointed by Lord Haldane because of Lord Haldane's other urgent duties. Lord Haldane contemplated that Schuster would be the right man to set up a Ministry of Justice. Schuster played a pivotal role regarding micro-case management aspects. Schuster was the conduit through which the Lord Chancellor communicated with the Law Society, The Bar Council and the Bench as well as both Houses of Parliament. Schuster had a particular interest in what Newbolt was doing because of Schuster's involvement with a more efficient County Court procedure.
[33] J114/1-8

Evidence of Newbolt's Procedural Experiments and Innovations.

The best evidence of Newbolt's novel forms of process in the 1920s is a report that Newbolt made to Lord Birkenhead in July 1920. Newbolt's letter enclosing it, and the report itself, formed the basis of what Newbolt later described as his 'Scheme.'

Newbolt's covering letter to Schuster dated 5th July 1920 enclosing a report to the Lord Chancellor which stated:

> Dear Claude,
>
> Here is the Report. It is cut down to its extreme limits to make itself read. I have shown it to no one.
> I cannot, of course, say that any of the defects [in the system] are due to individuals, but I feel some surprise that my very simple expedients have not occurred to anyone before.
> Today after I signed the report I had a case where the parties gladly agreed to have commission accounts examined by an independent accountant, this saving more than half of the time of trial.
> Do please try and do something to improve our status more definite and dignified.
>
> Yours,
>
> F. Newbolt.[34]

Here Newbolt tells the Lord Chancellor's Secretary that the court has a problem with traditional procedures and the way to overcome it involves what today we would term case management measures. His report is revolutionary in the same sense as was said at the time of the creation of the referees' office. Despite this Birkenhead's eventual reply in February 1922,[35] referred to subsequently, cautioned about pressure from the Bench in settlement, but one can also infer Birkenhead's concern for what he called: 'the waste of public time.'

Newbolt's full report is as follows:[36]

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[34] LCO 4/152.
[35] LCO 4/152 *Letter: Schuster to Newbolt. 21 February 1922*.
[36] LCO4/152.

Confidential **Official Referee's Court**

5th July 1920 **No. 195**

Royal Courts of Justice

I was appointed an Official Referee in April 1920 and had long been aware that there were serious defects in the business connected with this office. I am now informed that a brief report on the matter would be acceptable.

The defects fall under 3 heads:

1. Those which are noticeable in all litigation in the courts;
2. Those which are due to the personality of the Referees, and their want of status procedure and position; and
3. Those which are due to the present practice in this Court.[37]

The result of all these combined is that the volume of the business is not what it should be, and a vast number of disputes go to private arbitration instead of any to the Courts.

The reasons given generally for preferring a lay arbitration are that (1) it is a much cheaper tribunal; and (2) much more expeditious; (3) a lay arbitrator is chosen who belongs to the particular trade in which the dispute arises, or is an experienced solicitor or chartered accountant; and there is practically no appeal.

Here I say incidentally suggest that it is an anomaly that the appeal from a referee may go as of right to the Court of Appeal, and the House of Lords, but it must first pass through the Divisional Court. It seems difficult in these days to justify this extra proceeding in appealing against the decision of one who has all the powers of a High Court judge.

From the legal and logical point of view, indeed from almost any point of view, a lay arbitration is open to the gravest objections. Whenever a motion to set aside an award is made gross irregularities, often amounting to a denial of justice, are disclosed. These are well known, and indeed not enlarged upon, but the fact remains that the attraction of a cheap and speedy decision is so great that more important matters are overlooked. The natural desire to have a judge who understands trade customs will be dealt with later.

The first question then is how the present procedure can be cheapened and accelerated.

There is much room for improvement. I am informed that the list left to me by my predecessor will occupy my Court for a year, and some of the cases which I have already dealt have been over a year-one or two over a year and a half-on the way to trial.

[37] LCO 4/152.

During the last few days 3 cases have been referred to me after reaching trial before a judge, and in many cases the order or agreement to refer comes too late.

Solicitors are slow to take the initiative, and though it is not possible to generalise on many points it may be confidently stated that a strong tradition has grown up in the profession that a 'good reference,' when once the order is made, is a windfall for counsel and solicitors; it is long, lucrative and leisurely affair with great inducements to keep it alive, without fear of judicial censure.

The result of this tradition is that heavy and unmerited loss falls on almost every litigant, whether successful or not.

Connected with this great grievance is one of a more subtle nature. Many genuine disputes properly referred owing to the details of the claim, and involving in the aggregate £100 cannot be satisfactorily tried in the High Court at all on the present system.

The cost per hour is out of all proportion to the value of the items. It is a negation of business methods to spend even half an hour on an item valued at £2 or £3 and in a great many cases it is evident from an early period that the costs will probably fall upon the defendant and this has a great tendency to lengthen the case and penalise him. *This is hardly explained to him*.[38]

While upon this question of expense I should point out that a great deal of unnecessary time has been taken up in the past owing to the traditional attitude of the referee which can only be explained by his want of some more definite status. He has endeavoured to make up for his want of authority by a policy of conciliation and non-interference, especially when leaders of the Bar have appeared before him, and this attitude always tends to lengthen a case very considerably. I recollect one, which although it might well have been tried in about 10 days actually took 22 days, and the referee listened without comment to the speeches of counsel which occupied no less than 22 hours. The costs amounted to £5,000 and owing to an incomplete judgement the trial proved abortive.

Lastly it is clear that a referee is not a member of a trade; he for instance cannot be so expert at accounts as an accountant, or so familiar with building as a builder; and so he has to listen to contradictory evidence on many questions which would create no difficulty if he were a member of the particular trade or business. By comparison to a lay arbitrator this adds to expense.

As to these points I can best put my 2 first suggestions for improvement in the form of examples:

[38] Written in Newbolt's handwriting, the rest of the report being typed. Author's italics for emphasis.

(1). In an action on a mortgage the defendant desired to take an account over 12 years. Accountants were to be called on both sides and the case was expected to last 2 or 3 days. On a summons before trial I suggested that only one accountant should be employed an independent man nominated by agreement or by me. This was accepted. I named an accountant and he was engaged for one day. Upon his report the defendant capitulated. No briefs were delivered.

The same accountant is now by consent in another case, investigating the accounts of sales of goods amounting to £12,000 the amount in dispute being only a small balance less, I should think, than the costs of a 2 day trial. There will be an immense saving of expense here.

(2). In an action for damages for bad workmanship in decorating a theatre it was intended to call expert witnesses on both sides. On a summons, I suggested that one independent expert should examine and report, and this was accepted and his report was received. It will very greatly reduce the time of the trial and the extra expense of witnesses and increase the probability of a satisfactory decision.

There is no compulsion, and counsel and solicitors seem well aware of the advantage of the parties of the introduction of these changes, which are made possible by the fact that, at any rate, after the order of reference, all the summonses come before the judge who is to try the case. He can always, if he likes, get seisin of the case, and save much of the expense incurred by leaving the solicitors to carry it on in the usual way.

There remains the fundamental difficulty of status and to improve this, and so obtain the best candidates for this responsible position, clothed as it is with all the powers of a High Court Judge I venture to suggest (1) that the Referee should take precedence of County Court judges (2) that all appeals from their decisions should go direct to the Court of Appeal leave being required to appeal from a decision on a summons;(3) that the recognised form of address to a Referee should be ‘My Lord’ a title of respect allowed to a Commissioner of Assize and even to a junior barrister when he sits as a recorder or deputy recorder of a city like Bradford (4) that the salary and allowances should be increased and their pensions be at least on the same scale as those of County Court judges.

