

FUSION OF LAW AND EQUITY.

between the defendant and any other person, the Court should have power to make such order as may be proper for the purpose of having the question so determined.

We think, that either party should be at liberty to apply at any time, either before or after pleading, for such order as he may upon the admitted facts in the case be entitled to, without waiting for the determination of any other questions between the parties.

MODE OF TRIAL.

With regard to the trial and determination of disputed questions of fact, the mode of trial varies according to the court in which the litigation happens to be pending, without any sufficient power of adaptation to the requirements of particular cases.

In the Court of Chancery, until recently, the Judge had no power to summon a jury, whatever might be the conflict of evidence or dispute as to the facts; all questions of fact as well as of law were generally decided by the Judge. In some cases it was the practice to send issues to be tried by a jury at Common Law. This course, however, was taken, not as a mode of trial, but merely for the assistance or information of the Court, which still reserved to itself the ultimate decision of the facts, and if dissatisfied with the first verdict might send the case before a second jury, or decide the facts according to its own view, and without regard to the verdict. Substantially the practice of the Court of Chancery remains unaltered; but there is now a power, which is rarely exercised, of summoning a jury, and the practice of sending issues to be tried at Common Law has become less frequent.

The Court of Admiralty, which decides for itself all questions of law and fact, may in special cases call in the assistance of nautical or mercantile assessors, but it has no power to summon a jury. The Court, however, by a recent statute, has power to direct any question of fact arising in a suit to be tried in a Court of Common Law, and, if it thinks fit, to order a new trial; but the verdict of the jury, when final, is conclusive upon the Court. This power, we understand, has been exercised in only one instance.

[The mode of trial in the Courts of Probate and Divorce is here spoken of.]

In the Courts of Common Law, a jury has always been regarded as the constitutional tribunal for trying issues of fact; and the theory is, that all such questions are fit to be tried in that way. It has, however, long been apparent, in the practice of the Courts of Common Law, that there are several classes of cases litigated in those Courts to which trial by jury is not adapted, and in which the parties are compelled—in many cases after they have incurred all the expenses of a trial—to resort to private arbitration. Until the Common Law Procedure Act of 1854, the parties could not be compelled to go to arbi-

tration, and the power given by that Act is limited to cases where the dispute relates wholly or in part to matters of mere account, or where the parties have themselves before action agreed in writing to refer the matter in difference to arbitration.

The system of arbitration which has thus been introduced, is attended with much inconvenience. The practice is to refer cases which cannot be conveniently tried in court either to a barrister or to an expert. A barrister can seldom give that continuous attention to the case which is essential to its being speedily and satisfactorily disposed of; and an expert, being unacquainted with the law of evidence, and with the rules which govern legal proceedings, allows questions to be introduced which have nothing to do with the matters at issue. In neither case has the referee that authority over the practitioners and the witnesses which is essential to the proper conduct of the proceedings. If the barrister or solicitor who is engaged in the suit, or even a witness, has some other engagement, an adjournment is almost of course. The arbitrator makes his own charges, generally depending on the number and length of the meetings, and the professional fees are regulated accordingly. The result is great and unnecessary delay, and a vast increase of expense to the suitors. The arbitrator thus appointed is the sole judge of law and fact, and there is no appeal from his judgment, however erroneous his view of the law may be, unless perhaps when the error appears on the face of his award. Nor is there any remedy, whatever may be the miscarriage of the arbitrator, unless he fails to decide on all the matters referred to him, or exceeds his jurisdiction, or is guilty of some misconduct in the course of the case.

In the Court of Chancery questions involving complicated inquiries, particularly in matters of account, are always made the subject of reference to a Judge at Chambers. These references are practically conducted before the chief clerk, but any party is entitled, if he thinks fit, to require that any question arising in the course of the proceedings shall be submitted to the Judge himself for decision. In such a case the decision of the Judge is given after he has been sitting in Court all day hearing causes. It has been represented to us that this system does not give satisfaction, and that there is not sufficient judicial power to dispose of the business in Court, and at the same time to give that personal attention to the business in Chambers which was contemplated when references to the Judge in Chambers were substituted for the old references to the Masters in Chancery.

In the Court of Admiralty references are always to the Registrar, assisted if necessary by one or two merchants or other skilled persons as assessors or advisers; the Registrar from his knowledge of law, is enabled to regulate the conduct of the case; the merchants—assuming them to be properly chosen—