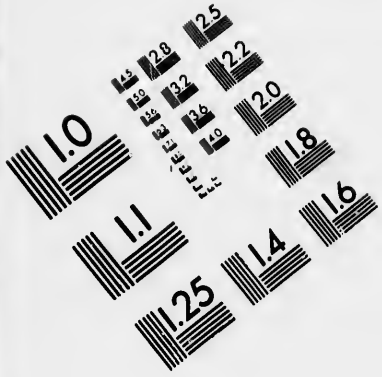


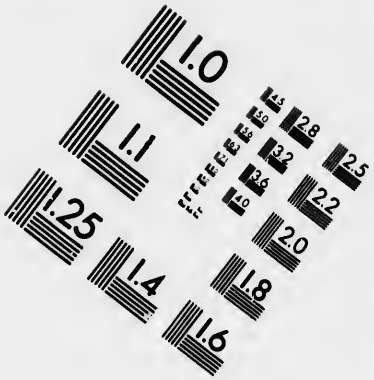
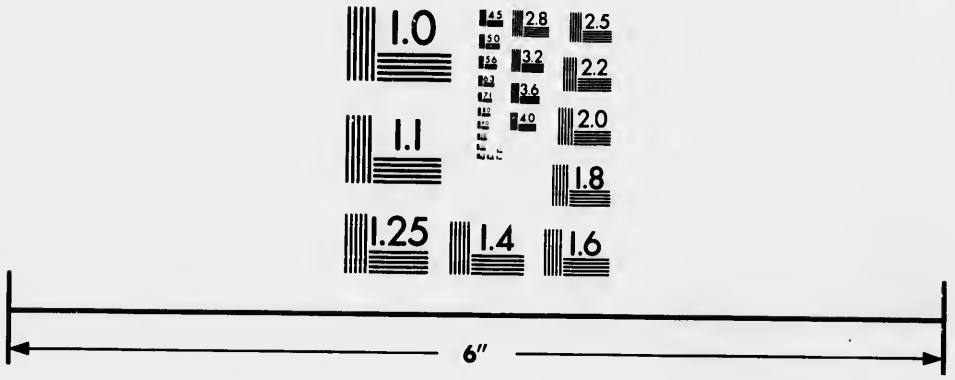
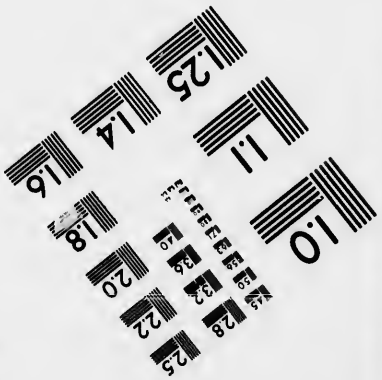


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

CIHM
Microfiche
Series
(Monographs)

ICMH
Collection de
microfiches
(monographies)

Canadian Institute for Historical Microreproductions / Institut canadien de microreproductions historiques

Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- ☐ Coloured covers/ Couverture de couleur
- ☐ Covers damaged/ Couverture endommagée
- ☐ Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- ☐ Cover title missing/ Le titre de couverture manque
- ☐ Coloured maps/ Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- ☐ Bound with other material/ Relié avec d'autres documents
- ☑ Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- ☐ Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.

- ☐ Coloured pages/ Pages de couleur
- ☐ Pages damaged/ Pages endommagées
- ☐ Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- ☐ Pages detached/ Pages détachées
- ☑ Showthrough/ Transparence
- ☐ Quality of print varies/ Qualité inégale de l'impression
- ☐ Continuous pagination/ Pagination continue
- ☐ Includes index(es)/ Comprend un (des) index

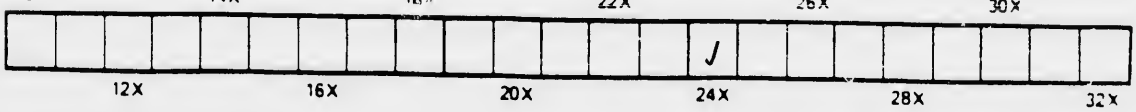
Title on header taken from:/ Le titre de l'en-tête provient:

- ☐ Title page of issue/ Page de titre de la livraison
- ☐ Caption of issue/ Titre de départ de la livraison
- ☐ Masthead/ Générique (périodiques) de la livraison

☑ Additional comments:/ Commentaires supplémentaires: Pages 81-84 are misbound. Pagination is as follows: [v]-[xxiv], [1]-80, 85-88, 81-84, 89-200, 2001-200d, [201]-252, [2], [253]-[288].

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X 12X 14X 16X 18X 20X 22X 24X 26X 28X 30X 32X



SU

GE

GENERAL

RULES AND ORDERS

OF THE

SUPREME COURT,

WITH NOTES THEREON;

AND THE

GENERAL ORDERS OF THE COURT OF CHANCERY,

ELECTION COURT,

COURT OF DIVORCE AND MATRIMONIAL CAUSES,

AND PROBATE COURTS.

By ALLEN OTTY EARLE,

BARRISTER-AT-LAW.

PRINTED BY GEO. A. KNODELL, ST. JOHN, N. B.,

FOR

CARSWELL & CO., LAW BOOKSELLERS, TORONTO AND EDINBURGH.

1881.

TO

THE HONORABLE

JOHN CAMPBELL ALLEN,

CHIEF JUSTICE OF NEW BRUNSWICK,

THE FOLLOWING PAGES

ARE,

WITH HIS PERMISSION,

AND

WITH SENTIMENTS OF THE GREATEST

RESPECT AND ADMIRATION,

DEDICATED.

ADDENDA.

Page 38.—Where the attorneys for both parties appeared, but, the plaintiff not moving for trial, the cause was struck off, held that the defendant was entitled to the costs of the day and that he was not bound to have the jury called; the English authorities were considered inapplicable to the practice of this Court (*McCarthy* v. *Providence Ins. Co.*, E. T. 1881).

One of the effects of the rule of Mich. T. 1872 (*post*, 164) is to render it unnecessary to state in the affidavit for costs of the day that issue has been joined or (*semb*) that notice of trial was given, if it appears that the cause was entered on the docket for trial, and it seems that the plaintiff will not be permitted to shew that the cause was entered before issue joined on the understanding that the cause was not to be tried at that circuit (*id.*) Applications for judgment as in case of nonsuit would be within this ruling.

Page 50.—42 Vic., c. 8, is repealed by 44 Vic., c. 12. Secs. 10 and 11 are, however, re-enacted thereby (ss. 3, 4), with the exception of the alteration of the words "five copies" to "six copies" in the former section and the omission of the proviso in the latter.

Page 51.—Where affidavits are to be used on a motion for a new trial they need not be filed or served as part of the grounds, but the Court will on the hearing, if necessary, give the opposite party time to answer them (*Anderson* v. *Mowatt*, M. T. 1880).

Page 65.—The rule laid down in *Oliver* v. *Campbell*, 2 Han. 251, was affirmed in *Randolph* v. *Taylor*, E. T. 1881, and judgment *qu.* nonsuit was refused, though two terms had elapsed, the plaintiff having had only one opportunity to try.

Page 66.—In *Cyr* v. *Ouillette* (4 P. & B. 264) a rule for judgment as in case of nonsuit was made absolute under the following circumstances: Notice of trial was once given, and after entry of the cause on the docket the trial was postponed on the usual terms of payment of the costs of the day, but the cause was not made a remanet; a subsequent notice of trial was given, but the plaintiff did not go to trial. It is not stated at whose instance the postponement was made, but from the case of *Thomson* v. *Keith* (6 All. 509) being cited as supporting the defendant's contention it may be inferred that the plaintiff was in default, as in that case. And it is to be noted that the motion was unopposed.

Page 135.—To a declaration for a total loss on a policy requiring written notice of abandonment, a notice of defence which denied the notice of abandonment, but did not allege facts shewing the necessity of the notice or that the loss was a constructive total loss, was held good (*McCarthy* v. *Providence Ins. Co.*, E. T. 1881).

Notices of defence which would if pleas be bad as being founded on the same ground of defence will be set aside (*McCarthy* v. *Providence Washington Ins. Co.*, *before Allen, C. J., at Chambers*).

Page 145.—The form of offer to suffer judgment and the notice thereof should be subscribed by the *defendant's* and addressed to *plaintiff's* attorney.

Page 225.—Last line of note—add to order for appearance "published under s. 18 of C. S., c. 49."

TABLE OF CASES.

ENGLISH RULES OF COURT CITED.

GEO. A. KNODELL, PRINTER, ST. JOHN, N. B.

GENERAL RULES AND ORDERS

OF

THE SUPREME COURT.

EASTER TERM, 1785—25 GEO. III.

Parchment.

1. IT IS ORDERED, That all the processes, records, rolls, and judgments of this Court be made on parchment (*a*), according to the usage of the Court of King's Bench in England.

(*a*) Otherwise they are not to be filed (R. Hil. 1810, r. 3, 4, *post*. R. Hil. 1862, *post*, prohibits the use of patent parchment. A recognizance on paper is not evidence on an issue upon a plea of *nul tiel record* (*R.* v. *Sparrow*, 1 Han. 237). A rule of court setting aside proceedings for irregularity is not a record, and cannot be enrolled and filed as such (*Watson* v. *Roberts*, 3 Kerr, 509; and see *Wilson* v. *Andrews*, 1 All. 715.) Where judgment is arrested, the arrest of judgment must be entered of record, and a plea setting out the order of the Court as matter *in pais* is bad (*Beardsley* v. *Dibblee*, 1 Kerr, 642; 2 Kerr, 254). So where the action is discontinued (*Bacon* v. *Johns*, 1 All. 257).* See as to trials by the record, R. Trin. 1846, *post*.

Mesne process.—Bill of York.

2. That the bill issued out of the Court of King's Bench in England, commonly called the bill of Middlesex, be the first process *ad respondendum* (*b*), where it is to be executed by the sheriff of the county where the Court sits; and that the first process, going into other counties, shall be a common *capias*, in form of the *alias* or *latitat*, leaving out the words "as before we have commanded you," except where it is actually the *alias*

---

*And see *Douglas* v. *Hinckley*, H. T. 1828, Stev. Dig. 184; *Sewell* v. *Olive*, 4 All. 394.

The writ *de pro. pro.* and the inquisition taken thereunder are required by the Act to be filed in the clerk's office, and they thereby become a record or a *quasi* record, and must be so treated in a plea to a declaration on a replevin bond averring such inquisition (*Wheeler* v. *Stewart*, 3 Pugs. 398).

A record of the plaintiff's acquittal on an indictment, produced from the custody of, and signed by the clerk of the Court of Oyer and Terminer is conclusive, and cannot be impugned on the trial of an action for malicious prosecution, by shewing that it was made up by the plaintiff's attorney and improperly authenticated by the clerk, and had not been compared with the original papers (*Heaney* v. *Lynn*, Bert. 27).

capias; the recital of the issuing and returning a bill being now supposed unnecessary.

(*b*) Mesne process is now regulated by the Con. Stat., c. 37. Sec. 2 gives the form of writ of summons for service in the Province; secs. 15, 16, forms of writs for service abroad; sec. 19, the form of *capias* for the commencement of an action; sec. 27, a form of *capias* in actions commenced by summons, and sec. 200. the form of a writ of replevin. The bill of York was abolished by 21 Vic., c. 20, s. 2.

Sheriffs.—Return of Writs.

3. That the sheriffs indorse their returns (*c*) on all processes delivered to them by the day of their returns respectively, and deliver them to the attorneys who issued the same. That (*d*) they attend the Court every term, by themselves or their under-sheriffs, and that they appoint deputies respectively, who shall always reside in the district in which the Court sits, and as near as convenient to the court house; who shall always attend the Court in the absence of the high sheriff: and that all writs, rules, and orders delivered to such deputy shall be of like effect as if served upon the high sheriff.

(*c*) The return ought to follow the usual precedents, even a slight departure in this respect is prohibited (*Watson*, 91), and should be in English, (*id.* 88) not Latin (*R.* v. *Sheriff of Gloucester*, Bert. p. 189). A return "*cepi corpus*," to a *capias* against two was taken to apply to both (*id.*). It must not be uncertain or argumentative, and an insufficient return is as no return, and will subject the sheriff to an attachment (*Watson* 89, 99; *Ketchum* v. *Muzeroll*, 3 All. 347). A return that "lands remain unsold for want of buyers," when they were never advertized or offered for sale is a false return (*Jarvis* v. *Miller*, Be.t. 191. A *venditioni exponas* not necessary, *id.*). As a general rule there can be no averment against the sheriff's return in the same action, but it is not conclusive in an action by the execution debtor for an excessive sale under a *fi. fa.* (*Miller* v. *Weldon*, 2 Han. 188). Where a *fi. fa.* was returned satisfied, and a third party (the owner of the goods levied on) afterwards recovered their value against the sheriff, the Court allowed the writ to be taken off file and the return to be amended (*Ketchum* v. *Gibberson*, 1 Kerr, 519). Evidence will not be received to contradict the indorsement under the Statute of Frauds (C. S., c. 76, s. 11) of the time of delivery of the writ to the sheriff (*Johnston* v. *Winslow*, Bert. 53). The return of a writ directed to coroners must be made in the name of all of them (*Noble* v. *Temple*, 1 Han. 274), except in the case of a *venire*, which may be directed to and returned by one coroner—C. S., c. 45, s. 12, (31 Vic. c. 26, s. 1). In England it is not usual for the sheriff to make return unless ruled for that purpose (as to which see R. Mich. 1844, r. 2, *post*), and the writ is filed in the office of the Court (*Watson*, 81, 88). The writ of summons is to be returned through the office of the sheriff of the county in which it is served (C. S., c. 37, s. 13). The sheriff shall immediately (i. e., without any improper delay, see *Doe* v. *Coigley*, 5 All. 561), on the service of the writ, return the same, with an affidavit of service, to the plaintiff's attorney (sec. 11). Sec. 25 contains a similar provision as to writs of *capias*, which by their form are re-

turnable immediately after service. The true day of the execution is to be endorsed with the return (*id.*). Writs of execution are still returnable on a return day in term (s. 124 and c. 31, s. 3). The attorney may be compelled to file a writ which has been set aside for irregularity (*Roberts* v. *Watson*, 1 All. 94).

(*d*) In *Scott* v. *Clark*, T. T. 1831, it was held that a sheriff coming to Fredericton in term was privileged from arrest, and that it would be intended that his coming was on the business of the courts, without inquiring into the particular cause. This part of the rule is now never acted on in practice (*All. Rules*, 2, n. *c*).

Filing Writ.—Dockets and Fees.

4. That every attorney of this Court enter the return, and file the writ or process, in all actions which have not been agreed, and in which they intend to proceed; and shall make a docket of all such returns and rules, and on the last day of the term shall deliver the same to the clerk of the Court; and shall pay to the clerk his own fees, as well as those of the judges and crier, in such actions (*e*).

(*e*) See R. Hil. 1820, r. 2, *post*.

Special Bail.—Notice of Exception.

5. That there be allowed twenty days (*f*) to all defendants to put in special bail; and the like number (*g*) to all plaintiffs to except against such bail, from the time of due notice of bail put in.

(*f*) See R. Mich. 1819, *post*.
(*g*) See R. Hil. 1832, r. 2, *post*.

Declarations.—Non pros.

6. That all attorneys file their declarations on or before the last day of the term next ensuing the return and filing the writ, or be *non prossed* (*h*).

(*h*) Judgment of *non pros.* may now be signed, if the declaration is not filed within three months after service of the writ, a declaration being first demanded (C. S., c. 37, s. 48; R. Hil. 1836, r. 5, *post*). It cannot be signed until the defendant has appeared, (*Anon.*, 2 Chit. R. 37; *Cushing* v. *Gordon*, M. T. 1872, Stev. Dig. 299), or in bailable cases until the bail-piece is on file (*Wiggins* v. *Dibblee*, T. T., 1834, *id.*). Nor can it be signed after declaration actually delivered or tendered, though after the expiration of the time (*Gray* v. *Pennell*, 1 Dowl. 120). Where the defendant obtains a stay of proceedings (as by demanding particulars, *O'Brien* v. *Tate*, 2 Pugs. 4), he cannot sign judgment until the stay of proceedings is got rid of (*Burgess* v. *Swayne*, 7 B. & C. 485). For the defendant's remedy, where he is arrested on two writs for the same cause of action, see *Johnston* v. *Bransfield*, Bert. 78. Applications to set aside the judgment for irregularity must be promptly made (*Ledden* v. *Rogers*, 2 Kerr, 326; *Lonchester* v. *Murray*, *id.* 334). A form of judgment roll is given by R.

Hil. 1875, r. 2, Form No. 2, *post*. Omitting to declare in time discharges bail (*Sykes* v. *Bawens*, 2 New R. 404), and renders a prisoner supersedable (R. Hil. 1839, r. 1, *post*).

Rules to Plead.

7. That all defendants have twenty days to plead from the day of the notice in writing delivered of the filing such declaration (*i*), except where the defendant is returned in custody (*j*); in which case the defendant shall have twenty days to plead, from the time of serving a copy of the declaration, and of the rule to plead, to be served on the sheriff or defendant.

(*i*) See *infra*. r. 8, n. (*k*).

(*j*) See as to proceedings against prisoners, R. Hil. 1839, *post*.

Interlocutory Judgment.

8. That on filing a declaration in any action, the plaintiff be entitled to judgment, if the defendant doth not plead in twenty days after notice (*k*) of declaration being filed in the clerk's office, the rule to plead being first entered; and if the defendant hath not entered his appearance in such action, the plaintiff may file a common appearance, and enter an interlocutory judgment for want of a plea as of the preceding term, without any imparlance, and proceed to a writ of enquiry as if the same interlocutory judgment had been rendered and entered the same preceding term (*l*); and the like proceeding to entry of judgment and executing writ of inquiry, where a defendant in custody (*m*) neglects to plead, pursuant to a rule served on himself, or the sheriff as aforesaid.

(*k*) It was not usual in practice to serve this notice (*Johnston* v. *Cornwall*, 1 Kerr, 197; All. Rules, 3 n. *n*).

(*l*) By C. S., c. 37, s. 38, "Immediately after service of a writ of summons not endorsed in the special form hereinbefore provided, the plaintiff may, on filing the writ of summons with ar affidavit of the personal service thereof, or a judge's order for perfecting the service, or in case of service on a corporation, on filing an affidavit of service in the manner authorized by this chapter, and on due entry of the cause, file a declaration indorsed with a notice to plead in twenty days; and in default of appearance within twenty days after declaration filed may sign judgment by default; a defendant may appear any time before judgment by default," etc. By sec. 197 (enacting the provisions of the Practice Rules of 1853, r. 174—R. G., H. T. 2 Wm. IV., pl. 8): "When any act is by this chapter, or by the rules and practice of the Court, directed to be done in any particular number of days not expressed to be clear days, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas day, Good Friday, or a day appointed for a public

fast, thanksgiving, or holiday, in which case the time shall be reckoned exclusively of that day also."