These suggestions hardly seem to require much argument but I may illustrate them by the following examples:

Some little time ago, in order to help an old friend who was ill I sat for 3 days as a Deputy County Court Judge and in my last case, in which no solicitor or counsel appeared I gave judgment for £5. In my first case here I gave judgment £17,700.

> Counsel of the first rank sometimes appear on references and it is essential to the proper speedy and economical conduct of the judicial business, whether heavy or light, that the referees should occupy a position which enables them not only to possess but to exercise all the powers of a judge in the most effective manner. Otherwise the old tradition will revive. I have endeavoured to compress my observations into the smallest possible compass, but in connection with this part of my report I cannot help wondering what a judge of the King's Bench Division would say if after adjourning a part heard case for the convenience of the plaintiff's leading and junior counsel, he found that neither of them appeared at the time arranged owing to engagements which they considered more important. In a Referee's Court such an incident carries no penalty, except for the plaintiff.
>
> F. Newbolt.[39]

This report is important because in it Newbolt identified the deficiencies in the referral process and is direct evidence of his conception of micro-case management or the 'Scheme' described above which had at its core the expeditious and economic resolution of disputes by conventional and unconventional means. In the absence of evidence to the contrary it is the first real and direct evidence of a rudimentary form of case management in this court. Here Newbolt recognised the issue and tells the Lord Chancellor how he overcame practical problems by his form of case management.

Newbolt used experts sparingly and proportionately. They had no right of audience. There was no provision in the *Rules of the Supreme Court* for a court expert. This did not come about until 1934[40] when Order 37A was amended. It appears that Newbolt may have invented the idea of a court expert and there is some evidence of it. He did it to expedite the process and save money: saving half the trial costs clearly demonstrated its success.

To Birkenhead the first issue he raised was of great concern to him and his colleagues-the question of status and judicial ranking. Judges like arbitrators must have command of the hearing not in telling counsel what to do but in commanding respect for their office and function. In that sense personality of the referee was important, particularly where the referee was of an equal professional standing to those appearing before him. Difficulty arose where the leaders of the Bar appeared

[39] LCO 4/152.
[40] RSC (No.2) 1934.

before a referee whom the leaders considered had equal or lesser standing. Referees continued to complain about their status for decades because of this. Whilst it is arguable that subordination had advantage in terms of informality, it could be detrimental where a referee might have difficulty in encouraging a leader to settle where there was always the tension as between the rights of parties to their day in court and the limited resources available to the court in terms of time allocation and cost, not just of the parties, but of the tax payer in the context of Treasury policy.[41]

Second, Newbolt warns about 'cheap and speedy' arbitration and the dangers of injustice through irregular awards, but at the same time he advocates reducing the costs of time spent in court and recommending what today we might interpret as elements of case management: expediting referrals from masters to referees and a use of independent experts. Significantly he identifies lawyers as a problem and suggests that a 'good reference' militates against efficiency. In the same vein he attacks disproportionate cases where the legal costs are out of all proportion to the value of the claim.[42] Newbolt clearly understood and demonstrated his overriding commitment to cost effective case management which today is perceived as one of the key features of judicial case management.

Third, he perceived that there was a perceived disadvantage of appeals to the Divisional Court;[43] they took time and added further unnecessary cost to the appellate procedure. The figures given in the *Annual Returns* gave an average of 7 per cent of cases were appealed.[44] But, not all referees agreed with Newbolt. For example,

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[41] These were years of austerity and restraint following the First World War when the economy suffered from loss of productivity due to the adjustment and reorganisation of industry from a wartime basis to a peacetime one, and reorganisation of international trade and finance following wartime disruption. There was mass unemployment among demobilised servicemen and widespread strikes took place. In April 1920 a severe slump accompanied by mass unemployment was caused by an austerity budget that severely reduced government spending, together with a deflationary rise in interest rates. A return to the gold standard presaged stagflation reducing exports and increasing unemployment. This placed obvious pressure on the Treasury to reduce spending on civil justice which was further increased by the effects of a General Strike in 1926 and later by the Wall Street Crash of 1929 and a deepening depression in1932.They were also years of growing European and international tension.

[42] Newbolt reported a case to the Lord Chancellor where the Plaintiff's costs exceeded the damages awarded. He gave the example of a case of five eggcups at three pence each and two pie dishes at one and sixpence. This case took as long as a case where the damages involved were £20,000. LCO 4/152.

43 LCO 4/152.

44 Between 1928-31 there were 31 appeals which occupied the Divisional Court for 51 days, each appeal taking an average of 8 hours. 5 were further appealed to the Court of Appeal taking another 4 days in court. LCO 4/152 .

Hansell did not agree with the abolition of all appeals.[45] From Newbolt's point of view it would have made things far more efficient and given the referees more credibility and status.

In this context the passing of the Administration of Justice Act 1932 must be considered a triumph in terms of Newbolt's attempts to improve both the procedure of the court and the recognition of the referees' role. The reason for this success was due to Lord Sankey, the Lord Chancellor, who wrote a memorandum to the Cabinet[46] in September 1932 regarding several legal reforms 'which experience has shown to be desirable.'

Lord Sankey advised the cabinet:[47]

> …This reform has been duly considered by the Council of Judges of the Supreme Court, and its achievement calls for legislation since it is not within the competence of the Supreme Court Rule Committee.

Although Newbolt was in favour of the legislation Hansell and Bosanquet[48] approached the question of appeals differently from Newbolt.[49] Bosanquet wrote to Lord Sankey in November 1932[50] saying:

OFFICIAL REFEREE'S COURT
No. 691
Royal Courts of Justice
November 2nd, 1932.

My Dear Paterson,

I have been reading with interest the clause in the Bill which the Lord Chancellor is introducing dealing with appeals from Official Referees. I should much like to have an opportunity of putting my views-which incidentally were those of Hansell him (*sic*). Which of his Secretaries is concerned with this hand of the business? The view which we both hold is that while we entirely agree that the appeal should go straight to the Court of Appeal, we think that having regard to the complexity of the matters which come before us the procedure by Special Case would be cumbersome, and in many cases quite unworkable. Of course, Hansel's view is deserving of much more respect than mine. I know that it is in conflict with Newbolts-but then the latter would like to abolish appeals from

45 National Archives LCO4/152.
46 LCO 2/1710 *Lord Chancellor to Cabinet.*
47 LCO 2/1710 above.
48 Sir Ronald Bosanquet K.C. Official Referee 1931-54.
49 Senior Official Referee 1927-1931.
50 LCO 2/1710 Sir Ronald Bosanquet K.C. *Letter to Lord Chancellor, 2 November 1932.*

Official Referees altogether-and has stated to me that in his view the proposed method would in effect do so!

Yours ever

S.R.C. Bosanquet.

However Newbolt seems to have won the day by sending a Memorandum to Lord Sankey:[51]

Administration of Justice Act, 1932

MEMORANDUM

What further Rules of Court are necessary.

In my opinion it would be to the advantage of suitors, and for necessary alterations in the Rules of Court to be made this term. If this is not generally acceptable, I suggest that the order should be made direct Jan. 1st, 1933, as the day, and the alterations, which seem slight and not controversial could be considered and settled in a brief period, this term.

