

THE REPORT OF THE JUDICATURE COMMISSION.

We therefore recommend that great discretion should be given to the Supreme Court as to the mode of trial, and that any questions to be tried should be capable of being tried in any division of the court.

1. By a judge.
2. By a jury.
3. By a referee.

The plaintiff should be at liberty to give notice of trial by any one of these modes which he may prefer, subject to the right of the defendant to move the judge to appoint any other mode. When the trial is to be by a jury or by referee, a judge, on application by either party, if he think the questions to be tried are not sufficiently ascertained upon the pleadings, should have power to order that issues be prepared by the parties, and if necessary settled by himself. The judge should also, on the application of either party, have power to direct that any question of law should be first argued, that different questions of fact arising in the same suit should be tried by different modes of trial, and that one or more questions of fact should be tried before the others.

The system which, in all the divisions of the Supreme Court to which it can be conveniently applied, we would suggest for the trial of matters suitable for trial by referees, is as follows:—

We think that there should be attached to the Supreme Court officers to be called official referees, and that a judge should have power, at any time after the writ of summons, and with or without pleadings, and generally upon such terms as he may think fit, to order a cause, or any matter arising therein, to be tried by a referee: and that whenever a cause is to be tried by a referee, such trial should be by one of these official referees, unless a judge otherwise orders. We think, however, that a judge should have power to order such trial to be by some person not an official referee of the court, but who on being so appointed should *pro hac vice* be deemed to be and should act as if he were an official referee. The judge should have power to direct where the trial shall take place, and the referee should be at liberty, subject to any directions which may from time to time be given by the judge, to adjourn the trial to any place which he may deem to be more convenient.

The referee should, unless the judge otherwise direct, proceed with the trial in open court, *de die in diem*, with power however to adjourn the further hearing for any cause which he may deem sufficient, to be certified under his hand to the court.

The referee should be at liberty, by writing under his hand, to reserve, or pending the reference to submit, any question to the decision of the Court, or to state any facts specially with power to the Court to draw inferences; and the verdict should in such case be entered as the Court may direct. In some other respects the decision of the referee should have the effect as a verdict *in Nisi Prius*, subject to the power of the Court to require any explanation or reasons from the referee, and to remit the cause or any part thereof for reconsideration to the same, or any other referee. The referee should, subject to the control of the Court, have full discretionary power over the whole or any part of the costs of the proceeding before him.

In connection with the subject of trial, it seems proper to refer to the recommendation of the

Patent Law Commissioners in the report of the 29th July 1864, who, after observing that the present mode of trying the validity of patents is not satisfactory, advise, that such trials should take place before a judge, sitting with scientific assessors to be selected by himself in each case, but without a jury, unless at the desire of both parties to the suit; and that on such trials the judge, if sitting without a jury, should decide questions of fact as well as of law. It appears to us that a plan similar in substance to that recommended by the Patent Law Commissioners, might with advantage be applied to the trial, not of patent cases only, but of any cases involving questions of a scientific or technical character, in which the judge, or the referee by leave of the judge, may think it desirable to have the aid, during the whole or any part of the proceedings, of scientific assessors.*

With this proposal, with one or two slight modifications, we entirely concur. We have already* given our reasons for disapproving of the trial of contested points of law before a single judge, and we think that it is even more objectionable to submit to a single mind the duty of deciding, upon conflicting evidence, disputed questions of fact; and we could therefore reserve to either party the right, *ex debito justitiæ*, to have all issues of the former kind referred to a Court, to consist, in the first instance, of three judges at the least, and to have all issues of the latter kind settled by the verdict of a jury: this right is by the proposal above-quoted left to the Court in its discretion, but we think that it ought to be vested absolutely in either party, and that the discretion of the Court should be limited to those cases in which the questions of law and fact are so blended as to be undistinguishable. On the subject of referees, also, we think that the report requires some qualification. We think that no case should be referred, except by consent, in any case where the order goes beyond "accounts and inquiries," but that the Court should have the fullest authority to order all such matters to be referred instead of prosecuting the inquiries itself or in chambers. The referees, however, (official or other), should be strictly limited to finding the facts, and should not, in the absence of agreement, be competent to make any final award; the Court, applying the law to the facts certified by the referees, should make the order, in the same manner as an order founded upon the certificate of the chief clerk is now made on the further consideration of a suit in chancery. We think also that provision should be made for the selection of the official referees partly from the profession and partly from the classes who now supply what is known as "*expert evidence*," with power from the Court to associate a legal and scientific referee or referees in any case, much as is now done in the Court of Admiralty on a reference to the "registrar and merchants." This would, we think, be preferable to leaving the legal referee uncontrollable by the opinions—save in so far as he

* *Ubi Sup.*