By sec. 36 (C. L. P. Act 1852, s. 26,) it shall not be necessary in any case for the plaintiff to enter an appearance for the defendant. This section is not applicable to the case of an infant defendant (*Jarman* v. *Lucas*, 15 C. B., N. S. 474, and see *Carr* v. *Cooper*, 1 B. & S. 230.) Ejectment was not affected by 36 Vic., c. 31 (see s. 202), or by C. S., c. 37 (see s. 199), and 21 Vic., 20, s. 4, is still in force in respect to that action. It was held by *Parker*, *J.*, at chambers, shortly after the passing of the latter Act, that it applied only to substitute a notice of appearance for common bail in cases where the defendant appeared, and that it did not do away with the necessity of filing common bail, *see. stat.* Accordingly it was necessary, down to the coming in force of 36 Vic., c. 31, to file it in other actions as well as ejectment, when judgment was signed for want of an appearance; and see *Doe* d. *Barnett* v. *Roe*, 3 P. & B. 102; 12 Vic., c. 39. s. 12. See as to the effect of omitting to file, *Andrews* v. *Hanson*, 1 All. 509; *Johnson* v. *Cornwall*, 1 Kerr, 197; *Davis* v. *Hughes*, 7 T. R. 206; *Williams* v. *Strahen*, 1 N. R. 306; *Roberts* v. *Spurr*, 3 Dowl. 551; *Watson* v. *Dore*, 2 M. & W. 386; *Mortimer* v. *Piggott*, 2 Dowl. p. 616. As to the necessity of filing common bail in the county courts, see C. S., c. 51, sched. A, B; c. 118, sub-s. 39; *Kerr* v. *Seovil*, 2 Han. 20; *Ex parte Ross*, 2 P. & B. 337; *Taylor* v. *Burpee*, 5 All. 191. C. S., c. 37, s. 110 (Pleading Rules of 1853, r. 31), abolishes continuances by way of imparlance.

By sec. 106: "Judgment by default shall be final where it was heretofore final." By sec. 109 (*post* R. East. 1848, r. 1, pl. 5), it is to be entered of record of the day of the month and year when signed.

See R. Trin. 1786, *post*, as to signing judgment upon an assessment by writ of inquiry, and Rules Mich. 1835, r. 7, and Trin. 1838, *post*, as to assessment of damages by a judge.

(*m*) See R. Hil., 1839, r. 2, *post*.

Declaration de bene esse.

9. That (*n*) in all cases where a declaration is filed *de bene esse* the plaintiff shall have the like advantage of an interlocutory judgment, on due notice having been given to the defendant of the filing of the declaration.

(*n*) Superseded by R. East. 1786, *post*.

Appearance.

10. That where an attorney appears for the defendant, a copy of the declaration, with notice of the rule to plead, shall be served on him, he paying for such copy at the rate of six pence per sheet, and on default of pleading in twenty days, judgment to be entered, and a writ of inquiry may be executed as aforesaid, a plea being first demanded after the said twenty days (*o*).

(*o*) See R. Hil., 1875, r. 1, pl. 3, *post*, substituted for this rule.

It is presumed that the copy of the declaration delivered is a true transcript of the

declaration on file, and the defendant is not bound to make a comparison (*Brocheau* v. *Desbrisay*, 4 All. 122). In *Wilson* v. *Andrews*, 1 All. 670, where the error occurred in the copy delivered, the Court gave judgment on demurrer for the defendant, though the declaration filed was correct.

By C. S., c. 37, s. 57 (36 Vic., c. 31, s. 58,): "Where the defendant is within the jurisdiction, the time for pleading in bar, unless extended by the court or a judge, shall be twenty days, and the time for replying, or other subsequent pleading, unless extended as aforesaid, shall be ten days, and a notice requiring the defendant to plead in twenty days, otherwise judgment may be endorsed on the declaration or delivered separately." By sec. 58: "a notice requiring the opposite party to plead, reply, rejoin, or otherwise, as the case may be, as aforesaid, shall be sufficient without any rule, and such notice may be delivered separately or be indorsed on any pleading which the other party is required to answer; but nothing in this or the preceding section shall obviate the necessity of a demand of plea or other subsequent pleading, according to the present practice of the Court, (see R. Trin. 1842, r. 1; Hil., 1839, r. 13, *post*), or to the rules which may from time to time be made by the Court." And see C. S., c. 37, s. 82, for the time for pleading to amended pleadings, and R. Mich. 1843, *post*, for the time for pleading in abatement.

Service of Notices.

11. That all notices to be served on defendants, or the attorneys of either party, shall be deemed well served if left at the dwelling house, or last, or most usual place of his or their lodgings (*p*).

(*p*) See R. Hil. 1865, *post*, limiting this rule in cases of service on the attorney; and see r. 15 *infra*, as to service, where the parties appear by attorney. Every appearance by a defendant in person must give an address at which pleadings, &c., may be left for him (C. S., c. 37, s. 35).

"Where the defendant has left the country and not since been heard of, proof that a copy of the rule was left at his place of residence is good service." (*Styrling* v. *Lloyd*, Day's C. L. P. Acts, 455).

Ejectment.

12. That (*q*) there be eight days exclusive between the time of serving and day of appearance in term in all actions of ejectment, where the person to be served with such declaration lives within the county where the Court sits; and fourteen days when such person lives in any other county.

(*q*) Superseded by R. Mich. 1835, r. 11, *post*.

Notice of Trial.

13. That (*r*) there be at least eight days notice of trial and for writs of inquiry in all actions where the defendant lives within the county where the court sits; and fourteen days notice if in any other county.

(*r*) Superseded by R. Hil. 1828, r. 1, *post*.

Bail—Justification of.

14. That (*s*) on exception to bail, the bail justify before one of the judges at his chambers within two days after notice of exception, or plaintiff be at liberty to proceed, notwithstanding such bail given.

(*s*) Superseded by R. Hil., 1832, r. 3, 4, *post*.

Service of Notice on Attorneys.

15. That (*t*) all notices be served on the attorneys for the parties, except notices of exception to bail, which may be served on the defendant or his attorney, or on the person who serves the notice of bail.

(*t*) See the English practice, *Brooks* v. *Till*, 2 Y. & J. 276; *Margetson* v. *Rush*, 18 L. J. Ex., 172. "This is a very reasonable rule, and ought not to be departed from" (*per Carter, C. J.*, in *Murphy* v. *Close*, 3 All. 83). An objection on the ground of the service being on the party, must be taken before the argument commences (*Wetmore* v. *Levy*, 4 All. 510). The affidavit of service should show that the person served was the party's attorney (*Brown* v. *Bartlett*, 3 Kerr, 369). A clerk, while in the office, has authority to receive papers, (*Moulton* v. *Dibblee*, Bert. 128), but an affidavit of service on a student "in the office of the plaintiff's attorney" is bad, in not stating that the service was at the office (*Cuiff* v. *Robertson*, *id.* 342). It is advisable that the affidavit should state the name of the clerk on whom service was made, (see *Sandall* v. *Godsoe*, 1 All., 441). A service by post is sufficient, (*Abbott* v. *Ledden*, Bert. 33 —demand of security for costs), but can only take effect from the time of receipt, (*Crane* v. *Taylor*, 2 Kerr, 171; *Frazer* v. *Harding*, *id.* 375—notices of trial), unless, perhaps, where such mode of service is agreed upon (*Robson* v. *Arbuthnot*, Har. C. L. P. Acts, 688). An affidavit denying the receipt of a notice is not answered by shewing that it was posted in due time (*Frazer* v. *Harding*, *supra*; and see *Smith* v. *Campbell*, 6 Dowl. 728). See R. Hil., 1865, *post*, as to service at place of abode. A service on the Queen's birth-day is not irregular (*Upton* v. *Phelan*, 2 P. & B. 192).

It is in many cases advisable to serve a notice to produce on the client as well as on the attorney (*Hughes* v. *Budd*, 8 Dowl., 315). Rules, &c., disobedience to which is to be punished by attachment, must be served on the party, and the service must be personal.

HILARY TERM, 1786.—26 GEO. III.

Bail Bond.—Notice.—Declaration de bene esse.

ORDERED, That in all process where an affidavit is made and filed of the cause of action, the sheriffs of the different counties, at the time of taking the bail bond, shall serve the sureties therein with a copy of such process, subscribed with the following notice:

"A. B., Take notice, that unless special bail is put in above by the

defendant in this cause within twenty days after the return of this process, the condition of the bail bond you have entered into will be forfeited;"

and upon affidavit made and filed, together with a return of the process by the sheriff of the service of such copies as aforesaid, the declaration may be filed *de bene esse*, at the return of the process, with notice to plead in twenty days; and if defendant puts in special bail, and doth not plead within time, judgment may be signed: provided such declaration be filed in the clerk's office with notice thereon within twenty days after the return of the process (*a*).

(*a*) It has not been the practice to serve this notice since the coming into force of 36 Vic., c. 31. See the notices subscribed to the copy of the writ of *capias* served on the defendant; C. S., c. 37, sched. A, No. 3, R. Mich. 1819, *post:*

"Where the defendant shall not be in actual custody upon a writ of *capias*, the plaintiff, after the execution of the writ, and on filing the same with the sheriff's return endorsed, shall be at liberty to declare *de bene esse* in case special bail shall not have been perfected, * * and all such proceedings as are mentioned in the notice marked No. 3 in schedule A to this act, shall and may be had and taken in default of a defendant's appearance or putting in special bail, as the case may be"—C. S., c. 37, s. 53. The following form of endorsement on a declaration filed conditionally, is given in Impey's K. B. Practice, 187:

"This declaration is filed *de bene esse*, and the defendant is to plead hereto in *twenty* "days, otherwise judgment."

Declaring absolutely before bail is put in and perfected, is a waiver of bail, or of justification, as the case may be—Ch. Arch. (4 ed.) 217. For the mode of declaring against prisoners, see R. Hil., 1839, *post*.

EASTER TERM, 1786—26 GEO. III.

Declaration de bene esse.

1. IT IS ORDERED, (*a*) That upon all process where no affidavit is made or filed of the cause of action, the plaintiff may file or deliver the declaration *de bene esse* at the return of such process, with notice to plead in twenty days; and if defendant doth not enter an appearance or file common bail, and plead within the said twenty days, plaintiff having first filed common bail for defendant, may sign judgment for want of a plea, provided that such declaration be delivered or filed in the clerk's office with notice thereon, within twenty days after the return of such process, and a rule to plead be duly entered.

(*a*) See R. East. 1785, r. 8, n. (*l*) *ante* p. 4.

Notice of Trial.

2. That (*b*) all notices of trial in actions where the defendant lives within the county where the Court sits, be given at least eight days before the first day of the term at which such case is to be tried, and fourteen days if the defendant lives in any other county.

(*b*) Fourteen days notice is to be given in all cases (R. Hil. 1828, r. 1, *post*); and see R. Mich. 1835, *post*, by which Nisi Prius sittings were established.

TRINITY TERM, 1786—26 GEO. III.

Assessment of Damages.—Writs of Inquiry.

THE COURT ORDERED, That in causes where interlocutory judgments have been signed, and the causes of action appear to be upon complicated accounts, the same shall be referred to a jury of inquiry (*a*), and judgment shall be considered to be entered as of the precedent term (*b*).

(*a*) The cases where a reference would be made to a Master to compute are collected in the note to *Holdipp* v. *Otway*, 2 Wms. Saund. 107, 107*a*. A defendant, upon due application therefor, may have the assessment made by a jury; and a judge, who may be applied to for an assessment, may refer the same to a jury, "when the same may appear proper or expedient" (C. S., c. 37, s. 115, cited post, n. to R. Trin. 1838). The rule obtained by a defendant for a writ of inquiry should be promptly served (*Harding* v. *Ledden*, 2 Kerr, 173). "Although a plaintiff has, in strictness of law, a right to have damages determined by a jury in all cases, yet he will not be allowed the costs of the inquiry, where they might have been, or, at all events, where, by the course of practice, it has become usual to have them assessed by the Master" (*Lush*, 706). See R. Mich. 1835, r. 7, and Trin. 1838, *post*, as to assessment by the Court or a judge.

The writ of inquiry is directed to the sheriff, or other proper officer of the county where the venue is laid, unless, in a transitory action, otherwise ordered by the Court or judge. In cases of difficulty and importance, leave may be obtained from the Court or from a judge upon summons (*Cunard* v. *Fraser*, M. T. 1834, Stev. Dig. 343) that the writ may be executed before a judge at Nisi Prius; in which case it is usual, and it would seem proper, to direct the writ to the judge and the sheriff (Chit. Forms, 10 ed., 529; Lush, 709; but see *contra*, *Fowlie* v. *Stronach*, Bert. 57, where a writ so directed was held to be a nullity). The judge sits as an assistant to the sheriff, by whom the inquisition must be returned, and not by the judge (*Fowlie* v. *Stronach*).

The stat. 8-9 Wm. III. c. 11, s. 8, requires that writs of inquiry on bonds, covenants, &c., where breaches are assigned, be executed before a judge at Nisi Prius, and the 16th sec. of 3-4 Wm. IV. c. 42, permitting them to be executed before the sheriff alone, has not been extended to this Province, but the plaintiff may, in some

cases, proceed under C. S., c. 37, s. 115, 117, unless the defendant obtains an order under those sections. Damages may be assessed under the statute by the jury summoned to try the issues at the assizes, and the sheriff need not return any panel on the writ (see *Wheeler* v. *Gow*, 1 Kerr, 580).

Fourteen days notice of the execution of the writ is required by R. Hil. 1828, r. 1, *post*, and ten days notice of countermand by R. Mich. 1848, *post*.

See R. Mich. 1835, r. 7, n., as to the necessary evidence, and how far the judgment admits the cause of action. Where the evidence was calculated to confuse and mislead, and no rule was laid down by the sheriff as to the measure of damages, the Court quashed the inquisition (*Kinnear* v. *Robinson*, 2 Han. 73). The inquisition will be set aside if a verdict be given for the defendant (*Doe* v. *Dobson*, 2 All. 456), and if no verdict be given, another writ may be issued without obtaining leave of the Court (*Ward* v. *Dow*, Bert. 21). See as to the effect of defendant's attendance at the inquisition in waiving irregularities, *Fowlie* v. *Stronach*, *supra*; *McDonald* v. *Upton*, 3 Kerr, 565.

See further, as to writs of inquiry, note to *Fowlie* v. *Stronach* (Stockton's Bert. 118).

The following form of writ for ordinary cases is taken, with slight alterations, from Chit. Forms, 10 ed., 529:

Victoria (&c.) To the sheriff of Greeting. Whereas, A. B., lately in our Court before us, at Fredericton, sued C. D., and declared against him for (&c., *state the substance of the declaration—see* Kinnear *v.* Robinson, *2 Han.* 73*—exclusive of the conclusion, and then proceed thus:*) and the said A. B. claimed $. And such proceedings were thereupon had in our said Court, that the said A. B. ought to recover against the said C. D. his damages on occasion of the premises. But, because it is unknown to our said Court what damages the said A. B. hath sustained in that behalf, therefore we command you, that by the oath of seven (*see C. S., c. 45 s. 15*), good and lawful men of your bailiwick, you diligently inquire what damages the said A. B. hath sustained, as well on occasion of the premises aforesaid as for his cos's of suit in this behalf; and that you send to us, at Fredericton, on the day of now next ensuing (*any day certain, in Term or vacation*, C. S., c. 37, s. 107; 36 Vic., c. 31, s. 110; stat. 1 Wm. IV. c. 7, s. 1), the inquisition which you shall thereupon take under your seal and the seals of those by whose oath you shall take that inquisition, together with this writ. Witness (&c. *The writ may, it seems, be tested in vacation—see* Collet *v.* Curling, 5 *D. & L.* 605; *R. Mich.* 1825, *r.* 1, *n. post*).

(*b*) For the time and manner of entering up judgment on the return of the inquisition, see C. S., c. 37, ss. 107-9 (36 Vic., c. 31, ss. 110, 112; stat. 1 Wm. IV. c. 7, s. 1; Practice Rules of 1853, rr. 55, 56).

Easter Term, 1788—28 Geo. III.

Terms for Trials at Bar.

Ordered, That (*a*) in future the Easter and Michaelmas terms be considered as terms for bringing causes to issue, and that Trinity and Hilary terms for the trial of causes.

(*a*) Omitted as obsolete, in the revised, and Allen's edition: see R. Mich. 1835, r. 1, 2, *post*.

TRINITY TERM, 1790—30 GEO. III.

Security for Costs.

ORDERED BY THE COURT, That (*a*) in all actions commenced in this Court by non-residents of this Province, and in which the plaintiffs are required to give security for the payment of costs, if the said plaintiffs shall lay the venue in the county where the Court sits, such security shall be given and entered into in the sum of twenty pounds and no more; and if the venue is laid in any other county, then in the sum of thirty pounds, and no more.

(*a*) Rescinded, and other provisions substituted, by R. Mich. 1844, r. 1, *post*.

MICHAELMAS TERM, 1791—31 GEO. III.

Agents at St. John and Fredericton.

ORDERED BY THE COURT, That (*a*) all attorneys practising in this Court, who are non-residents of Fredericton, or the city of Saint John, do appoint an agent at one or other of the said places, and give notice to the clerk or his deputy of the name of such agent, and at which of said places he resides, which notice shall be put up in the clerk's office; and that all notices, served on such agents respectively, shall be deemed as proper and legal a service as if served upon such attorney.

(*a*) This rule is never acted on in practice, and may be considered obsolete (All. Rules, 7; *Hatch* v. *Scoullar*, 1 Kerr, 571).

MICHAELMAS TERM, 1796—36 GEO. III.

Special Bail Piece—filing.

ORDERED, That in future all special bail pieces shall be filed as soon after the taking thereof as may be, with the clerk of the Court (*a*).

(*a*) See R. Hil. 1832, *post*.

MICHAELMAS TERM, 1800—40 GEO. III.

Bill of Costs—delivery of.

ORDERED, That every attorney of this Court deliver a regular bill of costs to his client, or to the client of the adverse attorney, as the case may be, before he demands the expenses of the suit;

and all receipts by attorneys from their clients, without this previous step, will be considered as a breach of this Rule (*a*).