The points requiring consideration are-

(1) Cases sent to the Referee for enquiry and report, under Section 88 of the principal Act;[52]
(2) Interlocutory appeals on questions of law;
(3) Trial of any question or issue of fact under Section 89 of the principal Act, which implies that the action remains in the jurisdiction of the Judge making the order of reference.

As to (1) the practice in this respect has become almost obsolete. I cannot remember having had such a case in 13 years, and I am informed by the Rota Clerk that only one such case has come into the office, certainly during the last 3 or 4 years.

Such a report when adopted, wholly or partially, becomes a judgement automatically and the appeal, if any, is an appeal against the decision of the Judge.

(2) Almost every interlocutory order is discretionary, and without appeal, but in a rare case a point of law might be decided. But I have formed the opinion which

[51] LCO 2/1734 *Appeals from referees: question of altering rules consequent on the Administration of Justice Act, 1932 (s.1); Rules of the Supreme Court (No.4, 1932; Appeals from Official Referee's Order, 1932* Memorandum from Sir Francis Newbolt QC to Lord Chancellor, November 1932.

[52] LCO 2/1734. Newbolt had certainly not had any such case in 15years and were to all intents defunct.

is shared by all those whom I have consulted that the Act forbids interlocutory appeals to the Court of Appeal or otherwise.

(3) Trials by Official Referees merely of issues of fact, except the estimation of damages are now unknown. Apart from damages, it is the invariable practice of the Judges to refer the whole cause or matter.

…

(Sgd) Francis Newbolt
Senior Official Referee
19.11.32.[53]

Newbolt's comment that High Court judges had adopted the practice of sending the *whole cause or matter* to a referee is significant. It goes beyond what Lord Selbourne said in the House of Lords in February 1873 that referrals would be confined to matters of fact and account.

One of the advantages of not having a jury was that the judge could order a short adjournment for the parties to consider settlement. The parties frequently requested trials on liability only without any reference to damages.[54]

Newbolt noted that the draft new rules recognised the referees' position by extending Rule 19A of the *Rules of the Supreme Court*.[55] This gave a right to appeal a decision of a referee on a point of law to the Court of Appeal, instead of to the Divisional Court of King's Bench.

On the 13 December 1932 Albert Napier[56] sent the Lord Chief Justice, Lord Hanworth[57] an advance copy of the new procedure. Hanworth endorsed the letter:

Yes. I have gone through them and agree
Hanworth[58]

[53] LCO 2/1734 *Memorandum Newbolt to Lord Chancellor*
[54] LCO 2/1734 *Memorandum Newbolt to Lord Chancellor*.
[55] LCO 2/1734 *Memorandum: Supreme Court Rule Committee on Rules of the Supreme Court (No.4) 1932.*
Rule 19A applied to appeals from the Railway and Coal Commission and the Railway Rates Tribunal.
[56] Napier was assistant secretary in the Lord Chancellor's office and Deputy Clerk of the Crown in Chancery from 1919 to 1944 when he became Permanent Secretary to the Lord Chancellor and Clerk of the Crown in Chancery. He has been described as a 'brake not an accelerator'.
[57] LCO 2/1734 *Letter from Lord Chancellor to the Master of the Rolls, Ernest Murray Pollock, Lord Hanworth.* (1923-1935). Rules effective as at 1 January 1933.
[58] LCO 2/1734.

Appeals direct to the Court of Appeal was perhaps the high-water mark of Newbolt's efforts to raise the standing of the referees. Newbolt's July 1920 report was the catalyst for Newbolt's 'Scheme' and whether officially supported or not it became the foundation for practice in the referees' court. The November 1932 Memorandum and Newbolt's views as to appeals gave the court a greater standing. Lord Sankey's action brought the referees' court into line with the other Queen's Bench courts so that their judgments were not capable of review by High Court Queen's Bench judges. The significance of the measure meant in effect that the judgment of the referee became a judgment of the High Court.[59]

Newbolt's 'Scheme' was the prototype of case management and informal referee resolution and provides the basis for the exposition of the theory that case management and informal referee resolution created a more efficient court. We further examine this 'Scheme' by a literature review and qualitative analysis of contemporaneous archival material and Newbolt's publications. From this review the following analysis of the principal features of rudimentary case management emerge.

Elements of Rudimentary Official Referee Case Management

Early Procedural Evaluation and Rudimentary Informal Referee Resolution

Newbolt's article in the Law Quarterly Review[60] *Expedition and Economy in Litigation* described various case-types including building and dilapidations cases, matters of taking account, local examination of building, machinery and farms and other subject matters. His central critique was aimed at cost inefficiency and delay. Newbolt wrote that defendants incurred unnecessarily burdensome costs in preliminary proceedings which were not 'always deserved.'[61] This loss deterred parties from litigation.

As Newbolt said:

> The interlocutory proceedings before reference may be so extravagant and dilatory as to defeat justice.

[59] LCO 2/1710. Note on the Administration of Justice Bill by Lord Chancellor's Assistant Secretary Napier.
[60] n.20 p. 434.
[61] n.20 p. 435

Newbolt significantly developed a practice at First Summons for Directions stage of not only giving directions for the further conduct of the case, but also made it his practice to discuss the merits, issues and value of the claim with the solicitors who appeared before him. In the course of this he took the opportunity of questioning by what means time and cost could be saved. In Newbolt's words he had 'friendly business discussions' during the interlocutory process with those appearing before him. It was this business-like approach and his rapport with solicitors that facilitated his 'Scheme.' This was a characteristic that seems to have continued in practice to the benefit of the court and practitioners alike. Newbolt certainly considered his approach effective so much so that in his last letter to Birkenhead as Lord Chancellor he wrote:[62]

> 13th Feb 1922
>
> My dear Lord Chancellor,
>
> I have from time to time sent in reports of the work in my Court, beyond the official returns, showing how I am able to prevent delay, simplify procedure and reduce expense. Now at the suggestion of two of the judges, I wish to draw attention specially to a case in which I delivered judgment yesterday as it is a striking example of what I am fighting against.
>
> The judgment is in writing, and if you so desire, I will send you a copy.
>
> A dispute arose between a builder and a building owner and a writ was issued in October 1920: the case only came before me for trial.
>
> The interlocutory proceedings during the previous 16 months was open to the most severe criticism and when I reserved judgment after a three day trial I ascertained by courtesy of the solicitors that the plaintiff's total costs were estimated at £497, including about £125 for counsel's fees and the defendant's costs at about £400. Total about £900. The plaintiff recovered £122, ordered by previous payment set off to £27.
> I gave judgment for £27.
>
> If the case had come before me on the delivery of the Statement of Claim indorsed on the writ it could have been disposed of in a few weeks at small cost.

[62] LCO 4/152.

On a hint from one of the judges, I only desire to add that in my scheme for cheapening and expediting litigation nothing is done without consent. It is by friendly business discussions over the table that the simplification is offered.
In no case has any decision of mine in Chambers been overruled and the only appeal against a decision of the court was emphatically dismissed today by the Divisional Court.

I respectfully suggest that after 2 years trial this is a satisfactory answer to any enquiry.

Yours truly,
Francis Newbolt

The Rt Hon.
The Lord Chancellor

This letter is significant first, because it confirms Newbolt's 'Scheme' in particular his 'friendly business discussions in Chambers' undertaken with the support of the parties. Second, because the decisions he reached as a result and his practice were never appealed or overruled. It is quite revolutionary in its content for those times, as is the fact that another judge suggested that Newbolt disclose his 'friendly business discussions'.

