and there the learned arguments of Mr. Gray and Mr. Willes was perfectly appalling by their length, by the multitude of cases quoted in them, and the ingenuity with which these are applied. Nearly at the same time, the Court of Exchequer decided in *Howell* v. *Rodbard*, 4 Ex. 309 in direct opposition to the judgment of the Court of Common Pleas in *Callendar* v. *Howard*.

Surely at this stage the legislature might well have interposed to substitute something like method and simplicity in the place of the mass of statutes which have been described. The legislature did step in, and by the 81st section of the Common Law Procedure Act, 1852, after empowering both the plaintiff and the defendant with proper leave to plead double, provided that the "costs of any issue either of fact or law shall follow the finding or judgment upon such issue, and be adjudged to the successful party whatever may be the result of the other issue or issues." A most inadequate enactment and one which has already been held in *Cazneau* v. *Morrice*, 2 Jur. n. s. 139, to apply only to the issues raised in double pleading; in fact it only explains, and does not even repeal the statute of Anne. We have therefore one more Act of Parliament added to our list of those which regulate costs, with very little corresponding benefit.

So far we have been concerned with the general rights to costs—

1st. Of the party who has been successful in the whole suit.

2nd Of the party who has succeeded on one or more of the counts or causes of action, but not on all the counts or causes of action involved in the suit.

3rd. Of the party who has been successful on an issue or issues, but not on the cause of action out of which it arose.

We now come to the class of enactments passed for the purpose of limiting this general right.

It was discovered at an early period that the indiscriminate award of costs to the successful party tended to encourage the bringing of actions on frivolous, though technically rightful grounds, and also favoured the vexatious choice of the higher and more costly in preference to the inferior tribunals. To check this evil the 43 of Eliz. c. 6, was passed which declared that, "if upon any action personal to be brought in any of her Majesty's Courts at Westminister, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same count, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein, in the same court shall not amount to the sum of 40s. or above, that in every such case the judges and justices before whom any such actions shall be pursued shall not award for costs to the party plaintiff any greater or more costs then the sum of the debt or damage so recovered shall amount unto, but less at their discretion."

To explain this enactment it should be remarked that the County or Sheriff's Court of that time had exclusive cognizance (6 Ed. 1, c. 8 *Kennard* v. *Jones*, 4 T. R. 495), of all (see authorities in Com. Dig. County C. 8) personal actions (not being for trespass *vi et armis* or for lands of freehold, &c.) under the value of 40s.; and therefore it became a common device for the purpose of taking the case out of the inferior jurisdiction to lay the damages in the declaration at an amount above that sum. The framers of the statute struck at the root of this mischief by making the certificate of the judge, to the effect that the extra claim was not *bona fide* made, the instrument of taking away the right to costs: in effect they said to the plaintiff, "If you will harass your opponent by coming to the courts at Westminster, when you ought to bring your suit in the County Court, you shall forfeit the right to full costs which success would otherwise give you." It is worth remarking that this statute was not acted upon for 150 years, until C. J. Willes, in *Whith* v. *Smith* (cited in 2 Str. 1232), for the first time gave the depriving certificate, that action being represented as a very paltry one brought for removing sand from Hunslow Heath.

In the following reign it was thought necessary to do something still more stringent towards repressing frivolous actions for verbal defamation, and accordingly the 21 Jac. c. 16, s. 6 enacted, that in all actions for slanderous words, wherever tried, if the jury should assess the damages under 40s., then the plaintiff should recover only so much costs as the damages so assessed amount to, any law, &c., to the contrary notwithstanding.

So things remained in this respect until the 22 and 23 Car. 2, c. 9 was passed, which statute, by the construction of the judges (3 Wils. 322: *Marriott* v. *Stanley*, 1 Man. & Gr. 853), was limited in its application to actions of trespass *quare clausum fregit*, together with the personal actions excluded from the operation of the 43 Eliz. c. 6—namely, actions of assault and battery and those in which title to land came in question. In its treatment of these it differed materially from its great predecessor; for it laid down that if the jury gave less than 40s. damages the plaintiff should not recover more costs, than the damages so found should amount to, unless the judge certified that an assault and battery was proved, or that title to land was chiefly in question. This section of the statute is not now in force, having been expressly repealed by the 3 & 4 Vic. c. 24; but it is necessary to refer to it because of its supposed connection with the 8 & 9 Wm. 3, c. 11, of which Act sec. 4 says, that "in all actions of trespass in any of his Majesty's Court of Records at Westminster wherein at the trial of the cause it shall appear and be certified by the judge under his hand, upon the back of the Record, that the trespass upon which any defendant shall be found guilty was wilful and malicious, the plaintiff shall recover not only his damages, but his full costs of suit, any former law to the contrary notwithstanding." It has been held, in *Bowyer* v. *Cook*, 4 C. B. 236, that this merely operated to mitigate the stringency of the 136th section of the 22nd and 23 Car. 2. c. 9, and therefore that the repeal of the latter annihilates both. Obviously the words of the section have no meaning if there was nothing antecedent to them which operated to take away costs in cases where a certificate of wilful and malicious trespass might possibly be given. But were the Court of Common Pleas strictly right in saying the 136th section of the 22 and 23 Car. 2. c. 9, was the only enactment which had this operation? A verdict for less than 40s. in an action for trespass, *quare clausum fregit*, where title to land was not in question, followed by the certificate, pursuant to the 43 Eliz. c. 6, would have the same depriving effect. Of course, if the giving of the certificate is entirely discretionary with the judge as is probably the case, the above decision is practically correct; but still this very indirect mode of repealing an express statute is extremely unsatisfactory.

The 3 & 4 Vict., c. 24, is the only act relating to our present topic which remains to be considered, It repealed, in express terms, the 22 & 23 Car. II., c. 9. sec. 136, and impliedly we must assume, the 8 & 9 Will. III., c. 11, sec. 4; it also took actions of trespass and trespass on the case out of the operation of the 43 Eliz., c. 6. Having done this, the 2nd section enacted, that in actions of trespass on the case, where the plaintiff recovered less damages than 40s., he should have no costs whatever, unless the judge or officer who presided at the trial should certify that the action was really brought to try a right, besides the mere right to recover damages for the grievance complained of in the action, or that the trespass or grievance in respect of which the action was brought, was wilful and malicious. And the third section provided, that nothing in the Act should deprive the plaintiff of his costs in an action for trespass committed by the defendant, after notice not to trespass.