(*a*) This rule is to be considered rather as a recognition of, than as a substitution for the statute, 3 Jac. I. c. 7, s. 1 (*Kerr* v. *Burns*, 4 All. 604), by which "all attorneys and solicitors shall give a true bill unto their masters or clients, or their assigns, of all charges concerning the suits which they have for them, subscribed with their hands and names before such time as they, or any of them, shall charge their clients with any the same fees or charges." The statute only applies where the charges are for business done in the superior courts (*James* v. *McLean*, 3 All. 164; *Brickwood* or *Berkenhead* v. *Fanshaw*, Carth. 147; 1 Show. 96; 1 Salk. 86, s. c.; *Raynal* v. *Smith*, 2 B. & Ad. 469). The bill must specify each item of charge. It will not suffice to put the costs of an action in gross, though taxed at that sum between party and party (*Drew* v. *Clifford*, 2 C. & P. 69; *Waller* v. *Lacy*, 1 M. & G. 54). Abbreviations are allowable (*Reynolds* v. *Caswell*, 4 Taunt. 193; *Frowd* v. *Stillard*, 4 C. & P. 51; *Ray* v. *Jackson*, Pract. Reg. 37). It may be subscribed with the name of the firm, such as "Smith & Jago," where the attorneys are in partnership (*Smith* v. *Broxon*, 1 C. & J. 542; *Owen* v. *Scales*, 2 Dowl. N. S. 304). A general account, including the amounts of bills of costs, though made out in the handwriting, and headed in the name of the attorney, is not sufficient (*Kerr* v. *Burns*, *supra*). The signature may be by initials of Christian name or surname only (see *Mayhew* v. *Locke*, 7 Taunt. 63; *James* v. *Swift*, 4 B. & C. 681). The bill must be left with the client; it will not do to shew it, and explain the items (*Crowder* v. *Shee*, 1 Camp. 436; *Brooks* v. *Mason*, 1 H. Bl. 290).

The statutes 2 Geo. II, c. 23, s. 23, and 6–7 Vic. c. 73, do not extend to this Province (*James* v. *McLean*; *Kerr* v. *Burns*, *supra*), it is therefore unnecessary to deliver the bill a month before action.

The statute must be specially pleaded (see *Lane* v. *Glenny*, 7 A. & E. 83; *Brooks* v. *Hayne*, 3 Salk. 19; *Robinson* v. *Roland*, 6 Dowl. 271; *Scarth* v. *Rutland*, L. R., 1 C. P. 642). It is no answer to an action on a bond (see *Marsh* v. *Carter*, Ca. Prac. C. P. 109), promissory note (*Jeffreys* v. *Evans*, 14 M. & W. 210); or, according to *Gordon* or *Jordan* v. *Powell*, Comb. 126; Carth. 57; 1 Show. 48, s. c.; *Brickwood* v. *Fanshaw*, *supra*; 2 Barnard. K. B. 164; Bac. Ab. "Attorney" (C.); Vin. Ab. "Attorney" (R.) and *Hooper* v. *Till*, Doug. 198, an account stated, but see *Scadding* v. *Eyles*, 9 Q. B. 858; *Brooks* v. *Beckett*, *id.* 847; *Elcke* v. *Nokes*, 1 M. & Rob. 359. It has been held that the statute does not extend to special actions upon a promise (*Exely* v. *Livermore*, Allen (K. B.) 4; *Brickwood* v. *Fanshaw*; *Gordon* v. *Powell*, *supra*; but see *Philby* v. *Hazle*, 8 C. B., N. S. 647; *Scarth* v. *Rutland*, *supra*). The client does not waive the statute by not objecting to the non-delivery, and offering to pay part of the sum demanded (*Kerr* v. *Burns*, *supra*).

A security for future costs will be avoided on application to the Court (*Jones* v. *Hunter*, 1 Dowl. 462, see *Smith* v. *Jones*, 2 All. 176), or reduced *pro tanto* (*Holdsworth* v. *Wakeman*, 1 Dowl. 532). For instances where Equity will relieve against securities for costs incurred, see *Pearson* v. *Benson*, 28 Bea. 598; *Morgan* v. *Higgins*, 1 Giff. 270; *Thomas* v. *Cross*, 10 Jur., N. S. 1163; *Walmesley* v. *Booth*, 2 Atk. 27; *Sanderson* v. *Glass*, *id.* 296; *Peston* v. *Dunbar*, 1 Anst. 126; *Proof* v. *Hines*, Cas. t. Talbot 111; *Newman* v. *Payne*, 4 Bro. C. C. 350.

Independently of the statutes 2 Geo. II. c. 23 and 6–7 Vic. c. 73, the Court has a

common law jurisdiction to compel the delivery of a bill (*Clarkson* v. *Parker*, 4 M. & W. 532; *Gunter* v. *Sharp*, 1 P. & B. 286), but cannot direct a taxation (*Weymouth* v. *Knipe*, 3 B. N. C. 387; *Slater* v. *Brookes*, 9 Dowl. 349; *Ex parte Cardross*, 5 M. & W. 545; *Crowdell* v. *Neale*, 1 C. B. N. S. 332; *Clarkson* v. *Parker*, *supra*; *contra*, *Wilson* v. *Gutteridge*, 3 B. & C., 157; *Ex parte Arrowsmith*, 13 Ves. 124; *Luxmore* v. *Lethbridge*, 5 B. & A. 899; *Anon.*, 2 Chit. R. 155), unless the bill containing taxable items has been made the subject of an action or set-off (*Chit. Arch.* 12 *ed.*, 117).*

Hilary Term, 1805—45 Geo. III.

Blank Writs.—Præcipes.

It is ordered, That the clerk of this Court (*a*) be in future authorized to deliver blank writs, signed and sealed (*b*), to the several and respective attorneys of this Court, to be by them (*c*) filled up as occasion may require; they accounting to the said clerk therefor, and forthwith forwarding to him proper præcipes (*d*) for such of the said writs as they may from time to time fill up and issue, in the same manner as is practised by filacers in England.

(*a*) The clerk of the Crown cannot issue blank writs (R. Trin. 1860, *post*).

(*b*) See *Hibblewhite* v. *McMorine*, 6 M. & W., p. 207. R. Mich. 1825, *post*, prohibits the issue of writs not signed and sealed.

(*c*) Or some other *attorney* (R. Hil. 1810, r. 2). As to the authority of an attorney's

* In an action on a bill of costs incurred in an inferior Court the items may be examined into at the trial, although the better course would be, and one which would be generally acceded to on the recommendation of the judge, to have a verdict taken subject to taxation and reduction by the clerk of the Supreme Court (*James* v. *McLean*, 3 All. 169. The taxation between party and party in the inferior Court is not binding on the client (*id.*) Where a bill of costs incurred in defending the defendant against a criminal charge had been taxed under a judge's order by the clerk, who, in conformity with a long established practice, taxed such items as the ordinance provided for and refused to recognize or touch the other items, it was held that the jury were bound by the clerk's taxation as to the taxable items, and the other items were left to them to find whether the services had been performed and their value (*Peck* v. *Tingley*, 1 Han. 418). *Quære*, if the clerk had followed the English practice and taxed the whole bill whether it would have been sustained (*id.*) An attorney can recover money paid by him *with the consent of his client* for special jury fees (*Ex parte James*, 3 All. 286) or counsel fees (*id.*; *Jack* v. *Clews*, 3 Kerr, 637), though the judge has refused a fiat. An attorney who is employed, with the assent of the attorney in the cause, to prepare a declaration is entitled to recover from the client charges for drawing, copying, etc., taxable to an attorney (*In re Bayard*, 1 All. 571). As to the liability of an agent who retains an attorney to carry on suits for a foreign principal, see *Jack* v. *Clews*, 3 Kerr, 637. As to what should be submitted to the jury where the defence is that the attorney settled the suit without the client's authority, see *Dibblee* v. *Wood*, 1 Pugs. 137.

A barrister cannot retain for counsel fees money belonging to his client which comes into his hands as attorney, without the precedent or subsequent assent of the client, express or implied (*In re Bayard*, 1 All. 359); nor can he maintain an action for such fees (*id.*; *Kerr* v. *Burns*, 4 All. 604; *Peck* v. *Tingley*, 1 Han. 418; *Kennedy* v. *Broun*, 13 C. B. N. S. 677; *Egon* v. *Kensington Union*, 3 Q. B. 935; *Mostyn* v. *Mostyn*, L. R. 5 Ch. 457; *Add. Con.*, 7 *ed.*, s. 851).

clerk to issue a writ in the absence of instructions from the attorney, see *Jones* v. *Cair* (5 All. 638). As to when a writ is issued, see R. Mich. 1825, r. 1, note, *post*.

(*d*) See R. Hil. 1810, r. 2.

HILARY TERM, 1807—47 GEO. III.

Travelling Charges.

ORDERED, (*a*) That in future the travelling charges to be taxed in causes at Nisi Prius be estimated from the place of residence of the counsel, attorneys and clerk of the circuits respectively to the place where the Court sits; and that the trials of causes in this Court at Fredericton hereafter be considered as trials Nisi Prius, and travelling charges taxed accordingly, unless in the case of trials at Bar.

(*a*) Omitted as obsolete in Allen's edition.

TRINITY TERM, 1809—49 GEO. III.

Entry of Causes at Term.

ORDERED, (*a*) That all causes for trial, and all demurrers, special motions and arguments be entered with the clerk on the first day of each term respectively; and that all causes for trial be noticed for the term generally, and that the same come on to be tried on the first day of the term in the order in which they are entered, and that after the jury causes shall have been tried, demurrers and other special matters come on to be argued in the order in which they are entered, otherwise that they stand over to the next term, unless special permission be obtained to the contrary.

(*a*) Omitted in Allen's edition. See R. Hil. 1826, r. 3, establishing the Crown and Special papers.

HILARY TERM, 1810—50 GEO. III.

Judgment Rolls—filing.

1. IT IS ORDERED, That the rolls of all judgments (*a*) entered at the several terms be brought in and filed on or before the first day of the term next after the term in which they shall be respectively entered (*b*).

(*a*) See r. 3, *infra*, for the manner of preparing judgment rolls.

There can only be one judgment roll in the same action (*Watson* v. *Robert*, 3 Kerr, 509). Where one of several defendants is acquitted, he cannot enter up a separate judgment for his costs, but the award of costs should be entered on the plaintiff's judgment roll; neither is a defendant in such a case entitled to enter on a separate roll a judgment on demurrer going only to part of the cause of action (*McLaughlin* v. *Wilson*, 2 Kerr, 626, and see *Allison* v. *Smith*, 4 All. 238). The Court will not allow a new judgment roll to be made up and filed *nunc pro tunc*, unless it clearly appears that the former one was actually in the clerk's office (*Sheldon* v. *Smith*, A. C. MS. 136; All. Rules 8; and see as to entering judgment *nunc pro tunc*, *Beardsley* v. *Pibblee*, 1 Kerr 642; C. S., c. 37, s. 109). As to amendment of judgment rolls, see *McMillan* v. *Ritchie*, 2 All. 469; *Smith* v. *Senea*, 4 All. 266.

(*b*) The judgment roll and the docket required by C. S., c. 37, s. 114, are filed at the time of signing judgment and taxing costs.

Blank Writs.—Affidavits for Bail.—Præcipes.

2. That in all cases where blank writs shall be filled up by the attorneys, the præcipes and affidavits for bail (*c*), in cases of bailable process, be transmitted to the clerk's office by the very first opportunity, after issuing the process; and that no attorney do, on any account, suffer any blank writ to go out of his hands to be filled up and issued by any other than an attorney of this court; and that no rule to plead, or other proceeding in the cause be had, unless the præcipe (*d*) and the affidavit, in cases where an affidavit is made, be duly filed.

(*c*) This part of the rule is only directory, and a defendant is not entitled to be discharged out of custody on filing common bail because the affidavit had not been filed in the clerk's office before the writ was returned and filed (*McPherson* v. *Hoskins*, before *Carter*, *J.*, at chambers July 1840; *Allen's Rules*, 8, n.). In *Read* v. *McLellan* (1 All. 3), it was held to be sufficient if the affidavit was filed within the time appointed by R. Hil. 1837, *post*, for entering the cause and filing the writ and docket, and see *Gilmour* v. *Simpson*, 5 All. 213; *Palmer* v. *Dinsmore*, 2 Pugs. 150. But if the affidavit was not on file at the expiration of that period, the defendant would be discharged (*Roller* v. *McEachern*, 1 All. 5, n.), or bail relieved from their recognizance (*Palmer* v. *Dinsmore*, *supra*), unless the omission was most satisfactorily accounted for. Though entering special bail was not a waiver of the omission, it was otherwise as to pleading (*Read* v. *McLellan*, *supra*); and see further, as to waiver, *Lewis* v. *Weldon*, 2 P. & B. 145. The attorney should file the affidavit, notwithstanding a judge's order for the arrest is made (*Palmer* v. *Dinsmore*).

(*d*) *Quære*, whether proceedings will be set aside for want of a *præcipe*? Entering an appearance is a waiver of the objection (*Kerlin* v. *Baillie*, 2 All. 115). It is merely a note of instruction to the clerk, who is supposed to make out the writ therefrom, styled by *Mansfield*, *C. J.*, in *Boyd* v. *Durand* (2 Taunt. 164), "a little worthless memorandum, which is no authority at all."

Judgment Rolls—Engrossing.

3. That all judgment rolls be engrossed upon parchment in a

fair legible hand, with a margin of not less than an inch in breadth, and a sufficient space at the top for binding up the same, and at the bottom for numbering the roll; and that no roll be received or filed by the clerk that is not made up in the manner herein directed (*e*).

(*e*) The roll is to be endorsed with the title of the term (R. East. 1848, r. 1, pl. 5, *post*) and of the cause, and with the attorney's name, and is to be folded to a width of, at least, two and a half inches (R. Hil. 1875, r. 3, *post*).

Process.—Parchment.

4. That no processes be signed or filed by the clerk which are not engrossed upon parchment, agreeably to the former rule (*f*) of this Court in that behalf made.

(*f*) East. 1785, r. 1, *ante*, p. 1.

Dockets and Fees.

5. That the rule (*g*) respecting the filing of dockets and payments of fees be strictly enforced, and that the clerk report to the Court any delinquency in this respect without delay.

(*g*) East. 1785, r. 4, *ante*, p. 3. See R. Mich. V. 1816; Hil. 1837, r. 2, *post*.

EASTER TERM, 1810—50 GEO. III.

Replevin.

1. IT IS ORDERED, That the writ of replevin, under the Act of Assembly, 50 Geo. 3d, c. 21 (*a*), be in the form following, viz:

"George the Third, by the Grace of God, of the United Kingdom (L. S.) of Great Britain and Ireland, King, Defender of the Faith, &c. &c. &c. To the Sheriff of GREETING.

"We command you, if A. B. shall make you secure of prosecuting his complaint, and also of returning the goods and chattels, to wit: which C. D. hath taken and unjustly detained as it is alleged, if a return thereof shall be adjudged, that then the goods and chattels aforesaid, to him, the said A. B., without delay you cause to be replevied and delivered; and put by sureties and safe pledges the aforesaid C. D., that he be before us at Fredericton on the Tuesday in next, to answer to the said A. B. of a plea, wherefore he took the said goods and chattels of the said A. B., and them unjustly detained against gages and pledges, as he saith, and have there then the names of the pledges and this writ. Witness at Fredericton, the day of in the year of our reign."

And if the defendant shall not appear at the return of such writ, or within twenty days after the return thereof, then the plaintiff

shall be at liberty to issue a process against such defendant, returnable at the next ensuing term, in the following form:

"George the Third, by the Grace of God, of the United Kingdom (L. S.) of Great Britain and Ireland, King, Defender of the Faith, &c. &c. &c. To the Sheriff of GREETING.

"We command you that you take C. D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us, at Fredericton, on the Tuesday in next, to answer A. B., of a plea, wherefore he took the goods and chattels of the said A. B., and them unjustly detained against gages and pledges, as he saith, and have you there then this writ. Witness at Fredericton, the day of in the year of our reign."

And shall serve such defendant personally with a copy of such process, upon which copy shall be written an English notice to such defendant of the intent and meaning of such service; which notice shall be in the form used in the service of processes in actions in which no affidavit shall be made and filed of the cause of action; and if such defendant shall not appear at the return of such process, or within twenty days after such return, the plaintiff shall be at liberty, upon the usual affidavit being made and filed of the personal service of such process, to enter a common appearance, or file common bail for such defendant, and to proceed thereon as if such defendant had entered his or her appearance or filed common bail.

(*a*) This Act, reciting that no County Courts are held by the sheriffs in this Province, and that the proceedings in replevin by writ issuing out of Chancery are dilatory and expensive, enacts by section 1, that such actions shall and may be prosecuted by writ issuing out of the Supreme Court, and that such writ shall be framed by the judges conformably, as near as may be, to the writs and processes in that behalf used in England; and by sec. 2, that like proceedings shall be had upon such writs as could be had in case they issued out of Chancery returnable in the Supreme Court. 13 Vic. c. 53 repealed this Act, and re-enacted these sections, in effect, by s. 12, and incorporated the above forms, as schedules "F" and "M" (ss. 12, 18). Among the alterations made by 1 R. S., c. 126, the provisions of which relating to this action in the Supreme Court are re-enacted by C. S., c. 37, was the abolition of these forms and the substitution of a writ made to answer as well for the replevying of the goods as for requiring the appearance of the party. By sec. 200 of the latter Act: "The action of replevin, whether for the unlawful taking or detaining" (*Firth* v. *Fitzpatrick*, 6 All. p. 355) "of any goods or chattels, shall and may be prosecuted by writ (Form No. 1 in Schedule D), issued out of the Supreme or County Courts, and the sheriff, at the time of seizing the goods, shall serve the party in possession with the copy thereof, which service shall be effected as in all other cases of non-bailable writs, to which he may appear within twenty days, inclusive of the day of service, and neglecting to do so, the plaintiff may proceed as in personal actions." Before the Revised Stat.,

the writ would have been set aside, if it was issued against one not actually or constructively the *taker* (*Groves* v. *Griffith*, Stev. Dig. 361; and see *Cliff* v. *Gunter*, 2 Kerr, 493), and the sheriff could not take the goods unless they were in the possession of the defendant named in the writ (*Wiggins* v. *Garrison*, Bert. 17). Since that Act the party out of whose possession the goods were replevied becomes *ipso facto* defendant, though he be not named in the writ (see *Wheeler* v. *Stewart*, 3 Pugs. 398; *Vanwart* v. *Shepherd*, 2 P. & B. 225). It has been held, however, that it is no ground for setting aside proceedings; that the defendant was not the proper party to be served, he not being in possession at the time of the issue or service of the writ (*Davidson* v. *King*, 2 Pugs. 5), nor can the objection be taken by plea (*id.* p. 532).