Birkenhead clearly felt some unease about this because of the judicial function and questions of judicial independence and impartiality which were essential to counter any suggestion of bias or prejudice. Descending into the arena of such discussions was undoubtedly a hazard as it would be for any judge or arbitrator. Thus, the last reply from Birkenhead's Permanent Secretary, Sir Claude Schuster, to Newbolt is an important caution in this regard although there is no evidence that such discussions ever made cause for complaint or appeal [63]:

21 February 1922

Dear Frank,

The Lord Chancellor asks me to reply to your letter of the 13th February.

[63] LCO 4/152.

He is very glad to read it. He had always anticipated from his long acquaintance with you that you would dispense justice with expedition and equity and that in so doing you would have special regard to the interests and the pockets of the litigant.

There is only one point upon which he has felt some uneasiness. He has now sat as a judge himself for three years and his experience during that time has confirmed the opinions which he formed at the bar as to the judicial conduct of litigation. It is no doubt desirable that the advantages to be obtained by settling instead of fighting should be present to the mind of the lay client and of his professional advisers. But the Chancellor himself has seen so much of the dangers which arise from any undue pressure towards a settlement exerted from the Bench that he himself is most careful ever to avoid such action. There are cases which are better fought out and there are clients who desire to fight even more than they desire to win. And there are others who, though their principal object is victory, are better content with defeat than an inglorious peace. So strongly does the Chancellor hold these views that he always deems it desirable to impress them upon all who administer justice, but he thinks that they are specially to be borne in mind by anyone who, like yourself, is eager for justice and justly impatient of the waste of public time.

Yours sincerely,

(Sgd). Claude Schuster

Sir Francis Newbolt K.C.

Birkenhead's unease about settlement discussions goes to the heart of a dilemma here: on the one hand, the referees wanted to have the status of High Court judges which Newbolt felt they were 'all but in name.' On the other hand, Newbolt wanted to dispense justice informally (which he undoubtedly found quicker) because this was the only way he could expedite his list. Newbolt's approach might be reconciled to the Commissioners objective of a process being 'capable of adjusting the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried.' Whilst Birkenhead's letter of reply was ambiguous in that Birkenhead thought that Newbolt should have special regard to 'the interests and the pockets of the litigants,' he also felt some 'uneasiness' in that there were dangers in judges 'exerting any undue pressure towards a settlement.' On the other hand, he was alive to 'the waste of public time.' Birkenhead could not sanction the 'Scheme' because of his unease in the light

of his own experience in sitting as a judge and anxiety over 'undue pressure' from the bench. On the other hand, Birkenhead and Schuster undoubtedly recognised Newbolt's initiative and to an extent whilst the letter is cautious it is also some acknowledgement for Newbolt's work. It is fortunate that Newbolt's early experimentation in this field coincided with Birkenhead's tenure and that Birkenhead did not ignore Newbolt's reports, his experimentation, or the 'Scheme' although Birkenhead would have been unlikely to have adopted such practice or to have encouraged it for the reasons he gave.

What is significant is that in the absence of any other contemporaneous evidence of fact Newbolt's 'experiments' may be considered as the first attempt by a judge to use alternative processes of dispute resolution in England in a court setting.

Newbolt was not deterred by Schuster's response of 21 February 1922 and there is no evidence to suggest that Newbolt altered his practice, because some time after July 1921 he wrote again to Birkenhead intimating support from the profession:[64]

> I have devised means of enabling the parties to have their disputes decided cheaply and rapidly and my efforts in this direction have been widely approved by the profession…

This suggests that Newbolt's informal discussions with the solicitors for each party were supported by them just as today many practitioners see sense in mediation saving time and costs. Newbolt's approach may have been like an early neutral evaluation giving each side a reality check on what costs might be incurred and whether that bore a proportionate relationship to the value of the claim.

A further extract from Newbolt's article[65] gives a good example of the benefit of Newbolt's approach here:

> The Defendant who often has good reason to complain of some overcharge, of defective work, swears a vague affidavit, and obtains leave to defend as to part, or all, of the claim. But he may have, in fact, no case. ……. If a few days after an order on the summons before the Master the parties met before the Referee and discussed the position such a miscarriage of justice as appears in the cases described would be impossible. The main source of avoidable waste of money is the occupation of time in Court which a little thought and discussion in Chambers would save, and does save. In matters of account, in kindred cases, much money has been thrown away in the past by discussing in open court

[64] LCO 4/152. The letter is undated but appears on the Lord Chancellor's Office file after the July1921 correspondence.

[65] n.20 pp. 438-439

> matters of pure arithmetic, or the contents of business books which turn out not to be in dispute, or not material to the issue, or fatal to one parties contention. Many other examples might be given. In one case evidence was taken before and also at the trial on both sides to prove the market price of goods at a foreign port. *If a preliminary discussion had taken place* [66]none of this evidence would have been gone into as it was not relevant to any issue on the pleadings. Another instance will strikingly illustrate the point. A mortgagor claimed an account of matters extending over many years: the case was expected to last for a fortnight. After *an informal discussion in Chambers*[67] the parties agreed that an independent accountant should examine the books before trial, as a witness for both sides, and report on the points in difference: so that the issue between the parties should be defined and tried. He reported that having explained the figures to both the Plaintiff and the Defendant there were no points in difference and there was nothing to try. *This is not arbitration or conciliation or concession, but an intelligent use of a Court of justice by business men*.[68] They spent perhaps £50 or less in arriving at a result which would in the ordinary course have cost ten times that sum, and would have worried them for a year.

What is crucial here are Newbolt's explicit references to 'preliminary discussion', 'informal discussion in Chambers', and 'use of a Court of justice by business men'. The fact that this article was published a year or so after his correspondence with the Lord Chancellor reveals his commitment to an anticipatory form of procedure akin to a form of evaluative mediation perhaps bypassing formal process. His illustrations relate to matters of account and do not appear to require forensic investigation. In such cases there does not appear to be justification for full disclosure as required for trial and the resolution may be based on preliminary discussions and limited disclosure with consequent saving of time and costs.

Newbolt's 'Scheme' was not applied in all his cases but in a limited number which excluded dilapidations and damage to property claims.[69]

[66] Author's italics.
[67] Author's italics.
[68] Author's italics for emphasis.
[69] Newbolt. *Further Report to Lord Chancellor*, June 1921.

As proof that this 'Scheme' worked Newbolt's article included the following figures for the recovery of damages in the immediate post first war period which appear in the following table:

Table. T 2 Amounts recovered

Year	Cases	Amount Recovered
1920	100	£76,536
1921	150	£81,482
1922	171	£171,079

Source; Expedition and Economy in Litigation [70]

According to Newbolt less than a quarter percent of the cases were subject to any appeal. What is interesting about his figures is that there appears a 100 per cent increase in recovery at the time Newbolt confirms that the 'Scheme' was in operation. Newbolt sent a copy of this article to Lord Haldane,[71] Lord Cave, Lord Justice Atkin,[72] and Sir Wilkes Chitty[73].

Lord Haldane was more appreciative than Lord Cave as Schuster on behalf of Haldane wrote:

> 9th May 1924.
>
> Dear Frank,
>
> The Lord Chancellor has asked me to thank you for your letter of the 2nd May and for the copy of the Law Quarterly Review which accompanied it. He has read your article with much interest and has considerable sympathy with many of the suggestions you make.
>
> He will be very glad to discuss any proposals which may be made with the Solicitor General in due course.
>
> Yours sincerely
>
> (sgd) Claude Schuster
>
> Sir Francis Newbolt, K.C.

