

THE REPORT OF THE JUDICATURE COMMISSION—INTERROGATORIES.

felt bound *verecundia causa* to defer to them—of scientific assessors.

In the same manner, without at all desiring to trench upon the power of the Court to sit with the assistance of assessors merely, we think it would be advantageous to enable the parties to require issues of fact involving special knowledge to be referred to a specially qualified jury of some limited number (say five), and to render their verdict (at all events when unanimous) absolutely and finally binding upon the parties. We say "when unanimous," because we think that such a jury ought to be entrusted with the power of finding a verdict by a majority, irrespective of consent, with, perhaps, the qualification that the Court, if dissatisfied with the verdict, might in such a case set it aside and order a new trial on the ground of such difference of opinion alone.

The Commissioners next take up the question of evidence, and upon this point we do not exactly understand their proposal.

They recommend that—

"In the absence of any agreement between the parties, and subject to any General Order of the Court applicable to any particular class of cases, the evidence at the trial should be by oral examination in open court, but that the Court should have power at any time to direct that the evidence in any case, or as to any particular matter at issue, should be taken by affidavit, or that affidavits of any witnesses may be read at the trial, or that any witnesses may be examined upon interrogatories or otherwise before a commissioner or examiner. Any witness who may have made an affidavit should be liable to cross-examination in open court, unless the Court or a judge shall direct the cross-examination to take place in any other manner. Upon interlocutory applications, the evidence should, we think, as a general rule be taken by affidavit, but the Court or a judge should upon the application of either party have power to order the attendance, for cross-examination or otherwise, of any person who may have made an affidavit."

If this means that wherever there is a dispute of fact the evidence *upon that issue* is to be taken orally in court, but that all subsidiary facts not in issue, and all formal proof of facts not really contested, may be given by affidavit, we fully agree with it, but if and so far as it may mean anything else we are unable to concur with it. We think that one of the principal objections—we had almost said the principal objection—to the existing common law system is the necessity for bringing witnesses, often at enormous expense, into court to prove every link in a long story of which perhaps but one or two points, depending often upon the evidence of a single witness, are really in contest; while, on the other hand, we believe it to be the unanimous opinion of all who have any personal experience of its working that no more solemn farce exists than a cross-examination in chancery before an examiner, ordinary or special. It would be utterly ludicrous were it not so terribly expensive.

The Report then proposes to give to the Court or judge very extensive discretionary powers, to which no objection can, we think, be taken, followed by a proposal* that "in all divisions of the Supreme Court the costs of the suit and of all proceedings in it should be in the discretion of the Court." As this is coupled with a proposal† that, "as a general rule, no appeal should be allowed as to costs only," we are constrained to object to it as vesting in the hands of a single judge a power which obviously may be, and where it exists not unfrequently is, used very arbitrarily, and even harshly, against suitors with whose conduct, on some point immaterial to the issue, the judge is dissatisfied, and whom, though he cannot deny their right to success in the suit, he punishes by the denial of their costs, knowing that of that decision there is no chance of reversal, though often such a victory is worse than a defeat. Nay, we have known more than one instance in which counsel, feeling morally certain of success on the merits, but knowing that the judge had a strong feeling against the case, have felt obliged to deprecate a successful decision, and actually to ask for an appealable decree, a request not invariably acceded to. We confess we cannot see any reason for the rule, and we are sure that it often operates to produce great injustice. Let us take as an instance a case which has been recently much before the public—*Martin v. Mackenochie*. If the learned Dean of the Arches had decided against Mr. Mackenochie on *all* the questions submitted to him, but added, "I do not, however, consider it a case for costs," Mr. Martin would have been without remedy, though in the opinion of the Court of Appeal (which must, of course, be presumed to be right) he was entitled to all his costs.‡

For so far (with the exception of a protest from the learned judge of the Court of Admiralty against the abolition of the exclusive jurisdiction of that Court, in which few, if any, will, we think, be found to follow him) the Commissioners appear to be perfectly unanimous. At this point, however, they enter upon a new field of inquiry, "the general arrangements for the conduct of judicial business," and from this point there appears to be some difference of opinion amongst them, though not perhaps so great as might reasonably have been anticipated.—*Solicitors' Journal*.

INTERROGATORIES—TENDENCY TO CRIMINATE.

Villeboisnet v. Tobin and Others, C. P., 17 W. R. 322.

This is another decision on the much argued question whether interrogatories the answers

* Page 15.

† Page 24.

‡ We are not, of course, here expressing any opinion whatever on the merits of this case; we are merely considering its operation on the question of costs.—ED. S. J.