At common law, replevin in general lies in all cases where there has been a wrongful taking of personal chattels, where the party has in them either an absolute or special property (2 Saund. Pl. & Ev., 768; 2 Sel. N. P., 1185; *George* v. *Chambers*, 11 M. & W. 149; *Ex parte Chamberlain*, 1 Sch. & Le. 320; *La Massen* v. *Dixon*, Sir W. Jones, 173; *Bishop* v. *Montague*, Cro. Jac., 4 ed., 50; note to *Roberts* v. *Snell*, 1 M. & G. 577; *Allen* v. *Sharp*, 2 Exch. 352; *Mellor* v. *Leather*, 1 E. & B. 619; *Jones* v. *Johnston*, 5 Exch. 875; see *Mennie* v. *Blake*, 6 E. & B. 842); and it is a co-extensive remedy with trespass in such cases (*Lyons* v. *Goram*, M. T. 1831, Stev. Dig. 361; see *McGowan* v. *Betts*, 2 Han. 321, *per Ritchie, C. J.*). It lies by the owner of land for timber cut upon and taken away from it, and the proceedings will not be set aside, though the party taking the timber claims title to the land (*Lyons* v. *Goram*). The mortgagor of chattels, in possession by consent of the mortgagee, may maintain the action (*Elston* v. *Vance*, 5 All. 634), as may a pawnee, even against the pawnor (*Gibson* v. *Boyd*, 1 Kerr, 150, the replication need not in such case shew the special property, but may take issue on the plea of property (*id.*). The property required in the plaintiff is the same as that necessary to sustain trover (Chitty on Pl., 16 ed., 183). Where the defendant mixed the plaintiff's chattels with others belonging to himself, which he refused to point out, and which could not otherwise be distinguished, it was held that this did not deprive the plaintiff of his right to replevy, but that the sheriff was justified in seizing the whole (*Desbrisay* v. *Mooney*, 2 All. 53).

Any objection to the form of action, on the ground that the taking is by virtue of an execution out of a superior court or in right of the Crown (*McGowan* v. *Betts*, 2 Han. 314, 296; *Gilb. Dis.* 138, 139), should be taken by application to set aside the writ, and not by plea (*Graham* v. *Wetmore*, 4 All, 377; *Desbrisay* v. *Little*, 6 All. 392; *Hanington* v. *Girouard*, 3 Pugs. 151). In *Breeze* v. *Stockford*, 3 All. 328), a writ of replevin for goods seized under a warrant of a justice, was thus set aside, but "this was admitted to be an exceptional case, the object of the Act under which the warrant issued being the *destruction* of liquor kept for illegal sale, which would have been entirely defeated by a replevin" (*per Allen, J.*, in *McGowan* v. *Betts*, *supra*). The writ will not be set aside on motion, unless in a clear case, and where there was some proof of property and possession in the plaintiff, and to connect the defendant with the taking, the Court refused to interfere (*Cliff* v. *Gunter*, 2 Kerr, 493). The Crown cannot sue in this form of action (*R.* v. *McMahon*, 3 All. 125).

By Stat. 11 Geo. II. c. 19, s. 19 (enacted in this Province by 50 Geo. III. c. 21, s. 7; 13 Vic. c. 53, s. 5; 1 R. S. c. 126, s. 7; C. S., c. 83, s. 7), an irregularity in conducting a distress for rent, where rent is justly due, does not make the landlord a trespasser *ab initio*; and replevin, accordingly, can be maintained only where no rent whatever was in arrear (*Harrison* v. *Barnby*, 5 T. R. 248 *n.*; *Cobb* v. *Bryan*, 3 B. &

P. 348), or where there had been a tender (see *Branscombe* v. *Bridges*, 1 B. & C. 145; *Smith* v. *Goodwin*, 4 B. & Ad. 413), or the goods were exempt from distress (*Nargett* v. *Nias*, 1 E. & E. 439), with the exception of animals *ferae naturae*, and perhaps fixtures), Woodf. L. & T., 11 ed. 455), or the like where the original seizure was wholly unjustifiable. If any sum, however small, was due, and the distress was for a greater sum, or excessive, or otherwise irregular, the remedy must be by action for the special damage. The 1 R. S., c. 126, s. 7, of which C. S.. c. 83, s. 7, is a literal copy, does not follow the terms of the prior Acts, and it has been held under it, by a majority of the Court, that breaking open the outer door of a dwelling house, in order to distrain, is merely an irregularity, and does not entitle the tenant to maintain replevin (*Myers* v. *Smith*, 4 All. 207). A contrary construction has been given to the English Act, see *Attack* v. *Bramwell*, 3 B. & S. 520; and see *Hancock* v. *Austin*, 14 C. B., N. S. 634; *Nash* v. *Lucas*, L. R., 2 Q. B. 590.

Substantial damages for the taking and detention may be given in replevin as in trespass (*Firth* v. *Fitzpatrick*, 6 All. 348; *Domville* v. *Keavan*, 2 Han. 392; *Davidson* v. *King*, 3 Pugs 396; *Gibbs* v. *Crookshank*, L. R., 8 C. P. 454; *contra*, *Gibson* v. *Boyd*, 1 Kerr, 150); and special damages may be laid and recovered (*Domville* v. *Keavan*, *supra*; *Davis* v. *Cushing*, 5 All. 383, 642; *McGowan* v. *Betts*, 2 Pugs. 90). The value of the goods is not recoverable in the present form of action in the *detinuit* (see Wms. Saund. 347*b*, *n*. (2). The plaintiff cannot recover for goods which were not replevied by the sheriff, and the defendant may shew at the trial that they were not replevied (*Steeves* v. *Wilson*, 1 Pugs. 186); such goods should not be included in the declaration (*id.*). As to the effect of a judgment for plaintiff in replevin as a bar to an action by him against a third party for damages for a previous detention, see *Goddard* v. *Fredericton Boom Co.* (6 All. 448).

Damages may also be awarded to a defendant, see R. Mich. 1840, *post*.

Replevin is not within the Acts requiring notice of action to be given (*Gay* v. *Mathews*, 4 B. & S. 425, 440; *Fletcher* v. *Wilkins*, 6 East. 283; *Jones* v. *Johnson*, 6 Exch. 133; *Sterling* v. *Jones*, 2 All. 522); nor is the want of notice available in reduction of damages (*McGowan* v. *Betts*, 2 Pugs. 90; and see *Firth* v. *Fitzpatrick*, *supra*, *per Ritchie*, *C. J.*; but see *Pease* v. *Chaytor*, 3 B. & S. 620; *Mellor* v. *Leather*, 1 E. & B. 619).

See further as to this action, Stockton's note to *Wiggins* v. *Garrison* (Bert. 17).

A bond must be taken by the sheriff before the execution of the writ (see R. Mich. 1840, *post*).

2. AND IT IS FURTHER ORDERED, That in all cases in which the sheriff shall be a party, the foregoing processes shall be directed to the coroner, as in other cases in which the sheriff is a party (*b*).

(*b*) If the sheriff be interested, as where he is an inspector of an insolvent's estate, of which the plaintiff is assignee, a writ directed to him will be set aside (*Fairweather* v. *Nevers*, 2 Pugs. 524; see Gilbert on Distress, 4 ed. 121, 141). "'Sheriff' shall mean coroner, or other officer or person authorized by law to act when the sheriff is interested, or the office may be vacant" (C. S., c. 118, sub-s. 37).

MICHAELMAS VACATION, 1816.

Judges' Fees.

The clerk having, by direction, furnished the Court with a statement of the arrears due from the several and respective attorneys, up to Easter term, 1815, inclusive, on account of fees remaining in their hands due to the judges (*a*), It is ordered, that he forthwith give notice to them respectively, that they be prepared to pay him their respective balances at the ensuing Easter term in May next; and that hereafter the rule entered at Easter term, in the year 1785 (*b*), be strictly and punctually enforced, in order to which the clerk is further directed not to file any papers, nor sign any processes, for any attorney who shall hereafter neglect to comply with the same rule (*c*).

At Chambers, Fredericton, 26th January, 1816.

J. BLISS,
JOHN SAUNDERS,
WARD CHIPMAN.

(*a*) Under the Ordinance of Fees—"Judges' fees" (C. S., c. 119, p. 956). By C. S., c. 26, re-enacting 32 Vic. c. 12, these fees are payable to the Clerk of the Pleas, except the trial fee, which is to be paid to the Clerk of the Circuits, to be by them paid over to the Receiver General. All rules and orders to secure the payment are continued in force, and the clerk is empowered to take proceedings for their recovery.

(*b*) *Ante*, p. 3.

(*c*) See R. Hil. 1820, r. 2, *post* 22. Where the plaintiff, after giving notice of setting down for argument a demurrer, discovered that the defendant's papers had not been filed, in consequence of the attorney being in contempt for non-payment of court fees, and thereupon signed interlocutory judgment, the Court refused to set it aside, though the attorney afterwards purged the contempt by paying the fees, and obtained an order to file his papers (*Partelow* v. *Smith*, 3 Kerr, 349). In *Lynott* v. *Seely* (1 All. 35), a judgment on verdict for the plaintiff, who had not filed his papers, was sustained, but the attorney was deprived of his costs. See as to change of attorney, where the original attorney is in contempt, *Kirlen* v. *Baillie*, 2 All. 115; *Kelly* v. *Doe*, 4 All. 256.

The non-payment of the library fee, under C. S., c. 34 (22 Vic. c. 28; and 37 Vic. c. 16), also incapacitates an attorney from practising, and renders all writs and proceedings illegal and void (*DesBrisay* v. *Mackay*, 1 Han. 138), and the defect cannot be cured by the consent of the other side (*Ryan* v. *McIntyre*, 2 Han. 247). It is sufficient, if the fee be paid before the actual issue of the writ, though after the *teste* (*Seelye* v. *Bliss*, 1 P. & B. 53). In *Voto* v. *Quinsler* (2 Pugs. 432), it was held that the Act did not extend to County Courts, but this is now changed by the above chapter of the Con. Stat., and see c. 51, s. 6.

The Saint John Law Society's Act, 41 Vic. c. 62, contains, in sec. 7, an enactment similar to that in sec. 4 of C. S., c. 34, to which the above cases, *Voto* v. *Quinsler*, excepted, are applicable (*Weldon* v. *Hagan*, before *Watters, J. C. C.*).

HILARY TERM, 1819.—59 GEO. III.

Writs of Assistance.

IT IS ORDERED, That the writs of assistance to the officers of His Majesty's Customs in this Province (*a*) do issue out of this Court, from time to time, according to the practice of the Exchequer in England. (*b*).

(*a*) The Imperial Act 7 Geo. III. c. 36, authorizing Colonial Courts to issue writs of assistance (ss. 10, 11,) is repealed by 30-31 Vic. c 59. A Supreme and Exchequer Court is established by the Dominion Act, 38 Vic. c. 11.

(*b*) The Supreme Court does not possess the jurisdiction of the Equity side of the Exchequer in England, even in revenue cases (*Att. Gen.* v. *Bailie*, 1 Kerr, 443). See as to the jurisdiction and practice of the Court as a Court of Exchequer, *R.* v. *Appleby*, Bert. 397; *R.* v. *Gerow*, 5 All. 633; *R.* v. *Street*, 1 Kerr. 373; *R.* v. *Morse*, A. C. MS. 28; *Wilson* v. *Briscoe*, 2 All. 535; *Price* v. *Bayard*, 5 All. 234.

Costs are recoverable by and against the Crown in suits by the Crown—C. S., c. 10, ss. 4, 5 (20 Vic. c. 6, ss. 1-2). Rules may be made by the judges for regulating the proceedings in the Court of Exchequer, *id.* s. 6.

MICHAELMAS TERM, 1819—59 GEO. III.

Special Bail.

ORDERED, That the time for putting in special bail, agreeably to the rule made in Easter term, in the twenty-fifth year of His present Majesty's reign, be enlarged to thirty days (*a*).

(*a*) By the form of the notice subscribed to the copy of the writ of *capias*, given by C. S., c. 37, sched. A. No. 3 (see sec. 53), bail is to be put in within thirty days after the day of the arrest, inclusive of such day. Where the *capias* is issued under the 27th sec., in an action already commenced, twenty days only are allowed. An extension of time may be obtained on judge's summons, returnable before the time has expired (1 Chit. Arch. (12 ed.) 833). If put in before a commissioner, it should be put in in sufficient time to allow the transmission of the bail piece to the judge, before the expiration of the time. See R. Hil. 1832, *post*, as to putting in and perfecting bail.

HILARY TERM, 1820—60 GEO. III.

Attorneys—Non-resident.

1. IT IS ORDERED, That in future, no attorney of the Court not being an established resident within the Province, be permitted to act as an attorney of this Court (*a*).

(*a*) See as to re-admission, R. Mich. 1837, rr. 6, 7, 8, *post*.

Dockets and Fees.

2. Whereas, by a standing rule of this Court, made and entered of Easter Term, in the twenty-fifth year of His Majesty's reign (*b*), it is ordered—

"That every attorney of this Court enter the return and file the writs or process in all actions which have not been agreed, and in which they intend to proceed, and shall make a docket of all such returns and rules, and on the last day of the Term shall deliver the same, *with the writs and processes in such actions*, to the clerk of the Court, and shall pay to the clerk of the Court his own fees, as well as those of the judges and crier in such actions."

And whereas, notwithstanding the repeated orders of this Court (*c*) enjoining a strict and punctual compliance with the said rule, the same has been in various instances violated and neglected: It is hereby ordered, that in future, if any attorney of this Court shall neglect a compliance with the said rule, in every respect, agreeable to the true intent and meaning thereof, on or before the first day of the term next after the term in which such rule ought to have been complied with, every such attorney shall be considered as in contempt of the Court, on account of such neglect of, and disobedience to the said rule. And the clerk of this Court is hereby enjoined not to receive or file from, or for, any such attorney, at any time afterwards, any writ, præcipe, process, or any other paper or proceedings whatever, of a date subsequent to the term in which such rule ought to have been complied with, until such contempt shall have been purged in compliance with the said rule. And the clerk is further enjoined, on the second day of the term next after the term in which the said rule ought to have been complied with, to prepare, and deliver to the Court, the name or names of all such attorneys as shall be so in contempt as aforesaid.

(*b*) R. East. 1785, r. 4, *ante* p. 3. The words in italics are not in the rule.
(*c*) R. Hil. 1810, r. 5, *ante* p. 16; Mich. Vac. 1816, *ante* p 20.
See R. Hil. 1837, r. 2, *post*, making new provisions for the filing of writs and entering of causes, and R. Mich. Vac. 1816, *ante*, as to payment of judges and clerk's fees.

HILARY TERM, 1821—2 GEO. IV.

Calculating Interest.

Interest upon bonds, debts, and other securities for money, pay-

able with interest (*a*), should be ascertained by adding the interest to the principal at the time of each payment, and deducting the payment, which is the same thing as first deducting the interest from the payment, and then giving credit for the balance on account of principal; and not by charging the interest upon the whole bond to the time of last payment, and interest for the debtor on the several payments from their respective dates, thereby inverting the principle of compound interest, and charging interest on his own debts, when a payment is made of less than the interest due at the time. Nothing should be credited until a sum is paid equal to the interest then due, except by endorsing it specially as a sum paid in part of the interest then due.

(*a*) At common law interest is payable where there has been a contract to that effect, express or implied, from the usage of trade or mode of dealing between the parties (*St. John Bridge Co,* v. *Woodward*, 1 Kerr, p. 37; *Ex parte Williams*, 1 Rose, 399). An agreement to pay even compound interest may be so implied (*Fergusson* v. *Fyffe*, 8 Cl. & F. 121). Interest is generally allowed on a bond with a penalty (*Hellier* v. *Franklin*, 1 Stark. 291; *Farquhar* v. *Morris*, 7 T. R. 124; *Hogan* v. *Page*, 1 B. & P. 337, see *St. John Bridge Co.* v. *Woodward, supra*). It may be given by the jury, if they think proper, and it seems it should not be withheld by them in the absence of negligence or default on the part of the holder (*Du Belloix* v. *Waterpark*, 1 D. & R. 16; *Cameron* v. *Smith*, 2 B. & A. p. 308; *Laing* v. *Stone*, 2 M. & R. 229; Ros. Ev. 13 ed., 586), on bills and notes, though not thereby specially reserved, from their maturity (*Gault* v. *McKenzie*, 3 Camp. 51), or when payable on demand, from the commencement of the action, if there has been no previous demand (*Pierce* v. *Fothergill*, 2 B. N. C. 167). To obtain it, the bill, &c., must be produced at the trial, though admitted on the record (*Hutton* v. *Ward*, 15, Q. B. 26). As in such cases interest is not part of the debt, but merely damages, a plaintiff has no right to arrest for it (*Gray* v. *Alcorn*, 1 P. & B. 555, see *Callum* v. *Leeson*, 2 Cr. & M. 406).

In most other cases there has been a considerable dispute upon the question, and the leaning of the courts seemed, on the whole, against allowing it (*Smith's M. L.*, 8 ed., 536). See the cases cited, 3 Fish. Dig. 4057; and *Ansley* v. *Peters*, 1 All. 339 (covenant—allowed); *Hammond* v. *Robinson*, 2 Kerr, 295 (money had and received—refused; *Raymond* v. *Hay*, 1 Kerr, 99 (*id.*—allowed); *Lee* v. *Howe*, 2 Kerr, 552 (account stated—refused); and *Southerland* v. *Gilmour*, 2 All. 481. Bail are only liable for the sum sworn to and costs, and the Court will not allow interest on the judgment against the principal in an action on their recognizance (*Byron* v. *Flagg*, 2 P. & B. 396; *contra*, in debt, *Tidd*, 9 ed. 1100, see *Lush*, 664).

By C. S., c. 37, s. 118 (7 Wm. IV. c. 14, s. 21; 12 Vic. c. 39, s. 27; 36 Vic. c. 31, s. 121; Stat. 3-4 Wm. IV. c. 42, s. 28), interest may (*Atwood* v. *Taylor*, 1 M. & G. 279) be allowed from the time debts or sums certain (*Ansley* v. *Peters*, 1 All. p. 345) are payable, if payable by virtue of some written instrument, at a certain time (*Duncombe* v. *Brighton C. N. H. Co.*, L. R., 10 Q. B. 371); or, if payable otherwise, then from the time when demand of payment shall have been made, in writing, so as such

demand shall give notice to the debtor that interest will be charged from the date thereof (*Morratt* v. *Londesborough*, 4 E. & B. 1), until the time of payment. The demand cannot be made after action is brought (see *Anderson* v. *Fawcett*, 3 P. & B. 34).

By the following sec. the jury may give damages in the nature of interest in actions of trover or trespass, *de bonis asport* (see *Kinnear* v. *Robinson*, 2 Han. 73; *Burpee* v. *Carvill*, 3 Pugs. 235; *People's N. Bank* v. *Stewart*, 3 P. & B. 268; *Jackson* v. *McLellan*, *id.* 432); or on policies of insurance (see *Commercial Bk.* v. *European A. Society*, 2 Han. 245).