Unfortunately, in this matter we cannot judge how far Lord Haldane's sympathy might have resulted in any reform as Haldane's party was defeated in the general election

[70] n.20 p. 439
[71] LCO 4/152 Letter: *Newbolt to Napier* undated.
[72] Newbolt's book: *Out of Court* was dedicated 'by his friend the author' to Lord Justice Atkin in 1925.
[73] Newbolt's former Head of Chambers.

of October 1924, following a motion of no confidence in the House of Commons. But despite what might have been at official level we know that following Newbolt's retirement in 1936 this informal process was continued as a matter of referee practice by his successors. This was demonstrated by a number of matrimonial property disputes which were referred to the referees after the war.[74] One such example was *Johnson v Johnson*.[75] Here the costs were grossly disproportionate. Damages were assessed for the plaintiff at £1 on the claim and for the defendant at £6 10 shillings on the counterclaim with costs on the County Court Scale. On an adjourned application the plaintiff was ordered to pay the defendant all the defendant's costs of £100. These terms were agreed between counsel at an adjourned hearing before the referee in chambers to avoid further cost.

Newbolt's Interventions Promoting Expedition and Economy

The interlocutory management practised by referees in the 1920s as advocated by Newbolt centred on the referee having control of that process. It is argued here that Newbolt's 'Scheme' resulted in more expeditious trials, if not earlier settlement, which promoted his 'Scheme' of a continuous judicially managed process whether that was under the *Rules of the Supreme Court* or *ad hoc* or an informally managed consensual process.

Experts

(a) Use of single joint expert/court expert

Presaging the civil justice reforms of the 1990s by more than 70 years Newbolt pioneered the use of court experts. He saved time and costs by the proper and necessary employment of experts. In his report of 5 July 1920[76] Newbolt tells Lord Birkenhead about his experiments with expert evidence citing the accountancy expert example.

What is interesting here is that Newbolt was experimenting, not only with a case management process at least 14 years before the *Rules of the Supreme Court* were

[74] These are included in the notebooks J.114/1-8 and refer to assessment of value of matrimonial property, and disputes over ownership. Evidence from the second comparative period 1947-1070 is contained in Chapter 4

[75] J114/1 21 October 1946.

[76] LCO 4/152 p 5.

augmented by Order 37A,[77] but he was directly intervening in the action in order to reduce cost and delay and procure by these means a quicker solution and settlement. This is therefore a good example of judicial management and 'interventionism.'

There is no evidence that Newbolt's practice encouraged the parties to incur further costs of instructing their own party experts. From the archives it appears that the court expert was the only expert engaged as there are no references to the parties' own experts.

The important point here is that the initiative came from the judge, not the parties; the judge taking control away from the lawyers to actively caseflow manage the proceedings more economically.

On the same theme, just over 10 years later, Newbolt wrote to the editor of *The Times* about methods of saving expense:[78]

> …Since the war there has naturally been a great stream of cases brought by landlords against tenants about dilapidations, and by builders, contractors, and decorators, and others against building-owners about the price of work done, and in all these cases at least the parties are very anxious to avoid unnecessary expense, and eagerly fall in with the idea that only one expert witness should be employed. He is not an assessor or arbitrator, but a witness. The saving of money, especially to defendants, is surprising.
>
> The plan has a double advantage, as the independent expert gives both parties a copy of his proof long before the expensive preparation for the trial, and from its perusal they can predict the result of a hearing in Court, apart from questions of law, so accurately that in many cases no formal trial takes place at all. …….If only one witness is employed he is single minded, and paid to be truthful and helpful, and not combative. He is chosen by the parties, by some professional institution, or by the Court, and can naturally be cross-examined by both sides, though this has very rarely happened. The same procedure can be pursued in many other cases, particularly those involving accounts, inspection of books, vouchers, &c. A report by one independent accountant of the contents of these, before any proceedings are taken beyond the writ, saves a startling percentage of the costs of the action.

[77] Under *Rules of the Supreme Court* (No: 2) 1934 Order 37A each party had the right to call an expert or experts with leave with regard to the 'issue for the expert'. This enabled the Court in non-jury actions to appoint an independent Court expert to 'enquire and report upon any question of fact or opinion not involving questions of law or construction',

[78] *The Times*. 4 September 1930. p.11. Issue 45609. col. F.

> There are many other ways of saving expense, which, when offered, are eagerly agreed to by litigants, but as they are not compulsory or according to old routine they are not so often suggested as they might be. Space does not permit me to suggest how the apparent difficulty about fixing trials can be met, or *how the suggested second summons for directions before the Judge would be most beneficial,*[79] or how arbitration, with all its convenience and finality can be obtained in the Law Courts for the ordinary Court fees.
>
> Yours truly,
> FRANCIS NEWBOLT

Not only does this letter advocate the utility of the single joint expert but it has wider implications for Newbolt's 'Scheme' and an activist approach. It may well be that because of Newbolt's practice in this sphere the rules were changed in 1934 to empower the court to appoint such experts.[80] The other important procedural innovation and case management function we would recognise today is the use of that 'second summons for directions.' This translates today to a pre-trial hearing or further case management conference. It is also further evidence of a tighter continuous judicial control: another facet of modern case management.

In *Expedition and Economy in Litigation* [81] Newbolt advocated the use of experts to deal with particular matters which could save time in the interlocutory process:

> What the commercially minded Defendant, willing to pay his debts, wishes to do is to show why and in what respects he objects to paying the whole of the claim, and this he does by giving particulars of the items which he says are not chargeable, or are overcharged. Every case must be treated on its special circumstances and not upon any rule which is not a Rule of Court, but there are some large classes of cases with common features: the greatest saving has been effected by the introduction of the independent expert witness and the attendant reduction of interlocutory proceedings which are rendered unnecessary, and of the expensive hours of trial in Court.

(b) Expert Determination and Investigators of Fact

Newbolt's 'Scheme' appears to have encompassed several experiments with experts as investigators. One example he reported to Birkenhead in November 1921 was in

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[79] Author's italics for emphasis.

[80] RSC (No. 2), 1934. applied to non-jury cases in which any question for an expert witness was involved. Maugham, L.J. regretted such witness had not been appointed in *Fishenden v Higgs and Hill Ltd.* (1935), 153 LT 128 CA Apart from this statutory power, the court could appoint an expert at Common Law under its inherent power *Kennard v Aslam* (1894) 10 TLR. 213; *Henson v Ashby* [1896] 2 Ch. 1. p. 26; *Coles v Home and Colonial Stores Ltd* [1904] AC 179, p. 192 and *Badische v Lewisham* (1883) 24 Ch Div. 156.

[81] n.20 p.427.

the form of a letter from a member of the Bar, Mr S. A. Merlin. Mr Merlin told Newbolt that his initiative in the case had been:

> One of the most practical means of reform of our jurisprudence as shown for years, as I know how costly were these actions in the past.

In the case, Newbolt ordered the surveyor/expert to view the premises. The expert took his instructions from Newbolt not from the parties. The Plaintiff claimed £349 damages. £300 was paid into Court, but the Surveyor opined that the claim was worth £185. This produced an expeditious settlement, saving costs without the need for a trial.[82] This innovation was ground-breaking because Newbolt himself selected and instructed the expert.

In *Expedition and Economy in Litigation*[83] Newbolt gives two further examples of the use of experts which are contradictory.