Interest is to be calculated down to the time of final judgment (*Robinson* v. *Bland*, 2 Burr. 1085-8). As to when verdicts and judgments carry interest, see R. Mich. 1856, *post*.

The Canadian Stat. 38 Vic. c. 18, s. 1, enacts: "That from and after the passing of this Act" (8th April, 1875), "any person, or persons, may stipulate for, allow and exact, on any contract or agreement whatsoever, made or to be performed in the Province of New Brunswick, any rate of interest or discount which may be agreed upon." The 2d sec. excepts banks and corporations, and the 3d saves rights and liabilities in respect to acts theretofore done. See 43 Vic. c. 42, as to interest on mortgages of real estate. Contracts made between the above date and 13th April, 1859, are governed by Provincial Act, 22 Vic. c. 21; and see the Rev. Stat., c. 102—C. S., p. 1061.

Where a contract is to pay a sum of money, with interest, at a given rate, on a certain day, if the sum be not paid on that day, there is no contract to continue to pay the same rate of interest after the day for payment; damages may, however, be awarded for the non-payment, and the former rate may be taken as a guide in assessing the damages (*Cook* v. *Fowler*, L. R., 7 H. L. 27; see *Keen* v. *Keen*, 3 C. B., N. S., 144; *In re Roberts*, L. R., 14 Ch. D. 49; *Briggs* v. *Winsmith*, 30 American Rep., 46 and note).

A count for interest is unnecessary, in cases where the law allows it to be given as damages (*Bank of Nova Scotia* v. *Morrow*, 2 Pugs. p. 461, and see C. S., c. 37, s. 49).

HILARY TERM, 1822—3 GEO. IV.

Attorney—Admission of.

IT IS ORDERED (*a*), That no person producing a certificate of admission as an attorney in the Supreme Court of any other Province, Colony, or Island in His Majesty's dominions, in order to obtain admission and enrollment as an attorney of this Court, shall be so admitted and enrolled unless he shall have served a regular apprenticeship of not less than three years at least in the office of some regularly admitted attorney in the Supreme Court of such Province, Colony, or Island, nor unless he shall produce an authenticated copy of the certificate of such service, by virtue of which he may have obtained admission as an attorney in such Province, Colony, or Island; and the same cer-

tificate shall include all the qualifications requisite in that behalf, to be included in the certificates of service as apprentices to the law in this Province.

(*a*) See substituted rule, Hil. 1823, r. 2, *infra*.

HILARY TERM, 1823—4 GEO. IV.

Admission of Attorneys and Barristers.

1. IT IS ORDERED, That hereafter no person, who shall study the law in this Province for the purpose of being admitted an attorney of this Court shall be so admitted, unless he shall have so studied with some barrister of this Court for the term of four years, if he be a graduate of any college, or if not such graduate, for the term of five years; *Provided*, that this rule shall not extend to any person who shall have commenced his studies under any barrister or attorney of this Court before the commencement of the present term (*a*).

(*a*) By C. S., c. 33, ss. 1, 2, 3, re-enacting 26 Vic. c. 23, as explained by *Ex parte Travis* (1 Han. 30), 30 Vic. c. 7, s. 1, and 31 Vic. c. 3, the term of study, where a student has taken the degree of A. B. at the colleges therein mentioned, before being entered as a student, or of L. L. B., before applying for admission as an attorney, is three years; in other cases it is four years. See R. Trin. 1843, r. 6, as to effect of discontinuance of study; and R. Hil. 1867, as to the examination of students.

See rule 6, *infra*, by which barristers only are entitled to take students.

2. That no person producing a certificate of admission (*b*) as an attorney of the Supreme Court of any other Province, Colony, or Island, in His Majesty's dominions, in order to obtain admission and enrollment as an attorney of this Court, shall be so admitted and enrolled, unless he shall have served a regular apprenticeship in such Province, Colony, or Island, agreeably to the terms prescribed in the foregoing rule for students at law in this Province, nor unless he shall produce an authenticated copy of the certificate of such service, by virtue of which he may have obtained admission as an attorney of the Supreme Court of such Province, Colony, or Island, nor unless such certificate shall include the qualifications as to age and moral character requisite in that behalf to be included in certificates of service as apprentices to the law in this Province.

(*b*). He must also produce a certificate of his conduct since admission, and pass an

examination (R. Mich. 1837, r. 5, *post*), after serving as a student for one year in this Province (*id.* r. 9), but need not undergo the examination under R. Trin. 1843, preparatory to being entered as a student, see r. 5. He may be admitted as a barrister one year after admission as an attorney (R. Mich. 1840, r. 2, *post*). *Barristers* from certain Colonies may be called to the Bar under R. East. 1856, *post*.

3. That after the expiration of two years (*c*) from the time of admission as attorneys, such attorneys may be called to the Bar, provided there appears no just cause to prevent such call.

(*c*) Now one year (C. S., c. 33, s. 7; 30 Vic. c. 7, s. 2), provided he has, in all other respects, conformed to the rules and regulations of the Barristers' Society relating to the admission of attorneys to the Bar. See the regulations *post*, R. Hil. 1867, By law, 25.

4. That no person, admitted as an attorney of this Court, shall, until he be called to the degree of a barrister, be permitted to wear a gown, or to make any motion as counsel in any cause in this Court (*d*).

(*d*) A barrister, who is a party to a suit, cannot conduct his case in person and by counsel (*Robinson* v. *Palmer*, 2 All. 223; *Gilbert* v. *Raymond*, 3 P. & B. 315; and see *Lush*, 205).

5. That notice of every application for admission as an attorney of this Court, be filed with the Clerk of the Pleas on the first day of the term at which such application may be made (*e*); and if no sufficient objection shall appear to the Court, or be made from the Bar during such term, such applicant shall be admitted and enrolled as an attorney on the last day of such term.

(*e*) A term's notice is now required (R. Hil. 1867, By-law 21). The latter part of this rule is obsolete, in consequence of R. Mich. 1840, r. 3, *post*, and it may be questionable whether the whole rule was not superseded by R. Mich. 1837, r. 4 (*All. Rules*, 12).

6. That no person, under the degree of a barrister, be hereafter entitled to take a student for admission as an attorney.

7. That every barrister taking a student for admission as an attorney, shall enter the name of such student forthwith, with the clerk of the pleas of this Court, to be enrolled by him in a roll to be kept for that purpose, with the date of the commencement of such student's term of study (*f*).

(*f*) The certificate of the Examiners must be produced before entry (R. Trin. 1843, r. 2, *post*, except in the case of attorneys of British courts (*id.* r. 5), and see r. 4 as to the transfer of students.

8. That no student, in any barrister's office, shall be permitted

hereafter to practice (*g*) in the name of any attorney, or otherwise, in any inferior Court of Common Pleas (*h*) in this Province.

(*g*) See R. Hil. 1867, By-law 24, *post*.

(*h*) Abolished by 30 Vic. c. 10, s. 37, and see C. S., c. 51, s. 73 *et seq*.

HILARY TERM, 1825—6 GEO. IV.

Admission of Barristers.

ORDERED, That whenever any attorney of this Court shall be desirous of being called to the Bar as barrister, he shall make known his wishes, by petition to the Court, on the first day of the term, which petition shall be delivered to the clerk, and be open for the inspection of the gentlemen of the Bar, until the sitting of the Court on Thursday following in the same term, when the Court will determine upon the said petition (*a*).

(*a*) See R. Hil. 1867, By-law 25, *post*, as to notice.

MICHAELMAS TERM, 1825—6 GEO. IV.

Signing and Sealing Writs.

1. UPON reference to the rule of Hilary Term, 45 George III., relating to the delivery of blank writs to the attorneys of this Court (*a*):

It is ordered, That from and after Hilary Term next, no attorney of this Court do presume to issue any writ or process whatever, unless the same be actually signed and sealed by the proper officer of this Court (*b*); and that the clerk of the pleas do forthwith furnish a copy of this rule to every attorney of this Court.

(*a*) *Ante*, p. 13.

(*b*) After the writ has been issued, an alteration in the return day, though made before it is returnable, vitiates it, unless it is re-sealed (*Andrews* v. *McKenzie*, 1 All. 264, and see *Siggers* v. *Samson*, 2 Dowl. 745; *Gibson* v. *Varley*, 7 E. & B. 49), and an amendment of a writ, altered after a return had been made on it by the sheriff, but while it was in his hands, by striking out the alteration and restoring it to its original form, was refused, though the statute would be a bar to a fresh action (*Barlow* v. *O'Donnell*, 1 All. 561). A writ, altered and re-issued after it had been once issued and returned, is a nullity, and affords no justification to the sheriff (*Johnston* v. *Winslow*, Bert. 53).

A writ is considered to be issued when it is sent from the attorney's office for the

bona fide purpose of reaching the sheriff in the ordinary course of transmission of such documents (*All. Rules*, 13, citing *Lunt* v. *Estabrooks*, 3 Kerr, 291). Until the writ actually issues from the attorney's office, there is no cause in Court (*per Allen, C. J.*, *Davidson* v. *O'Connell*, 3 Pugs. 686). It has been held, under 21 Vic. c. 20, s. 1, which enacted that "all writs to be issued from any of the Courts in this Province may bear teste on the day on which such writs shall be issued, any law, usage, or custom to the contrary thereof in anywise notwithstanding," that in the absence of evidence of the actual time of issuing a writ of *mesne* process, it will be presumed to have been issued on the day it bears date (*Pomares* v. *Provincial Ins. Co.*, H. T. 1873, Stev. Dig. 413). In *Seelye* v. *Bliss*, 1 P. & B. 53, the plaintiff was permitted to shew, in answer to an application to set aside proceedings for non-payment of the library fee, that the writ, though tested before, was in fact served by the attorney after the payment had been made.

The Act 21 Vic. 20 was repealed by 36 Vic. c. 31, which expressly directed that writs of execution (s. 127) and the writs introduced by it, viz., writs of summons (s. 5), *capias* (s. 20) and revivor (s. 122), should bear test the day of issue, but left the question of teste of subpœnas and other writs to be determined by the construction to be put upon ss. 215, 221, in connection with the above sections. C. S., c. 31, s. 3, contemplates that some writs are to be tested in Term. Under the English practice, a subpœna tested in vacation is void (*Edgell* v. *Curling*, 7 M. & G. 958), nor could writs of *sci. fa.* be so tested, even after 2 Wm. IV. c. 39 (*Seaton* v. *Heap*, 5 Dowl. 247), but it was otherwise as to writs of inquiry since that statute (*Collett* v. *Curling*, 5 D. & L. 605). See *Power* v. *Johnson*, 2 Kerr, 43, decided under the Act 5 Wm. IV. c. 37, ss. 10, 11, where it was held that an execution bearing teste in vacation was irregular merely, and not a nullity; and see *Coffin* v. *Marsh*, 3 Kerr, 427, as to teste of executions at common law.

Declarations de bene esse.

2. It is ordered, That the time for delivering or filing declarations *de bene esse*, agreeably to the rule made in Easter Term in the 26th George III. be enlarged to thirty days (*b*).

(*b*) See C. S. c. 37, s. 38, *ante* p. 4.

Discharge of Bail.

3. Ordered, That if any person or persons who are, or who hereafter shall become bail in this Court for any defendant in any action whatever, shall be impleaded by action of debt upon the recognizance in such suit acknowledged, such person or persons shall have liberty to surrender such defendant by the space of twenty entire days next after the return of the writ of *capias ad respondendum* or other process sued out against such bail; and upon notice thereof given to the plaintiff or his attorney, in the suit aforesaid, all further proceedings against such bail, upon the recognizance aforesaid, shall cease (*c*).

(*c*) Taken from R. G., Q. B., T. T. 1 Ann., see note to *Haynes* v *Chalmers*, A. C. MS. 2.

R. Hil. 1832, r. 11, *post*, requires the costs up to the time of notice of render to be paid.

See *Byron* v. *Batson*, 2 P. & B. 396, as to relief of special bail under the existing practice.

HILARY TERM, 1826—7 GEO. IV.

Trials at Nisi Prius—Filing N. P. Records.

1. IN order to prevent inconvenience and delay in the trial of causes at Nisi Prius (*a*)—

It is ordered, That no record of Nisi Prius shall be received at any Circuit Court in any county in this Province, unless the same (*b*) shall be delivered, to be entered with the clerk of the circuits, at or before the opening of the Court, on the first day of the sittings, unless the judge, in his discretion, under special circumstances, shall allow the clerk to receive a record, and enter the cause for trial after the time above limited (*c*); and that every cause shall be tried in the order in which it shall be so entered (*d*) beginning with *remanets* (*e*), unless it shall be made out (*) the satisfaction of the judge, in open Court, that there is reasonable cause to the contrary, who thereupon may make such order for the trial of the cause so to be put off, as to him shall seem just (*f*).

2. And it is further ordered, That a list of all the causes entered as aforesaid, shall be made by the clerk of the circuits, and by him delivered to the judge as soon as practicable after the entry so made.

(*a*) See R. G., K. B. H. T., 14 Geo. II.

(*b*) Regularly and properly made up—R. Mich. 1872, *post*.

(*c*) By C. S., c. 45, s. 38 (11 Vic. c. 16, s. 1; 18 Vic. c. 24, s. 34), causes are to be entered on the Trial Docket on the first day of the sittings of the Court, "at such hour as the Court may, after the opening thereof, direct; unless the Court, for some special and reasonable ground of excuse, to be shewn by affidavit," allows an entry to be made subsequently.

At the Saint John Circuit, causes in which the defence was put in merely for the purpose of delay, and in which it is not intended that any counsel shall appear for the defendant, are entered on a "special docket;" if, however, the defendant appears, and on the trial the judge is satisfied that he *bona fide* intended to defend, the jury will be discharged and the cause struck off (*Lloyd* v. *Allen*, 2 P. & B. 239).

The jury fees (C. S., c. 45, s. 39) and the judge's trial fee (*Doe* d. *Mayor, &c.*, *St.*

John v *Christopher*, 2 All. 420) are payable on the entry of the cause. The 40th sec. of C. S., c. 47, requiring the payment of jury fees pending the trial of the cause, is merely directory as to the time of payment (*Briggs* v *McBride*, 3 P. & B. 202). A trial began on the 20th, the plaintiff's case extended over that day and part of the 21st, when the defence was gone into, and occupied the remainder of that day and part of the 22d; the plaintiff then opened his rebutting case, which continued into the 23d—held that the fee for the 22d should be paid by the defendant, and that no fee should be required from the plaintiff until the 23d (*id.*).

Entering the cause before issue is joined, and afterwards obtaining an order making it a remanet, is merely an irregularity, and the defendant should apply to have it struck off, *McLellan* v. *Masson*, 2 Pugs. 59, *per Ritchie, C. J.*, and *Weldon, J.*; *per Allen* and *Fisher, JJ.*, such entry is a nullity.

Where there are issues in law outstanding, the cause is not to be entered unless the plaintiff intends to try it when reached, R. Hil. 1880, *post*.

(*d*) "Whenever a cause is taken down to trial by *proviso*, it shall be tried by the record which is first entered, whether it be the plaintiff's or defendant's, unless the Court otherwise order, on good cause shown by affidavit," C. S., c. 37, s. 104 (36 Vic. c. 31, s. 107; Stat. 15–16 Vic. c. 76, s. 116). For the former practice see *Meyer* v. *Gardiner*, 2 Han. 504).

It is the duty of the parties to the cause to attend until it is disposed of, and where it is called on in its regular course, and tried as an undefended cause, in the absence of the defendant, a new trial will not be granted (*Smiley* v. *Winslow*, 2 Kerr, 349; *Doherty* v. *Hogan*, *id.* 492; *Boyne* v *Elston*, 5 All. 164), unless the absence is satisfactorily accounted for, and merits are sworn to, and then only upon terms (*Gibbs* v. *Steadman*, 2 Kerr, 406; *McLean* v. *McDonald*, T. T. 1864, Stev. Dig. 288; *Trueman* v. *Wood*, 2 P. & B. 219; and see *Jackson* v. *McLellan*, 3 P. & B. 432), even though the cause be reached, by reason of several causes standing before it being postponed by the judge, under the latter part of the above rule (*Bowes* v. *Southerland*, 2 Kerr, 1).

But it is a ground for a new trial, if the cause has been called on out of its turn and improperly, and tried in the absence of the defendant (see *Hunter* v. *Hornblower*, 3 Dowl. 491; *Fourdrinier* v. *Bradbury*, 3 B. & A. 328; *Sprigge* v. *Rutherford*, 2 Dowl. 429; *Aust* v. *Fenwick*, *id.* 246), as where it was so called on and tried, in consequence of the statement of the plaintiff's attorney that it was undefended, the defendant swearing that he had a good defence and intended to defend (*Sayre* v. *Steeves*, 5 All. 86; and see *McIntosh* v. *Hamilton*, 2 P. & B. 654). So, where the judge publicly stated, in effect, that he would not take up the cause, whereupon a material witness was permitted to leave, and afterwards, and before the witness could be recalled, called on and tried the cause, a new trial was granted, though affidavits were not produced to h[illegible] on an application to put off the trial, the facts not being disputed, and though co[illegible]el appeared and defended, under protest, at the trial (*Mehan* v. *Louther*, 2 Han. 356).

A defendant who seeks to take advantage of the non-appearance of the plaintiff, should take care that the jury are sworn and then proceed to have the plaintiff nonsuited, instead of letting the cause be struck out (Rosc. Ev., 13 ed. 298, *post*, R. Hil. 1828, r. 2 *n.*)

(*e*) The first cause is not to be called on before half an hour after the opening of the Court (R. Trin. 1832, *post*).

(*f*) If the attorney is unable, through illness, to attend, application should be made to postpone the cause; and where this was not done, and the cause was tried as undefended, a new trial was refused (*Boyne* v. *Elston*, *supra* note (*d*)). "The absence of a material witness is not a ground for a new trial; for the party might have applied to the judge to put off the trial or withdrawn the record—*Flaherty* v. *McLardy*, Mich. T. 1846). The case of *Shillito* v. *Theed*, 6 Bing. 753, in which a contrary rule of practice is stated was not considered correct by this Court. It is to be remarked that the report of this case is very short, and no reason is given for the decision. The case of *Turquand* v. *Dawson*, 1 C. M. & R. 709, where the absence of the witness was occasioned by the fraud of the defendant's attorney is also directly opposed to it"—*All. Rules*, 23.

Crown Paper and Special Paper.

3. Ordered, That the clerk of the Crown do keep a paper, to be called the "Crown Paper," in which shall be entered demurrers, motions for new trials, and other special matters for argument on the Crown side (*g*); and that the clerk of the pleas do in like manner keep a paper, to be called the "Special Paper" (*h*), in which shall be entered all demurrers, motions for new trials, and other special matters (*i*), for argument on the plea side (*j*): such entries to stand on such papers respectively, in the order in which they may be made, with the said respective clerks (*k*); and that all the matters contained in the said papers shall come on to be argued on the Monday in the second week in each term (*l*), in the order in which they are entered, always beginning with the Crown paper.

(*g*) The party who is served with a rule *nisi* to quash a conviction brought up on *certiorari*, enters the cause for argument on the Crown Paper (*R.* v. *Justices of York*, A. C. MS., p. 117). Where such a rule was not served on the prosecutor or justice until the day preceding the term at which it was returnable, the Court refused to enlarge the rule, no satisfactory reason being shewn for the delay (*R.* v. *Harshman*, T. T. 1868, Stev. Dig. 166). A rule *nisi* for a *certiorari* will not be enlarged, unless the delay in serving be satisfactorily accounted for (*Ex parte Glass*, 2 All. 88).

The application to enlarge a rule for an attachment, on the ground that it could not be served in time, must be made at the term in which the rule is returnable (*Abbot* v. *Frink*, 3 Kerr, 368). The party served may obtain an enlargement, if he requires time, in order to answer (*Jones* v. *Smith*, 2 Pugs. 45), and see as to enlarging rules on the plea side, note (*j*) *infra*.

Where a rule *nisi* for a *certiorari* was granted in Easter Term, and was improperly entered on the Pleas side of the Court, in consequence of which it was discharged in *Trinity* Term, it is too late to renew the application in *Michaelmas* Term, and *quære*, whether it would have been granted in Trinity Term (see *Robbins* v. *Watts*, 6 All. 513).

(*h*) When the Court sits in two divisions, two special papers shall be made up, if necessary—see 42 Vic. c. 8, s. 11.

(*i*) See as to entering demurrers, special cases, and special verdicts, R. Hil. 1846, *post*; and see 42 Vic. c. 8, s. 11, cited *post* note to R. Mich. 1834, r. 3, as to entering motions for new trials, &c. The clauses in the above rule relating to the latter motions are omitted in Allen's edition.

(*j*) An irregularity in the copy of the rule served is waived by the opposite party entering the cause on the special paper, and appearing by counsel to show cause (*Barlow* v. *O'Donnell*, 1 All. 433, distinguishing *Wood* v. *Critchfield*, 1 Dowl. 587; *Clothier* v. *Ess*, 2 *id.* 731; and *Barham* v. *Lee*, *id.* 779).

An application to enlarge a rule *nisi* for a new trial, and compel the defendant's attorney to enter the cause for argument, or in default thereof, that the plaintiff might be at liberty to move to make the rule absolute, was refused, the only excuse for not serving the rule being that the defendant's counsel was in Court when it was obtained, and the belief of the plaintiff's attorney that the defendant's attorney was aware that it was obtained (*Donohue* v. *Todd*, 1 All. 598), but in *Wilson* v. *Street*, 3 All. 215, and *Marter* v. *Peters*, 6 All. 327, where, from the inadvertance of the attorney, the rule was not served, but the opposite attorney had notice of it, the rule was enlarged upon payment of costs.

It is the duty of the party to take care that the rules he obtains are properly entered on the minutes of the Court and taken out (*Ex parte Glass*, 2 All. 88; *Sayre* v. *Smith*, *id.* 363; *Robin* v. *Watts*, 6 All. 515; and see *Doe* d. *Stephenson* v. *True*, 1 P. & B. 743; *Crookshank* v. *MacFarlane*, 3 All. 18). and he cannot set up his ignorance of the terms of the rule (*Patterson* v. *Patterson*, 1 All. 490; and see *Buchanan* v. *Peters*, June, 1871, Stev. Dig. 384, 385, on the Equity side).

(*k*) See R. Mich. 1866, r. 1, *post*, for the time for making the entries, and *Milner* v. *Bridges*, 2 P. & B. p. 73, there cited as to re-entering a cause struck off the special paper.

(*l*) Now on the second day in each term (R. Mich. 1835, r. 5, *post*). The "motion paper" is to come on before the special paper (R. Hil. 1836, r. 1), and the "record trial docket" is to be taken up immediately after the "motion paper" (R. Trin. 1846, *post*.

Trinity Term, 1826—7 Geo. IV.

Consent Rule—To Confess Possession.

Whereas, (*a*) by the common consent rule (*b*) in actions of ejectment, the defendant is required to confess lease, entry, and ouster, and insist upon his title only; and whereas, in many instances of late years, defendants in ejectment have put the plaintiff, after the title of the lessor of the plaintiff has been established, to give evidence that such defendant was in possession, at the time the ejectment was brought, of the premises mentioned in the ejectment and for want of such proof have caused such

plaintiffs to be nonsuited; and whereas, such practice is contrary to the true intent and meaning of such consent rule, and of the provisions therein contained, for the defendant's insisting upon the title only—

It is therefore ordered, That from henceforth, in every action of ejectment, the defendant shall specify in the consent rule for what premises he intends to defend (*c*), and shall consent in such rule to confess upon the trial that the defendant (if he defends as tenant, or in case he defends as landlord (*d*), that his tenant) was, at the time of the service of the declaration, in the possession of such premises; and that, if upon the trial, the defendant shall not confess such possession, as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff in that case to be taxed (*e*).

(*a*) Taken from R. G., K. B., M. T. 1 Geo. IV.

(*b*) If the tenant in possession intends to defend, he must, before the expiration of the rule for judgment (*post* R. Mich. 1835, r. 10), file an appearance (see *ante* p. 5— need not file the warrant of attorney or memorandum thereof, *Fleming* v. *Shaw*, A. C. MS. 117), and enter into a consent rule (*Tidd's Forms*, 637; *Chit. Forms*, 6 *ed.*, 359).

The practice in this Province, in regard to entering into the consent rule, is by no means uniform, but it is submitted, the following is that most generally adopted. The defendant's attorney makes out and signs, in duplicate, the agreement therefor, describing the premises as in the particulars (see *Doe* d. *Morrice* v. *Roe*, *infra*), and delivers one copy to the plaintiff's attorney, and obtains his signature to, and retains, the other; either party then obtains the rule from the clerk, by whom it must be signed (see *Jarvis* v. *Edgett*, 1 All. 264), when he requires it.

By the Queen's Bench practice, prior to 1838, it was necessary that the plea (the general issue) and the agreement for the consent rule* should be filed in the chambers of one of the judges (*Impey*, 583), where the plaintiff, when the time for appearance was out, had to search for them (*id.* 588), and the Rule of Hil. T., 4 Wm. IV., r. 1, requiring pleas to be delivered, did not apply to ejectment (*Doe* d. *Williams* v. *Williams*, 2 A. & E. 381); but in that year, by R. H. T., 1 Vic., after reciting the

* "If the plea be delivered without the consent rule, or with a consent rule, which is a nullity (*Doe* d. *Poole* v. *Willes*, 27 L. J., Q. B. 24; *Doe* d. *Huncheorne* v. *Roe*, 2 D. & L. 96), or *vice versa*, the rule for judgment having been entered, the plaintiff may sign judgment"—*Lush's Pr.* (ed. 1840), 823. In *Adams' Eject.* (3 ed.) 269, it is said, if the plea be not left with the consent rule, the plaintiff must give a rule to plead and then judgment may be entered for want of a plea, as in other actions, for which R. G., H. T. 1649, and T. T, 18, Car. II., are cited, but *Tidd* and *Impey* do not mention these rules. By the terms of the rule for judgment, the tenant is to "appear *and plead to issue.*"

necessity of so filing the plea, &c.. it was ordered that "the said practice be discontinued, and in all such actions the plea, with the consent rule annexed thereto, be delivered in like manner as pleas in other actions, the defendant's appearance being first entered with the proper officer, as heretofore." The plaintiff's attorney, in order to proceed in the action or avoid a *non pros.* (*Chit. Arch.*, 8 *ed.*, 944), signed it, and had the rule drawn up by the clerk. A copy of the rule was then served on the defendant's attorney (*Doe* d. *Burnham* v. *Lever*, 13 M. & W. 688; *Doe* d. *Blayney* v. *Savage*, 4 Q. B. 416).

A practice at one time very generally prevailed of considering the agreement of the attorneys as the consent rule (*Fraser* v. *Harding*, 3 Kerr, 100), but this was incorrect, see *Doe* d. *Scott* v. *King*, *id.* 178, 296. It may, however, be used in an action for *mesne* profits, to connect the defendant with the previous ejectment (*Fraser* v. *Harding*, *supra*), and the rule itself need not be produced by the plaintiff at the trial for the purpose of compelling the defendant to confess lease, entry, &c. (*Johnston* v. *Milne*, 2 P. & B. 375).* Costs are recoverable against the lessor of the plaintiff only on the consent rule—he is not liable for them until he has entered into it (*Doe* d. *Pratton* v. *Board*, 10 M. & W. 675; *Goodright* d. *Ward* v. *Badtitle*, 2 W. Bl. 763; *Doe* d. *Vernon* v. *Roe*, 7 A. & E. 14; *Goodtitle* v. *Badtitle*, 9 Dowl. 1069), but a second ejectment will be stayed until the costs be paid (*Smith* v. *Barnardeston*, 2 W. Bl 904; *Doe* v. *Langdon*, 5 B. & Ad. 864; *Doe* d. *Morrice* v, *Roe*, *supra*).

(*c*) In order to enable him to frame his consent rule he may. after entering an appearance, apply for particulars of the premises sought to be recovered (*Doe* d. *Vernon* v. *Roe*, 7 A. & E. 14; *Doe* d. *Birch* v. *Phillips*, 6 T. R. 597). The object of the rule is to settle the local situation of the premises, the consent rule admits nothing but that the defendant defends for certain specified premises (*Doe d. Parr* v. *Roe*, 1 Q. B. 700) and a plaintiff is not estopped by the description of the land therein as being "granted to J. M., and by him conveyed to the defendant," from giving proof of his title (*Doe* d. *Mallet* v. *Robicheau*, 1 All. 419), and see as to description of premises and evidence of identity, *Doe* d. *Sands* v. *Phillips*, 1 Kerr, 533. If the defendant defends for part only of the premises, he must state with particularity what part, on account of costs. for otherwise, if the plaintiff succeeds as to any portion of the premises, he will be entled to his general costs of the cause, though the defendant succeeds (see *Doe* d. *McKenzie* v. *Mosher*, 2 Pugs. 355), in respect of those premises to which he is really entitled (*Doe* d. *Bishton* v. *Hughes*, 4 Dowl. 412), An amendment after verdict, by striking out the part not claimed, can only be had on payment of such costs (*Doe* d. *Richards* v. *Day*, 3 All. 440), and see further, as to such amendment, *Doe* d. *Baxter* v. *Baxter*, 2 All, 377. In such cases the consent rule is special, and the lessor of the plaintiff is not bound to enter into it without the order of the Court or a judge (*Doe* v. *Day*, *supra*). In *Doe* d. *Morrice* v. *Roe* (3 All. 84), where the agreement described part only of the land mentioned in the particulars, and the tenant would not amend the description, whereupon a second action was brought (no rule for judgment having been entered), the Court refused, with costs, a rule to stay proceedings, until the costs in the first suit were paid. Where part only of the premises is defended for, judgment may be signed for the residue, but where one of two tenants in joint poss-

* It is advisable, however, that the plaintiff should have the rule, or, at least the agreement therefor, at the trial, in order to prove thereby the plaintiff's possession of the premises, or in case any question as to the identity of the premises should arise.

ession entered into the common consent rule, an action for *mesne* profits on a judgment by default against the other, was held not to be maintainable pending the action of ejectment (*Doe* v. *Esterbrooks*, 1 Kerr, 119). See as to form of affidavit for special consent rule, where the parties are co-tenants, R. Trin. 1845, *post*.

(*d*) Under Stat. 11, Geo. II., c. 19, s. 13. By this stat. the Court may allow the landlord to make himself defendant, by joining with the tenant if the tenant appear (see *Fairclaim* v. *Shamtitle*, 3 Burr. 1302), but if the tenant shall refuse or neglect to appear, judgment shall be signed against the casual ejector for want of such appearance, but if the landlord shall desire to appear by himself, and consent to enter into the like rule the tenant must have entered into had he appeared, the Court shall permit him to do so, but shall order a stay of execution upon the judgment against the casual ejector until they shall make further order therein. The term "landlord" in this statute has been liberally construed (*Doe* d. *Welles* v. *Birchman*, 9 A. & E., p. 668), and includes all persons claiming title consistent with the possession of the occupier (Day's C. L. P., Acts 172, and see *Doe* d. *Tubb* v. *Roe*, 4 Tau. 887; *Doe* d. *Tilyard* v. *Cooper*, 8 T. R. 645; *Roe* d. *Leah* v. *Doe*, Barn. 193; Sel. N. P., 13 ed., 647; *Doe* d. *Pearson* v. *Roe*, 6 Bing. 613; *Den* d. *Fauls* v. *Fen*, 1 All. 585, 633; *Lovelock* v. *Doncaster*, 4 T. R. 122; *Ex parte Beauchamp* (vacant possession), Sel. N. P., 648; *Doe* d. *Hebblethwaite* v. *Roe*, 3 T. R. 183, *n.*; *Fairclaim* v. *Shamtitle*, 3 Bur. 1290; *Lovelock* v. *Doncaster*, 3 T. R. 783; *Doe* d. *Gaisford* v. *Stone*, 3 C. B. 176; *Driver* v. *Lawrence*, 2 W. Bl. 1259; and the cases on 15-16 Vic. c. 76, s. 172, which is to the same effect as the above stat. (*Butler* v. *Meredith*, 11 Exch., p. 93). If a rule is obtained by a party who is not a landlord within the meaning of the Act, it will be set aside with costs (*Den* d. *Fauls* v. *Fen*, *supra*; *Doe* d. *Harwood* v. *Lippencot*, Adams' Ejct. (3 ed.) 260; *Doe* d. *Horton* v. *Rhys*, 2 Y. & J. 88; *Doe* d. *Carr* v. *Jordan*, 4 Scott, 570); or, if he continue on the record as defendant, he will not be allowed at the trial to set up a title inconsistent with the possession of the tenant (*Doe* d. *Knight* v. *Smyth*, 4 M. & S. 347; *Doe* d. *Mee* v. *Litherland*, 4 A. & E. 784; *Doe* v. *Challis*, 17 Q. B. 166). If the landlord is admitted to defend, the plaintiff must shew a title as against him (*Doe* d. *Hathaway* v. *Hatch*, 3 Kerr, 687). The landlord's rule is obtained on a motion paper, signed by counsel, except in cases where the relationship of landlord and tenant does not clearly exist when a summons or rule nisi is necessary (*Den* v. *Fen*, 1 All. 633), and a copy is delivered with the consent rule and plea within the time limited for the tenant to appear.

(*e*) If the plaintiff has a verdict, he recovers his costs by execution (see Tidd's Forms, 653), as in other cases, if he recovers judgment by default his remedy is by action for *mesne* profits, in which they are recoverable as damages (*Symonds* v. *Page*, 1 C. & J. 29; *Doe* v. *Dobson*, 2 All. 446; see as to pleading and evidence, *Doe* v. *Cahil*, 2 All. 650); or if he be nonsuited at the trial, from the defendant refusing to confess lease, &c., he proceeds on the consent rule by attachment (*post* R. Trin. 1860) or execution in lieu thereof, under C. S., c. 38, s. 36.

When the defendant recovers a judgment, his only remedy for his costs is by such attachment or execution, which he can obtain without first issuing a *ca. sa.* against the nominal plaintiff (*Doe* d. *Scott* v. *King*, 3 Kerr, 492; *Doe* d. *Prior* v. *Salter*, 3 Taunt. 485). To obtain the attachment the costs (made up under the table of fees established by R. Hil. 1874, *post*, *Doe* d. *Hartt* v. *Brayley*, 3 Pugs. 468) must be taxed after the consent rule has been actually taken out (*Doe* d. *Scott* v. *King*, 3 Kerr, 178, 296). The rule, and the clerk's allocatur, must be served by delivering copies

and exhibiting the originals to the party personally, and the costs at the same time demanded. When the action is brought by an infant, who, it seems, is not liable to an attachment (*Thrustout* v. *Percival*, Barn. 183), proceedings will be stayed until security for costs be given, or a substantial person substituted for the nominal plaintiff (*id.*, and see *Doe* d. *Roberts* v. *Roberts*, 6 Dowl. 556). As a defendant has also no remedy by attachment against a corporation (*Doe* d. *Rector, &c., St. John* v. *Crawford*, 3 All. 266; *Trustees Greenock Church* v. *Love*, 3 Kerr, 179), he may, perhaps, in such case obtain like security. In some instances the *real* defendant, though he be no party to the record may be compelled to pay costs—see Chit. Arch., 8 ed., 956; *Doe* d. *Masters* v. *Gray*, 10 B. & C. 615; *Thrustout* v. *Shenton*, *id.* 110; *Hutchinson* v. *Greenwood*, 4 E. & B. 324.

TRINITY TERM, 1827—8 GEO. IV.

Writs of Error Coram Nobis.

IT IS ORDERED, That henceforth no writ of error *coram nobis* (*a*) shall be allowed but in open Court, and then on affidavit of the error to be assigned.

(*a*) The Court of Chancery out of which this writ, as well as that for the removal of causes from inferior courts (*Mills* v. *Vail*, 4 All. 239; *Wetmore* v. *Levy*, *id.* 510; see *Kinnear* v. *Gallagher*, 1 Kerr, 424; *Wetmore* v. *Levy*, 4 All. 502; 5 All. 55, 180; *Mills* v. *Vail*, 4 All. 629; *Gilbert* v. *Sayre*, 2 All. 512) issued, was abolished in part by 17 Vic. c. 18, sub-c. 1, s. 1, and entirely by C. S., c. 49, s. 14.

In the Royal instructions to Colonial Governors, issued prior to the Stat. 3–4 Wm. IV. c. 41, establishing "the Judicial Committee of the Privy Council," a clause was inserted giving an appeal, in the nature of a writ of error, from the Supreme Court to the Court of the Governor and Council (see *Coffin* v. *Marsh*, 3 Kerr, 427), but in the instructions since issued no mention is made of appeals (see *Kelly* v. *Sullivan*, 1 Duval's S. C. R. 1, and see the Stat. 7–8 Vic. c. 69, and the Order in Council thereon of 27th Nov., 1852 (4 All. p. 497), providing for an appeal from the Supreme Court direct to the Judicial Committee).

HILARY TERM, 1828—9 GEO. IV.

Notices of Trial and Inquiry.

1. IT IS ORDERED, That from henceforth there be at least (*a*) fourteen days' notice of trial (*b*), and for writs of inquiry (*c*), in all cases, whether the defendant lives within the county where the Court sits or not; any former rule (*d*) of this Court to the contrary notwithstanding.