> Number 13 - Writ issued March 1921, action eventually referred. An accountant nominated in 1922 to make a report and in January 1923 after a two day trial Plaintiff recovered about £140. 22 months from issue of Writ to trial. Costs exceeded £400, accountants were not independent and their appointment was made before the case was referred.
>
> Number 14 Dilapidations case - Defendant put in a substantial defence and paid £300 into Court less than half the amount of the claim. After several days hearing the Plaintiff accepted the Defendant's offer of £500 including costs. The Plaintiff's costs were taxed at £577. The assistance of an independent witness was refused, had it been accepted in all probability it would have saved the Defendant a sum not much less than his whole legal liability under the covenant.

Example 13 suggests that such partisan experts did not reduce delay or costs whereas, in example 14, the court appointed expert may have facilitated considerable savings. The important point here is how they may be managed by the judge, not the parties. Newbolt seemed very aware of this. Whilst the lawyers undoubtedly helped facilitate some settlements, in others 'enjoying a good reference' was another matter. In such cases, case management was a means of making the process cost effective and less attractive to those who might want to protract the proceedings.

(c) Experts and Settlement

Newbolt's objective, as explained in his article, was focussed on questions of damages and costs:

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[82] LCO 4/152.
[83] n.20.

> that in a *discussion in chambers* [84] on date and mode of trial both parties agree that one expert engaged and paid by both sides is preferable, and for the following secondary reason, even more than for the most obvious one. The great error in the ordinary honest Defendant's course is that he fails to pay enough into Court. So in all cases immediately under consideration the Defendant must pay in something: the punishment is terrific if he does not, as he is entirely at the mercy of the Plaintiff, and in general has to pay most, or all of the costs of both sides in any event.

The dilemma was how the defendant was to estimate the measure of payment in. To pay in too little was useless. He had to act on the advice of his expert. According to Newbolt, such experts calculated the figures upon rash assumptions assuming their evidence would be accepted on every single point. Newbolt gave warning about this:

> When he comes into Court he hears the Plaintiff's experts swear to a claim not only larger, but in some cases twice, three times, five times or even ten times as large. A recent decision was for six times the Defendant's figure, although it only amounted to one quarter of the Plaintiff's figure. In another the estimate of a reliable expert was 10% of that of his opponent.

Understanding expert evidence was one of the key problems for referees who might have had little knowledge of the technical issues before them, hence Newbolt's attention to the proper use of experts in his court:

> An independent witness surveys the subject matter unbiased and estimates that the amount due before any of the great expense of the trial is incurred, with any necessary reservations, where questions of law may arise, and gives proof to both sides, and receives half his fee from each, both halves being made costs in the cause. He may be cross examined by both parties if either calls him at the trial, which he attends only if required: and both parties retain the right to call any amount of evidence to contradict him, a right which in practice, however, is not often exercised. The advantage to both parties can easily be perceived, but to the Defendant it cannot be over-estimated. He knows in time what to pay into Court, and in general is able to agree the facts with the Plaintiff, and to narrow the issue to something which occupies the Court for perhaps one fifth of what used to be considered the normal time. The layman who has had this properly explained to him, and prefers the old method, and what is called a fight to a finish regardless of costs, can hardly be said to exist.[85]

We have already seen the utility of judicial intervention in the appointment of court experts, but in this context what is particularly interesting here is the linkage in Newbolt's analysis of the expert's role and settlement. Newbolt saw the expert as playing a leading role in estimating or calculating the damages facilitating early settlement. The expert was in court to assist the court, not to advocate the parties' case. More importantly Newbolt refers to saving 'perhaps one fifth of what used to be considered the normal time.'

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[84] Author's italics.
[85] n.20 p.437

Application of Proportionality on Costs

In his critique *Expedition and Economy in Litigation*[86] Newbolt criticised the waste of time and money in the traditional adversarial procedural system. Whilst not directly advocating his scheme of a concurrent consensual referee resolution process, he acknowledged the fundamental principle that allowed 'every citizen to make or resist a claim in the courts with perfect freedom.' He then considered the citizen's complaint:

> No one complains that his case is impatiently tried, or decided against him by a dishonest, biased or incompetent tribunal: and yet every litigant complains.

Reading the article, it is clear that his experience as a referee led him to these views. He focused upon delay and expense as being the subject of very wide complaints. As he wrote:

> They overlap to a certain extent, as delay causes expense and actual loss of money in more ways than one: unnecessary proceedings not only cause expense, but also delay. In all discussions between those who desire to see a serious grievance mitigated or removed a difficultly always arises because the actual relevant facts are not ascertained or agreed. I shall therefore try to avoid this, by first inviting perusal of the briefest précis of a small number of recent cases, referring to them afterwards only by their numbers. The points to bear in mind are (a) time from writ to judgement; (b) amount of expenses of litigation in comparison with money obtained or in dispute; (c) payment into Court; (d) the assumed desire of one or both litigants for a fight to the finish regardless of expense; (e) the urgent necessity especially at the present time for encouraging litigation and not starving it, or diverting it towards the quicksands of arbitration.[87]

From the same article Newbolt gives illustrations of disproportionate costs and some practical examples 'so extravagant and dilatory as to defeat justice.'[88]

The first was that of a builder who issued proceedings by writ in October 1920 against the building owner for the balance of account. After interlocutory proceedings lasting 16 months the case was referred and judgment was given for the plaintiff in the sum of £27. The trial lasted three days and the plaintiff's costs including £125 for counsel amounted to £490. The defendant's costs were approximately £410. The Defence was dated nine months after the Statement of Claim. £900 was spent pursuing a £27 claim. The costs were 33 times the amount of claim.[89]

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[86] n.20 p.427.
[87] n.20 p.427
[88] n.20 p.435
[89] Interestingly in 2005 the Court of Appeal dealt with a similar situation in the *Burchell* case where legal costs were 37 times the damages awarded.

His second illustration was a claim for damages for dilapidations worth £100. £10 was paid into court. It took almost three years to come to trial. The referee gave time to settle and negotiate without result. Judgment was given for the plaintiff for £16. Costs were awarded on the County Court Scale.

Another illustration (Number 9) concerned a schedule of dilapidations and a claim for damages for £162. Proceedings were issued in January 1922. The defendant refused consent to a referral and wanted the High Court to decide on a matter of title. He lost that preliminary issue in January 1923 and a reference for an assessment of damages was taken in April 1923. At trial, in June 1923, the value of items was reduced from £95 to £81. The plaintiff's taxed costs were £129; the defendant paid that and the costs of the reference. Newbolt commented that the liability of £81 was increased to about five times that amount by the contest which lasted for 18 months; without the help of an independent expert witness the defendant's losses would have been much greater.

To be a success Newbolt's 'Scheme' required continual management of the process by the judge and avoidance of such examples as this. His publications and reports suggest that Newbolt would have enquired not only into merits, but also into costs in proportion to the value of the case.

In Eastham's report to Lord Jowitt on 28 January 1947[90] and in the report's appendix he cited the case of an ex-London Sheriff who sued his architect and his quantity surveyors for negligence claiming £35,000 in respect of an extension and alteration of his country house. The trial lasted 22 days. Four King's Counsel were instructed with one brief marked at 350 guineas. The referee gave judgment for the plaintiff in the sum of £4,214 with costs. The taxed costs in this case were over £3,500.