(*a*) Service on Tuesday, the 14th day preceding the Circuit, was held insufficient (*Grumble* v. *Perley*, 1 All. 376; see C. S., c. 37, s. 197, *ante*, p. 4.).

Where no proceeding (see *Green* v. *Gauntlett*, 1 Str. 531; *Richards* v. *Harris*, 3 East, 1; *Hatchel* v. *Griffiths*, 2 Salk. 645), have been had within four terms (*Connell*

v. *Sisson*, 4 All. 504; *Collins* v. *Kerlin*, *id.* 505), after issue joined a term's notice must be given of the plaintiff's intention to proceed (note to R. G., K. B., M. T. 4 Ann.), unless the delay has been by the defendant's request (*Evans* v. *Davies*, 3 Dowl. 786), or the cause be brought for trial at the first Circuit at which it could be tried (*Justices of Northumberland* v. *Russell*, 1 Pugs. 345). It should be given before the first day of term, and after the end of the term notice of trial may be given (Chit. Arch., 4 ed. 269, citing *Smith* v. *Coleman*).

(*b*) Notice of trial must be given, though the cause has been made a remanet (*Gains* v. *Bilson*, 4 Bing. 414), or put off by rule of Court (*Jacks* v. *Mayer*, 8 T. R. 245; Day's C. L. P. Acts, 123), or order of a judge (*Caveley* v. *Knowles*, 16 C. B., N. S. 107; *contra*, *Claudet* v. *Prince*, L. R., 2 Q. B. 406), or of Nisi Prius (*Frazer* v. *Harding*, 2 Kerr, 375; see *Shepherd* v. *Butler*, 1 D. & R. 15). The want of notice is not waived by counsel appearing and defending at the trial without authority from defendant (*Doherty* v. *Desbrisay*, 1 Han. 497), though it is otherwise if he had authority (*Doe* d. *Antrobus* v. *Jepson*, 3 B. & Ad. 402).

No particular form is necessary, so long as it clearly informs the party in sufficient time when and where the cause is to be tried (*Cory* v. *Hotson*, 1 L. M. & P. 23; *Sears* v. *Cahil*, 2 P. & B. 301).

(*c*) If notice of the execution of a writ of inquiry be not given, the proceedings will be set aside (*Sandall* v. *Godsee*, 1 All. 441). A term's notice must be first given where four terms have elapsed (*McDonald* v. *Upton*, 3 Kerr, 565), but it is, it seems, unnecessary in such case to revive the interlocutory judgment (*id.*). Ten days notice of countermand is required by R. Mich. 1848, *post*; and see as to the issue and execution of writs of inquiry, *ante*, p. 9. See the form Lush's Pr. 719; Chit. Forms, 10 *ed.*, 531; Tidd's Forms, 208.

(*d*) R. East. 1795, r. 13, *ante*, p. 6.

Notice of Countermand.

2. It is further ordered, That no notice of countermand shall be deemed sufficient to save the costs (*e*) for not proceeding to trial pursuant to notice, unless it be given at least ten days before the time of the intended trial.

(*e*) The rule on which payment of costs in such cases is founded is R. G., K. B. Mich. 1654, r. 18 (see 3 Chit. G. P. 782), which provides, in case of notice of trial being given, that if the plaintiff does not countermand the notice nor proceed to trial, the defendant shall be entitled to costs, see *Oulton* v. *Morse*, 2 Kerr, p. 79. In that case the plaintiff, being ready to proceed to trial, was prevented from so doing by the objection made by the defendant (not by *challenge*) that the officer summoning the jury was of affinity to him, and the motion was consequently dismissed. But the defendant is, as a general rule, entitled to the costs of the day, where he challenges the array for affinity between himself and the sheriff, *Sirois* v. *Hammond*, 1 Han. 331. "These costs are not given, as a matter of course the plaintiff may have reasonable excuse for not proceeding to trial" (*Pell* v. *Linnell*, L. R., 3 C. P. 441–, *per Bovil, C. J.*; and see *Mullings* v. ———, 5 Taunt. 88; *Oyle* v. *Moffit*, Barnes, 133; *Eastern U. R. Co.* v. *Symonds*, 4 Exch. 502; *Greenway* v. *Holmes*, 2 C. L. R. 745; Day's C. L. P. Acts, 3 ed., 126), or the defendant may be in default (*Pope* v. *Fleming*, 5 Exch

249; *Sleeman* v. *The Governor &c. of the Copper Mines*, 17 L. J., Q. B. 113; *Waters* v. *Weatherby*, 3 Dowl. 328; *Brett* v. *Stone*, 1 D. & L. 140). The *rule* is, however, of course, and absolute in the first instance (*Alderley* v. *Storey*, 2 Dowl., N. S., 335; see *Graham* v. *Gilbert*, 5 All. 217); so, that if the plaintiff has any good excuse, he must move the Court to discharge it (*Warne* v. *Hill*, 7 C. B., N. S. 726). A defendant is not entitled to costs where the cause was struck out, owing to the absence of both parties (*Morgan* v. *Fernyhaugh*, 11 Exch. 205; *contra*, *Abbott* v. *Bearcroft*, 4 D. & L. 327), or if the defendant, although present, neglects to have the jury sworn and to claim a nonsuit (*Leech* v. *Gibson*, 10 W. R. Exch., 354; *Smith* v. *Marshall*, 33 L. J., Q. B. 332; Day's C. L. P. Acts, 127; Rose. Ev., 13 ed., 298; see, however, *Doe* v. *Stackhouse*, 2 Pugs. 298). A defendant cannot move for judgment *qu.* nonsuit and for costs for not proceeding to trial at the same time (*Thomas* v. *Williams*, 4 B. & C. 260), nor after moving for the former is he, in general, allowed to apply for the latter on the same default (*Thomas* v. *Williams*; Tidd, 9 ed., 789; *Stevens* v. *Hamilton*, 1 Han. 335; and see *Kinnear* v *Watts*, 3 Kerr, 300, where the motion for judgment *qu.* nonsuit failed because of a demurrer pending, and *Graham* v. *Wetmore*, 5 All. 217, where, under special circumstances, the Court refused to discharge the rule for costs of the day). Before R. H. T., 2 Wm IV. r. 69, the defendant could, in the King's Bench, first move for the costs of the day, and immediately afterwards move for judgment *qu.* nonsuit (Tidd, 759; 3 Chit. Gen. P. 782). In discharging the rule for that judgment the Court will, in general, grant the costs of the day as part of the rule (*id.*; *Percy* v. *Owen*, 1 Dowl. 362; *Stiles* v. *Gilbert*, 3 All. 262). Costs of the day are the same as those which are paid on the withdrawal of the record (*Walker* v. *Lane*, 3 Dowl. 504). If cause has been made a remanet, the costs allowed are the costs of the Circuit only at which the default was made (*Doe* d. *Sherwood* v. *Stackhouse*, 2 Pugs. 298). If a cause is postponed upon payment of costs of the day, it is the duty of the plaintiff's attorney to use all reasonable efforts to prevent his witnesses attending, but he is not bound to telegraph, unless the defendant offers to pay the expense. The expenses of a witness (the plaintiff), who left Boston the day after the postponement to attend the trial, were allowed (*Gibson* v. *North British &c. M. Ins. Co.* 1 P. & B. 573), and see as to allowance of witness fees, R. East. 1849, r 1, *n. post.* The affidavit on which the motion is made need not shew that costs have been actually incurred by the defendant (*Pinel* v. *James*, 12 M. & W. 100). See the form of affidavit *post n.* to R. Mich. 1859. Costs of the day, awarded on discharging a rule for judgment, *quasi* nonsu't, cannot be taxed as part of the defendant's general costs of the cause, in case be afterwards obtains a verdict; they must be taxed on the order discharging the rule (*Stiles* v. *Gilbert*, 5 All. 166).

Scire Facias.

3. It is further ordered, That from henceforth all defendants in *scire facias* have twenty days to appear from the return day of the *scire facias;* and that, where a defendant appears in *scire facias*, there shall be the like time for pleading as in other actions in this Court (*f*); and that, in cases, where the plaintiff in *scire facias* proceeds upon two *nihils* (*g*) returned, besides the entry of the rule to appear with the clerk, a copy of the said rule shall be

affixed in some conspicuous place in the clerk's office twenty days before the plaintiff shall be entitled to sign judgment, and the day on which such copy is so affixed shall be marked thereon, in order to manifest the time.

(*f*) The provisions of C. S., c. 37, as to the return of writs, shall apply to writs of *sci. fa.*, and such writs shall be made returnable in like manner as writs of summons and *capias* issued under that chapter, and shall be proceeded upon in like manner as writs of summons s. 156 (36 Vic. c. 31, s. 158). They may be directed to the sheriff of any county—s. 154 (2 Wm. IV. c. 20, s. 2).

The writ of *sci. fa.* should state the particular circumstances which entitle the party to the remedy sought, and he can only have the judgment prayed for therein (*Johnson* v. *Tibbits*, Bert. 355, and see *R.* v. *Hammond*, 3 Kerr, 181; *Le Gal* v. *Duffy*, 3 All. 57). The form of a *sci. fa.* to obtain execution against a joint debtor not served with process, is given by R. Hil. 1839, r. 12, *post*.

"The plaintiff obtaining judgment on an award of execution shall recover his costs of suit upon judgment by default, as well as upon a judgment after a plea pleaded or demurrer joined—C. S., c. 37, s. 211 (7 Wm. IV. c. 14, s. 26; 12 Vic. c. 39, s. 21; Stat. 3-4 Wm. IV. c. 42, s. 34).

In case it becomes necessary to revive a judgment, by reason either of lapse of time or of a change by death, or otherwise, of the parties entitled or liable to execution, proceedings are now to be taken under C. S., c. 37, s. 147-152 (36 Vic. c. 31, s. 149, 152; see Stat. 15-16 Vic. c. 76, ss. 129, 131, 134), by entering a suggestion on the roll or issuing a writ of revivor. During the lives of those parties to a judgment, during whose lives execution might formerly have issued within a year and a day without a *sci. fa.*, an execution may be issued within the period of twenty years without a revival of judgment—43 Vic. c. 8, s. 8 (C. S., c. 37, s. 125, 35 Vic. c. 4; see 15-16 Vic. c. 76, s. 128).

If the original execution, issued within the time limited, was on file (*Brown* v. *Partelow*, 3 Kerr, 324), or had been suspended at the request of the defendant (*Betts* v. *Johnson*, T. T. 1852, Stev. Dig. 320), an *alias* might have been issued at any time within twenty years.

Writs of revivor are also substituted for writs of *sci. fa.* in proceeding against an executor upon a judgment of assets *in futuro*—C. S., c. 37, s. 152 (36 Vic. c. 31, s. 155; stat. 17-18 Vic. c. 125, s. 91).

(*g*) This part of the rule is obsolete, the proceedings by two *nihils* having been abolished by 2 Wm. IV. c. 20 (36 Vic. c. 31, s. 157; C. S., c. 37, s. 155), and the writ is now to be served in the manner directed by C. S., c. 37, ss. 157, 158, 160, and such service is equivalent to a return of "*scire feci*." The Crown is bound by, and must proceed under these Acts (*R.* v. *Hammond*, 3 Kerr, 181).

TRINITY TERM, 1831—2 WM. IV.

Demurrer Books.

WHEREAS, expense is often unnecessarily incurred in making up demurrer books, from setting forth those parts of the plead-

ings to which the demurrers do not apply: It is therefore ordered, That from and after the end of this term, when there shall be a demurrer to part only of the declaration or other subsequent pleadings, those parts only of the declaration and pleadings to which such demurrer relates shall be copied into the demurrer books; and, if any other parts shall be copied, the clerk shall not allow the costs thereof on taxation, either as between party and party, or as between attorney and client (*a*).

(*a*) A copy of R. G., K. B., H. T. 8–9 Geo. IV.; see Practice Rules of 1853, s. 17.

Where a plea demurred to contains a reference to something partly answered in another plea, the rule does not prevent the insertion of such other plea (*Burroughs* v. *Hodgson*, 9 A. & E. 499, *n.*).

The Court will, if necessary, look to the other parts of the record not set out (*id.*: but see *Allen* v. *Bank of N. B.*, 1 P. & B. 450), so that in no case would it seem to be necessary or allowable to set out more than the rule specifies.

In *Hanington* v. *Girouard*, 3 Pugs. 151, the Court disallowed costs of making up the demurrer book, for any pleading subsequent to the pleas, the pleadings being extremely prolix.

The demurrer book consists of a transcript of the pleadings and demurrers, including counsels' signatures, on paper, copied in the same order as in a nisi prius record. The grounds of demurrer and objections to the opposite pleadings must be stated in the margin (R. Trin. 1840, r. 3, *post*). See R. Hil. 1836, r. 6, *post*, as to the delivery of the books to the judges.

Hilary Term, 1832—2 Wm. IV.

Special Bail.—Bail-piece.—Notice of Bail.

1. It is ordered, That in all cases where bail is put in before a commissioner, the bail-piece, together with the affidavit of the due taking thereof, shall be forthwith transmitted by the attorney who puts in the bail to one of the judges of this Court (*a*); and the notice of bail, in such cases, shall specify the judge to whom the bail-piece has been so transmitted, as well as the commissioner, before whom the bail was put in, and the names and additions of the bail (*b*).

(*a*) It must be transmitted within the time for putting in bail (*Craig* v. *Evans*, 5 Dowl. 664).

(*b*) Before this rule the plaintiff had to refer for these particulars to the book kept by the Comissioner, under R. G., K. B., T. T., 8 Wm. III. See a form of notice, *post*, R. Mich. 1834, *n.*

Exception to Bail.

2. That plaintiffs shall be allowed twenty days, after service of the notice of bail, to except against such bail; and such exception shall be entered with the judge before whom bail was put in, or to whom the bail-piece has been transmitted, as the case may be (*c*).

(*c*) By writing the exception, entitled in the Court and cause—

"I except against these bail. P. A., Plaintiff's Attorney, 18 ,"

on a separate piece of paper, and filing it with the judge (*Porter* v. *Burnes*, 1 All. 106; not necessary to enter it in the judge's book, *id.*), and by serving a notice thereof in this form, entitled in the Court and cause—

"I have excepted against the bail put in for the defendant in this cause. Dated, &c. Yours, &c, P. A., Plaintiff's Attorney."

on the defendant, his attorney, or the person who served the notice of bail (R. East. 1785, r. 15, *ante*, p. 7). If either the entry or notice be omitted, the exception will be incomplete, even, it would seem, as against the defendant (*Oldham* v. *Burrill*, 7 T. R. 26). A notice of justification waives both (*Hanwell's Bail*, 3 Dowl. 425). If default has been made in putting in bail (*Turner* v. *Cary*, 7 East, 607; *Fuller* v. *Prest*, 7 T. R. 109), or it be put in by a *prisoner*, they must justify, though not excepted to. If not excepted to within the time, the bail becomes absolute, *infra*, r. 9.

Justification of Bail.

3. That defendants shall be allowed twenty days, after service of notice of exception, to procure their bail to justify, or to add (*d*) other bail, who shall justify within the said twenty days, unless in either case, upon application made before the said twenty days expire, the Court, or a judge, shall see fit to extend the time (*e*).

(*d*) See Tidd (9 *ed.*), 258.

(*e*) See a form of affidavit for extension of time, where bail are sick or unaccountably absent, *Chit. Forms* (6 *ed.*), 250; *Tidd's Forms*, 98.

4. That bail shall justify (*f*) in open Court, or before the judge with whom the exception is entered, notice of justifying (*g*) being first duly (*h*) given; and that, in all cases, when the bail reside more than ten miles from the place where they are to justify, they may justify by affidavit (*i*) without personal attendance.

(*f*) They may be opposed either by their personal examination, or by affidavit, or by both, in which case the affidavit must be first put in and read (see *Tidd* (9 *ed.*) 274).

(*g*) The notice must be properly entitled in the Court and cause, and is in the following form:

"Take notice, that E. F. and G. H., the bail already put in for the defendant in this cause, and of whom you have had notice, will, on next, at the hour of (*see* Stalnes *v.* Stoneham, *4 Dowl. 678*; Smith *v.* Webb, *2 M. & W. 879*),

justify themselves (*add* 'by affidavit,' *if so intended, under the latter part of the rule,* Brigg's Bail, *1 Jur. 822*), before the honorable Mr. Justice , at his chambers, in , as good and sufficient bail for the said defendant in this cause. Dated, &c. Yours, &c. D. A., *defendant's attorney.* To P. A., *plaintiff's attorney.*"

(*h*) The notice must be served one day prior to the time appointed for justification, as on Tuesday for Wednesday (*Wright* v. *Ley*, 2 B. & P. 311; *Tidd*, 260).

(*i*) See the form *infra*, r. 6; it is usually transmitted with the bail-piece, and a copy served with the notice of bail (*Tidd*, 9 *ed.*, 263-4; *Peterad.* 342).

5. That bail must be housekeepers (*j*) or freeholders (*k*); and, in cases where the sum sworn to does not exceed three hundred pounds, must be worth (*l*) double the sum sworn to; and in cases above three hundred pounds, must be worth three hundred pounds more than the sum sworn to, over and above their just debts (*m*) and every other sum for which they are bail (*n*).

(*j*) See *Wilson's Bail*, 2 Dowl. 431. The house, or some main part of it, must be in the actual possession of the bail (*Bold's Bail*, 1 Chit. R. 288, 316, 502), and within the jurisdiction of the Court (*Hughes* v. *Sterling*, 11 Price, 158; *Anon.*, 1 Dowl. 61).

(*k*) The possession of long *leaseholds*, of whatever value, is not sufficient (*Smith's Bail*, 1 Dowl. 1).

(*l*) Bail cannot justify on property which they hold in trust; it must be property which is absolutely and beneficially their own (*per Chipman, J.*, at chambers; *Tisdale's Bail*, All. R. 18), and, at least in the case of foreign bail, it must be within the jurisdiction of the Court (*Chit. Arch.*, 12 ed., 852).

(*m*) Circumstances raising reasonable suspicion of their solvency, render them inadmissable (*Lush*, 618). An acceptor of a bill cannot be bail for the drawer (*Anon.*, 1 Dowl. 183), but an indorser or drawer may be for the acceptor (*Prime* v. *Beesley*, 3 B. N. C. 391).

(*n*) Bail will be rejected if they are persons having privilege of Parliament (*Graham* v. *Sturt*, 4 Taunt. 249), practising attorneys (R. G., K. B., M. T. 1654; *Anon.*, 1 Chit. R. 714), attorneys' clerks (*Bologne* v. *Vautrin*, Cowp. 828), sheriff's officers, or persons concerned in the execution of process (R. G., K. B., M. T. 14 Geo. II. r. 2), or bail who have before been rejected for insufficiency (*Snell's Bail*, 1 Chit. R. 82).