Eastham's notebooks have numerous entries dealing with costs. Eastham was innovative in this area; his orders being more in keeping with the second millennium than the mid-twentieth century. In *Harris v Mac Rex Foods Limited*, [91] for example, a claim for defective works to a boiler, judgment was given for the plaintiff who was not fully paid, and an order was made against the defendant for payment out. Both solicitors agreed that the judge could make a 'fractional order' on costs on a four-fifths

[90] Lord Chancellor 1945-51. LCO 4/153. *Appendix to Report of Sir T Eastham to Lord Jowitt, Lord Chancellor.* 28 January 1947.
[91] J114/2 p. 92

basis.[92] In *Plant Machinery v HP Thomas Limited* an order was made for payment of monies out of £200 to plaintiff's solicitors without further authority and the trial was adjourned until May 1947. Each party was ordered to pay half the court fees of the application for adjournment.[93]

In *Zenith Skin Trading Co Ltd v Frankel*[94] there is a good example of a modern costs order such as more lately seen under the *Civil Procedure Rules*. Here the plaintiff's costs of the first day of trial were borne 70 per cent by the defendant, and 30 per cent by the plaintiff. The defendant paid all subsequent costs to the plaintiff.

It seems the referees were ahead of their times because there is further evidence of a more modern type of costs order, for example, an entry on 31 January 1949 for the adjourned hearing of *Jayes Limited v Home Foods Limited.*[95] The Order entered provided that the defendants be granted two-thirds of the costs of the hearing. What is demonstrated here is the referee's modern approach to costs, what we call today 'proportionality,' and its application as a basis for the award of costs.

Invention of Special Pleadings

In *Expedition and Economy in Litigation*[96] Newbolt criticised formal pleadings considering that a mere formal denial by way of defence was totally unnecessary and burdensome. It was merely a 'dilatory step in the proceedings'.

In his eleventh example[97] concerning a claim for dilapidations the parties nominated a surveyor as a joint expert. There were no pleadings, no summonses, nor was a trial appointment fixed. Newbolt dispensed with pleadings and ordered Statements of Case being a summary of the claim with the relevant documentary evidence. In other cases, he often found that the defendants demanded particulars which had already been received before the action, but were not given to the solicitor. He also found that defendants often put in defences alleging work not done, excessive charges and bad workmanship, without adequate or any particulars. Newbolt considered that these

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92 Considering the year 1948 this is a very modern type of costs award where costs are not awarded as to each party's case, but one order is made taking into account the other side's result. This saved time and cost in taxing two bills one for the claim and another for the counter claim.

93 J. 114/2

94 J.114/4

95 J114/6 pp 67-105.

96 n.20 p.430 and pp. 435-436.

97 n.20 p..430.

defendants acted unthinkingly without regard to the fact that they would have to pay for these further proceedings. Newbolt was critical of those who spent time 'making costs' and went to trial 'rashly' as opposed to those who employed experts properly. Such persons were excluded so far as he was able.[98]

Preliminary Issues and Questions for The Court

In his article[99] Newbolt considered the advantages of the new Order 30 RSC[100] regarding the summons for directions procedure. He opposed this for referees because of the advantage of dealing with directions early. He saw the Summons for Directions as arbitrators saw preliminary meetings: a business meeting to discuss the agenda for resolving the dispute. There was no point in leaving issues to be defined too late if it could be avoided, as he wrote:

> Without venturing upon any general criticism of legal procedure, it may safely be said that there is no greater check on wasteful expenditure than the arrangement by which the Trial Judge takes his own summonses, especially if he makes notes of them upon the file……..*the mere discussions across a table which costs nothing in comparison with the costs per minute in Court,*[101] discloses what issue it is exactly that the parties wish to try, and eliminates the very source of the litigants grievances. Where the case is referred too late the mischief is already half done, but in time this will remedy itself, and all cases which must eventually be referred will be referred on the issue of the Writ, or at any rate on the hearing of a summons under Order 14.[102]

Again, the focus here is upon informal discussions at the summons hearings and what they could achieve. This would be lost by adherence to Order 30. Newbolt reiterates his views contained in his letter dated 15 February 1932 to Lord Sankey.[103] He confirms his informal resolution practice and indicates how important it is to caseflow manage the process so that issues between the parties are identified early to save court time and party costs. The former procedure had been to issue a Summons for Directions before pleadings were exchanged.[104] The new Order 30 (ignored by the

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[98] n.20 pp.435-437.
[99] n.20 p..437.
[100] RSC 1883 as amended by RSC (No.1), 1933. Under the 1883 rules the taking out of the summons for directions was optional; under the 1933 amendment it had to be taken out within 7 days of close of pleadings.
[101] Author's italics for emphasis.
[102] n.20 pp.437-438
[103] LCO 4/152 Lord Sankey was appointed Lord Chancellor from the High Court Bench in 1929 and served as Lord Chancellor until 1935 the only Commercial Court judge to have become Lord Chancellor.
[104] RSC amendments to RSC 1875 (May and August 1897, and July 1902)

referees in practice) provided that such summons could only be issued after service of the Reply.

Geographic and Economic Factors

One of the novelties of the Judicature Acts was that the referee was empowered to sit at a convenient location. It was not unusual for referees to sit elsewhere. In fact in 1925 Newbolt sat in Manchester.[105]

The following correspondence confirms that Newbolt also sat in Lancaster. The endorsement by Lord Cave rejected Newbolt's request for a meeting.

Much more complicated
impossible now[106]

12 March 1925

Confidential

OFFICIAL REFEREES'COURT
No. 195
Royal Courts of Justice
W.C. 2

Dear Lord Chancellor,

Augustine Sherman is reported as having stated at Assizes that there ought to be an Official Referee for Lancashire as many cases arise there suitable for such a Court as witnesses cannot conveniently travel to London. This is so misleading that, if allowed, I should be glad to explain the position to you privately, and invoke your assistance.

I should be able to explain to you, and cannot do so in a letter, why cases are "specially referred", so as to avoid the Rota.

Why References mistakenly go first to Assizes with enormous loss to the litigants is easily explained: but to begin at the beginning, Lancashire witnesses need not come to London to attend the Court of an Official Referee. Except, very rarely, by consent, they never do so, as the Referees travel to Liverpool and Manchester when necessary. I have myself been to the latter even to take the evidence of a witness going abroad. ….

[105] LCO 4/152. Letter to Lord Cave, 12 March 1925.
[106] LCO 4/152 Lord Cave's handwritten note endorsed on letter.

Subsequently Eastham recorded that he sat at the Town Halls in Leeds[107] and Henley.[108] He also sat in the Magistrates Court at Tunbridge Wells.[109] Another example in the post second war decade is a note by John Trapnell K.C.[110] in *Agnew v Maycock* [111] who notes that proceedings took place in the Town Hall in Leeds. Also in *Plaehet v Stormond Engineering Corporation Limited* Sir Derek Walker Smith agreed with the referee that there would be no formal disposition, and that evidence could be taken at the plaintiff's premises.[112]

In Eastham's report to Lord Jowitt[113] he describes an action by the plaintiff the owner of land in Durham who claimed damages from the defendant a colliery company for subsidence caused to the plaintiff's land by mining operations. Liability and damages were tried by the referee at Newcastle for the convenience of the parties.

Such sittings at the convenience of the parties must be considered a time and cost saving exercise.

Preliminary assessment of the "Scheme"

Having analysed the instances of rudimentary caseflow management in the inter war years it is interesting to consider the impact of Newbolt's experiments by way of a preliminary survey of the court's overall effectiveness. This survey covers the Pollock court between 1920 and 1927 as illustrated in Tables T.4.1-T 4.2[114] and the Newbolt court 1928-36 illustrated in table T.4.3. What is significant in the context of the hypothesis is the marked effect the "Scheme" may have had between 1921 and 1929. Comparing Tables T.4.2 and T.4.3 we find an increase of 22 per cent in the rate of disposals to referrals in those years from 19 per cent in 1921 to 41 per cent in 1929 and 1931.

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[107] J.114/1. Entry for 12 November 1944

[108] J114/2 29 January 1946 Davis *v Solomon*. Dilapidations case. Judgement for defendants for £70 with costs and leave to enforce.

[109] J114/8 pp. 9-10.

[110] Official Referee 1943-1949. Formerly appointed Judge Advocate of the Fleet while holding his post at the Bar. He was also Recorder of Plymouth. *The Times.* 21 July 1933. p.16.Issue:46502.col.D. He was also a Commissioner of Assizes appointed on the Midlands Circuit in July 1948. *The Times.* 10 July 1948. p.3.Issue: 51120.col.C.

[111] J114/6 p.15. This was for an account of partnership debts.

[112] J114/8 at p. 205. Here the parties managed to arrive at a settlement. This was produced in the form of an order of settlement. Evidence taken 18 January 1949.

[113] Lord Chancellor 1945-51. LCO 4/153. *Appendix to Report of Sir T Eastham to Lord Jowitt, Lord Chancellor.* 28 January 1947.

[114] Percentage values throughout the text have been rounded up from decimal to whole integers. These figures rounded up from figures in the Civil Judicial Statistics Analysis: Official Referees: 1919-70.

Table T.4.1. Total referrals and trials

Year	1919	1920	1921	1922	1923	1924	1925	1926	1927
Total references	210	393	649	593	470	376	389	400	389
Tried	86	159	296	291	184	181	168	157	155
Percentage tried	41%	40%	46%	49%	39%	48%	43%	39%	40%

Source: Civil Judicial Statistics 1919-27

Table T.4.2. Total cases withdrawn and disposed of and percentages of same

Year	1919	1920	1921	1922	1923	1924	1925	1926	1927
Withdrawn or otherwise disposed	44 21%	91 23%	127 19%	118 20%	144 31%	76 20%	105 27%	136 34%	115 30%

Source: Civil Judicial Statistics 1919-27

We also observe that before the war it would appear that Pollock's court was more efficient in terms of resolving matters at trial.

During Newbolt's time as Senior Official Referee, 1928-36, the corresponding figures were:

Table T.4.3. Percentage of trials and disposals

Year	1928	1929	1930	1931	1932	1933	1934	1935	1936
Tried	130	121	105	109	96	102	134	139	179
Percentage of referrals tried	39%	33%	31%	32%	31%	32%	40%	40%	48%
Withdrawn or otherwise disposed	118	148	133	140	107	102	75	86	70
Percentage of referrals withdrawn or otherwise disposed	36%	41%	40%	41%	35%	32%	22%	24%	19%

Source: Civil Judicial Statistics 1928-36

Newbolt's court appears more resourceful in encouraging parties to resolve matters either by withdrawal or settlement before trial thus saving the time and costs of a court hearing. Such a difference in approach may be the dividing line between an activist and a passive approach to case management or it may simply suggest that Newbolt alone adopted this approach.

Conclusions

The interesting question here is whether Newbolt's 'Scheme' was efficient and effective. Calculating the average percentage of disposals and trials we find that in the period 1919-1927 Sir Edward Pollock resolved most of his cases at trial amounting to 43% of his list and 25% of his cases were otherwise resolved before trial. In Newbolt's case 32% of his case were resolved before trial and 36% at trial[115]. Comparison is difficult because the nature and type of case is not given but broadly speaking this shows some tendency to suggest that Newbolt's approach had an effect as he indicate din his correspondence with Lord Birkenhead and in his published article and letters,

Table T.4.5. Average percentage of referrals resolved before and at trial

Management stage	1919-27-Pollock	1928-36-Newbolt
Resolved before trial	25%	32%
Resolved at trial	43%	36%

Source: Tables T 4.2.-T.4.4

Here we may conclude:

First, the earliest direct evidence of micro-case management in the court was Newbolt's Report in July 1920 to Lord Birkenhead. Second, that Newbolt recognised the utility of expert determination more than half a century before the benefit of such expedient was perceived by the legal profession. Third, that Newbolt experimented with the idea of a court expert. Fourth, that Newbolt pioneered effective cost saving devices such as identification of preliminary issues; early case directions; referral to an agreed expert and use of experts to examine other experts, as well as dispensation of formalities such as formal pleadings in certain cases. Fifth, he advocated the proportionate use of time and related the value of the claim to the costs of the case,

Sixth, the referees' case managed through an early summons for directions process and pre-trial summons giving the parties more opportunity to consider settlement.

Finally, they acted flexibly like their predecessors in sitting at locations convenient to the parties and visiting the site of the claim.

In summary Newbolt and his colleagues demonstrated a rudimentary form of case management which included an informal settlement process through what he termed

[115] This is a preliminary analysis and is quantified in far more detail in Chapter 5 of MP Reynolds, *Caseflow Management: A Rudimentary Referee Process, 1919-70* (London School of Economics Thesis 2008).

'an intelligent use of a court of justice by businessmen.' [116] Beyond that it can be hypothesised that Newbolt's 'Scheme' may have been employed in 25% of the referee cases in the following order:

Table T.5 Hypothetical application

Period	Referrals	Hypothetical Average percentile	Hypothetical Number of cases case managed
1919-1938	7,683	25%	1,921
1947-1970	13,932	25%	3,483
1919-1970	21,615	25%	5,404

Source: Judicial Statistics 1919-70 as calculated in Appendix C.5 Spreadsheet [117]

This is an interesting discovery which may help to explain why the procedure in the court was unique and, in many respects, ahead of its time, a lead that it happily continues to this day and whose judges have now attained their well-deserved place in the judicial hierarchy.

[116] n.20 p. 438-439.
[117] See also: Chapter 5 of MP Reynolds, *Caseflow Management: A Rudimentary Referee Process, 1919-70* (London School of Economics Thesis 2008) p.208.

During Newbolt's time as Senior Official Referee, 1928-36, the corresponding figures were:

Table T.4.4. Percentage of trials and disposals

Year	**1928**	**1929**	**1930**	**1931**	**1932**	**1933**	**1934**	**1935**	**1936**
Tried	130	121	105	109	96	102	134	139	179
Percentage of referrals tried	39%	33%	31%	32%	31%	32%	40%	40%	48%
Withdrawn or otherwise disposed	118	148	133	140	107	102	75	86	70
Percentage of referrals withdrawn or otherwise disposed	36%	41%	40%	41%	35%	32%	22%	24%	19%

Source: Civil Judicial Statistics 1928-36

Newbolt's court appears more resourceful in encouraging parties to resolve matters before trial thus saving the time and costs of a court hearing. Such a difference in approach may be the dividing line between an activist and a passive approach to case management.

Table T.5.39 Hypothetical application

Period	**Referrals**	**Hypothetical Average percentile**	**Hypothetical Number of cases case managed**
1919-1938	7,683	25%	1,921
1947-1970	13,932	25%	3,483
1919-1970	21,615	25%	5,404

Source: Judicial Statistics 1919-70 and Table T. 5. 37