Form of Affidavit.

6. That the affidavit of justification shall be according to the following form, and may be made before a judge or a commissioner of this Court for taking affidavits.

In the Supreme Court.

Between, &c.

A. B. (*o*) and C. D., bail for the defendant in this cause, severally make oath and say, and first this deponent, A. B., for himself saith, that he is a housekeeper (*p*) (*or* freeholder, *as the case may be*), residing (*q*) at (*describing particularly the place of residence*); that he is possessed of (*r*) property to the amount of £—— (*double the amount of the sum sworn to, if under*

£300, *and if above* £300, *the amount of the sum sworn to, and* £300 *added thereto*), over and above all his just debts (*if bail in any other action add*), and every other sum for which he is now bail (*if not bail in any other action add*), "that he is not bail for any defendant (*s*) except in this action (*t*); that this deponent's property to the amount of the said sum of £—— (*and if bail in any other action*, "and of all other sums for which he is now bail as aforesaid") consists of real property of the value of £——, and of personal property of the value of £—— (*as the case may be*), and this deponent, C. D., for himself saith (*as before*).

Sworn, &c.

(*o*) The affidavit should now be drawn in the first person, and divided into paragraphs (R. Hil. 1875, r. 1, pl. 5, *post*; Chit. Forms (10 ed.) 427), and the additions of the deponents inserted (*Treasure's Bail*, 2 Dowl. 670).

(*p*) House-*holders*, bad (*Anon.*, 1 Dowl. 127).

(*q*) "Residing," material (*Heald's Bail*, 3 Dowl. 423).

(*r*) It would seem advisable to insert the words "and worth," to comply with r. 5, *supra*. In England, where a similar variance existed between the form of affidavit of sufficiency given by R. G., T. T., 1 Wm. IV., and the subsequent R. G., H. T., 2 Wm. IV. pl. 19, the affidavit could not be used by country bail as an affidavit of justification, unless it complied with the latter rule (*Weller's Bail*, 6 Dowl. 312; *Penson's Bail*, 4 Dowl. 627).

(*s*) Omission of "defendant" does not invalidate (see *Smith's Bail*, 1 Dowl. 514).

(*t*) "Except for the above named defendant"—bad (*Warren* v. *DeBurgh*, 7 Dowl. 96).

Costs of Justification.

7. That (*u*) if the notice of bail shall be accompanied by such an affidavit (*v*) of justification, and the plaintiff afterwards except (*w*) to such bail, he shall, if such bail are allowed, pay the costs of justification; and, if such bail are rejected, the defendant shall pay the costs of opposition, unless the Court, or a judge, shall otherwise order (*x*).

(*u*) English R. G., T. T., 1 Wm. IV. pl. 3.

(*v*) The rule will be satisfied by the delivery of a *copy*, but the original must be filed with the bail-piece, the notice must so state, and the copy purport to be a copy of the affidavit so filed (*West* v. *Williams*, 3 B. & Ad. 345). It was the practice in England, for country bail, to use the affidavit of sufficiency as an affidavit of justification (*Penson's Bail*, 4 Dowl. 627).

(*w*) This rule is not applicable where bail must justify, though not excepted to (*Webb's Bail*, 1 Dowl. 446).

(*x*) To entitle a defendant to costs, the affidavit must strictly follow the form (*Anon.* 1 Dowl. 126; *Weller's Bail*, 6 Dowl. 312), and must be authenticated and referred to in the notice of bail (*West* v. *Williams*, 3 B. & Ad. 345). If the affidavit or notice be irregular, or the property be mis-described—if the fault be in these, and not in the qualification itself—the practice is to allow the bail to justify, but the plaintiff will be

saved from the costs of the justification, which, therefore, become costs in the cause, but if the bail are rejected, whether the affidavit, &c., be right or wrong, the defendant pays the costs of opposition (*Lush*, 630; *Evan's Bail*, 1 Dowl. 384).

Bail when perfected.—Filing Bail-piece.

8. That, in cases of exception, when bail have duly justified and been allowed, and a rule for an allowance (*y*) has been entered in Court, or an order therefor made by a judge, and a copy of such rule or order has been served on the plaintiff's attorney, the bail shall be deemed perfected; and the attorney who puts in the bail shall forthwith obtain the bail-piece from the judge, with whom it lies, and file the same with the clerk (*z*).

(*y*) "Upon reading the affidavit of it is ordered, that the bail put in for the defendant in this cause, who have this day justified themselves in Court, be allowed, and the bail-piece filed. On motion of Mr. . . By the Court."

(*z*) See r. 13, *infra*.

9. That if the plaintiff does not except against the bail, within twenty days after service of notice of bail, the bail shall, in like manner, be deemed perfected (*a*); and the attorney who puts in the bail shall forthwith, after the expiration of the said twenty days, obtain the bail-piece from the judge, and file the same with the clerk (*b*).

(*a*) *Hodson* v. *Garrett* (1 Chit. R. 174); *Thewaites* v. *Gallington* (4 D. & R. 365).

(*b*) See R. 13, *infra*.

Exoneretur.

10. That in cases of render in discharge of bail (*c*), the clerk, upon production of a certificate of the sheriff, to whose custody the defendant has been committed, that such defendant is in his custody, together with an affidavit of the service of notice of render upon the plaintiff's attorney, shall indorse upon the bail-piece an *exoneretur*, in the words following: "The bail within named are exonerated," and shall set down the day of the month and year of his so doing, and sign his name thereto; and such certificate and affidavit shall thereupon be filed with the bail-piece.

(*c*) See C. S., c. 37, ss. 28, 29 (Stat. 11 Geo. IV. and 1 Wm. IV. c. 70, ss. 21, 22), as to render.

An Act in somewhat similar terms (12 Vic. c. 39, s. 13), was held to empower *sheriff's bail* to render after the return of the writ (*James* v. *White*, 6 All. 431). Where an action was brought against the bail after the render, but before the service of the notice, the Court refused to stay proceedings, except on payment of costs (*Duff* v. *Hunter*, 1 Kerr, 499). An *exoneretur* will be entered, though the defendant escapes

between the time of render and notice, if the notice be given within a reasonable time (*Ratchford* v. *Giles*, *id.* 459(.

The following is the form of notice of render (see *Chit. Forms*, 6 *ed.*, 262; 10 *ed.*, 446):

(*Title of the Court and cause.*)

Take notice, that the above named defendant was, on this day [*or*, "on the day of instant," *or* "last"], rendered, in discharge of his bail in this action, to [*or* "in"] the common gaol, in the county of , pursuant to an order of the honorable Mr. Justice , dated , and that the said order has been duly lodged with the gaoler of the said gaol (*Jackson* v. *Black*, 4 All. 79), and that the said defendant is now actually in the custody of such gaoler, by virtue of the said order. Dated . Yours, &c.

It should, it seems, be signed by the defendant or bail, as the clause as to signature by attorney is omitted in the Con. Stats. See *Jackson* v. *Black*, *supra*; *Wilson* v. *Maxwell*, 6 All. 219.)

11. That hereafter proceedings against bail, in any action upon the recognizance, shall not cease, as provided for in the rule of this Court of Michaelmas term, one thousand eight hundred and twenty-five (*d*), without the costs incurred in such action up to the time of notice of render being first paid (*e*).

(*d*) *Ante*, p. 28.

(*e*) *Duff* v. *Hunter*, *supra*, *n.* (*c*) to r. 10. The bail should apply to a judge, at chambers, to stay proceedings and enter an *exoneretur*, as soon as an action is commenced against them; they will then, in general, only be obliged to pay costs up to the time of application (*Gilbert* v. *McLaughlin*, T. T. 1846; *Sullivan* v. *Small*, M. T. 1846; All. Rules, 20).

Inconsistent Rules.

12. That any former rules of this Court, inconsistent with any of these present rules, relating to bail, shall be hereafter of no effect.

Filing Bail-piece.

13. That any attorney, who shall neglect to transmit or to file the bail-piece, as the case may be, according to the foregoing rules, shall be deemed to be in contempt of the Court for disobedience of its rules (*f*).

(*f*) See R. Mich. 1796, *ante*, p. 11; R. East. 1848, r. 1, pl. 4, *post*; and *Wiggins* v. *Dibble*, *ante*, p. 3.

TRINITY TERM, 1832—3 WM. IV.

Trials at Bar and Nisi Prius.

IT IS ORDERED, That in future all causes for trial at the terms of this Court be entered with the clerk at or before the opening

of the Court, on the first day of its sittings, in like manner as the rule is at the Nisi Prius, and that no such entry be made after the time so limited, unless the Court, under special circumstances, shall see fit to allow the same.

And it is further ordered, That hereafter, as well at the terms as at Nisi Prius, trials shall be proceeded with on the first day of the sittings of the Court, in the order in which the causes are entered, any usage to the contrary notwithstanding; the (*a*) first cause not to be called on before the expiration of one hour after the opening of the Court on such first day of the sittings.

(*a*) This rule, with the exception of the concluding clause, has been superseded (*All. Rules*, 14 *n.* (r.); it is omitted in the revised edition. See R. Hil. 1826, r. 1, *ante*, p. 29.

TRINITY TERM, 1834—5 WM. IV.

Summary Actions (*a*).

1. IT IS ORDERED, That the writ in summary actions shall be on parchment, according to the usage in this Court in other actions.

2. That in every action which has not been agreed, and in which it is intended to proceed, the plaintiff's attorney shall file the writ, and enter the cause at the term in which the writ is returnable, and shall make a docket of such causes, and deliver the same to the clerk, and pay the fees in like manner as in other actions.

3. That in actions to be tried at Nisi Prius, the writ and plea shall be delivered from the files of this Court to the plaintiff's attorney, and shall form the record, and be filed as such, at the Court of Nisi Prius.

4. That the result of trials at Nisi Prius shall be entered in a brief and summary form, according to the circumstances of each case, and endorsed on the writ, or annexed thereto, in the nature of a *postea*, and returned by the clerk of the circuits accordingly.

5. That the clerk of this Court shall not, in any case, sign final judgment, unless the writ be on file in his office; and in every memorandum of judgment there shall be reference made to such writ so on file.

(*a*) 30 Vic. c. 10, s. 38, repealed "all Acts and parts of Acts relating to the summary practice in the Supreme Court," and see C. S., c. 37, s. 126.

Sec. 15 of 12 Vic. c. 40: "An Act to consolidate and amend the several Acts of Assembly relating to summary actions," enacting that "no attorney shall commence any action, in any court in this Province, either by himself or his agent, unless first having been authorized, in writing, by the plaintiff or his agent," was held in *James* v. *McLean*, 3 All. 164, to be not confined to summary actions in the Supreme Court; it is, therefore, so far as it relates to other actions, unrepealed. In delivering the judgment in that case, *Carter, C. J.*, says (p. 167): "As to the effect of this clause we have no doubt it would entitle either party to apply to the Court to stay proceedings brought without this authority—see *Hubbert* v. *Phillips*, 13 M. & W. 702; *Doe* d. *Davies* v. *Eyton*, 3 B. & Ad. 785; *Wright* v. *Castle*, 3 Meriv. 12."*

The applicant is entitled to have the proceedings stayed without payment of costs (*Reynolds* v. *Howell*, L. R., 8 Q. B. 398; *Spurr* v. *Albert Mining Co.*, 2 Pug. 260). In the latter case, on an application to set aside the service of the writ and the appearance, on the ground that the service was not on the duly qualified officer of the corporation, and the attorney appearing was not appointed by such officer, the question as to the validity of the election of officers was raised and decided on affidavits.

If the plaintiff, after the issue of the writ, adopts and ratifies the act of the attorney, the defendant cannot have it set aside (*Albert Mining Co.* v. *Spurr*, 2 P. & B. 665).

An application by a plaintiff to set aside a judgment of nonsuit, in an action of trespass, *q. c. f.*, brought in his name by a person to whom he had sold the land, was refused, though he did not appear to have expressly authorized the action, he having received the purchase money, and delivered the title deeds to the attorney of the plaintiff on the record, before the commencement of the action, and, after receiving the bill of costs, promised to pay it (*Wetmore* v. *Reed*, 2 Kerr, 430). Where an application of this nature is made by the defendant, the plaintiff must have notice thereof (*Glencross* v. *Wark*, 6 All. 201).

Where one is entitled to sue in another's name, an authority from the real party is sufficient (*Pickford* v. *Ewington*, 4 Dowl. 456).

In an action by an attorney for the costs of a suit in which judgment has been obtained, with the knowledge of the client, it will be presumed, in the absence of evidence to the contrary, that the attorney had a written authority (*James* v. *McLean*, *supra*).

MICHAELMAS TERM, 1834—5 WM. IV.

Special Bail—Commissioners.

1. ORDERED, That it shall be deemed irregular to put in bail before a commissioner (*a*), in any parish or city in the Province, in which one or more of the judges of this Court may reside, unless at times when such judge or judges may be absent from

* "Every respectable attorney ought, before he brings an action, to take a written direction from his client for commencing it" (*per Ld. Tenderden, C. J.*, *Owen* v. *Ord*, 3 C. & P. 349; *James* v. *McLean*, *supra*).

their place of residence; and further, that always, during the sitting of the Court in term time, it shall be irregular to put in bail before a commissioner in the parish of Fredericton, in the county of York; and that no judge do receive any bail-piece, transmitted to him, in which the bail may have been entered contrary to this rule (*b*).

(*a*) Appointed under 4–5 W. & M., c. 4. County Court judges are, by C. S., c. 51, s. 11, constituted *ex officio* commissioners for taking bail in the Supreme Court, in the several counties for which they may be respectively appointed.

(*b*) Special bail may be put in and perfected according to the established practice (C. S., c. 37, s. 30). See as to the time within which bail should be put in, *ante*, p. 21, and as to the qualification of the bail, *ante*, p. 42. For the purpose of rendering (see R. Hil. 1832, r. 10), one bail is sufficient (*Duncan* v. *Barnes*, 6 All. 172, overruling *Steward* v. *Bishop*, Barnes, 60), but in other cases there must be two, and two only, unless where the debt is large (*Jell* v. *Douglass*, 1 Chit. R. 601). The county, in the margin of the bail-piece, must be that into which the writ issued, but bail need not be put in in that county (*Moore* v. *Kenrick*, 3 Bing. 603). The bail-piece is engrossed on parchment, in the following form (see as to amendment, *Estey* v. *Brown*, 2 All. 527; *Riorden* v. *Dunn*, 3 All. 124):

In the Supreme Court.

On the day of A. D. 18 .

(*The county in the writ*) to wit. C. D. (*defendant*), is delivered to bail upon a *capi corpus* to

E. F., of (*residence and addition*),
and
G. H., of (*residence and addition*).

Oath for $
D. A.
Attorney for the defendant.

At the suit of A. B.

Taken and acknowledged, conditionally, at my chambers, in the day of A.D.
(*or, if before a Commissioner*), at in the county of , the day of , A.D. 18 . Before me.
A Commissioner.

On attending the judge or commissioner with the bail and bail-piece, he will take the recognizance—see the form, C. S., c. 38, s. 3. The commissioner's fee is 2s. sterling. If put in before a commissioner, the bail-piece, and, annexed thereto, an affidavit of the caption stating—

"That the recognizance of bail or bail-piece, hereunto annexed, was duly taken and acknowledged by E. F., of , and by G. H., of , the bail therein named, before , esquire, the commissioner who took the same in my presence, the day of , instant,"

is to be forthwith transmitted to a judge (R. Hil. 1832, r. 1, *ante*, p. 40). The bail

having been thus put in, a notice thereof, setting forth, with truth and certainty, the names (*Smith* v. *Mellon*, 5 Taunt. 854), additions of degree, trade, or calling (*Costar's Bail, id.* 554), and place of abode (*id.*; *Anon.*, 1 Chit. R. 493, *n.*; *Anon.*, 6 Mod. 25), as well when put in before a commissioner (R. Hil. 1832, r. 1 *ante*, p. 40), as when put in before a judge (R. G., M. T. 16 Car. II.), must be served within the time for putting in bail (see *Grant* v. *Gibbs*, 3 Dowl. 409); yet if it be not given in time, the plaintiff cannot, after notice, regularly take an assignment of the bail bond (*Tidd*, 9 *ed.* 253).

Notice of Bail.

(*Title of the court and cause.*)

"Take notice, that special bail was, on the day of , instant, put in for the above named defendant, before the honorable Mr. Justice (*Kelly* v. *Wrother*, 2 Chit. R. 109), at his chambers, in (*or*, 'before , esquire, a commissioner appointed to take bail in and for the county of '), and the names and additions of such bail are E. F., of (*residence and addition*), and G. H., of (*residence and addition*), [*if before a commissioner, add* 'and the bail-piece, with the affidavit of the taking thereof has been transmitted to the honorable Mr. Justice .' [*If accompanied by a copy of the affidavit of sufficiency* (see R. Hil. 1832, r. 7, *ante*, p. 43), *add* 'and that the said E. F. and G. H. have, in pursuance of the rule of Court in that behalf made and sworn to the affidavit, a true copy whereof is hereto annexed, and which affidavit is filed with the said bail-piece.] Dated, &c. Yours, &c. To Mr. P. A., plaintiff's attorney. D. A., defendant's attorney."

Entering special bail, and giving notice thereof, subscribed "Attorney for defendant," without adding express words of appearance, is a sufficient appearance (*Fleming* v. *Shaw*, A. C. MS. 117).

Sheriff's Fees.

2. In order to secure to sheriffs the proper emoluments of their office, It is ordered, That, after the first day of Hilary term next, no costs for the service or return of any writ or process be taxed or allowed in any bill of costs, without the production of such writ or process, with the return thereof, signed by the sheriff or his deputy, and the fees for the service and return (*c*) marked thereupon by such sheriff or deputy (*d*).

(*c*) *Quære*, whether this endorsement is conclusive as to the amount on the taxation of costs (*Atkinson* v. *McAulay*, 4 All. 265; *Stevens* v *Ryan*, 1 P. & B. 547).

(*d*) The stat. 29 Eliz. c. 4, is not in force here, and the title of a sheriff to fees must be sought in some Provincial law (*Kavannah* v. *Phelon*, 1 Kerr, 472).

C. S., c. 25, s. 8 (6 Wm. IV. c. 1, s. 11; 13 Vic. c. 50, s. 9; 1 R. S., c. 131, s. 8), enacts that no person shall be paid for executing any process, *mesne* or final, unless it be the sheriff or his deputy (*Herrington* v. *Lugrin*, 1 Kerr, 109). It having been held that this Act did not entitle a sheriff to fees where he had performed no services (*Drury* v. *Howe*, 3 Kerr, 588), it was enacted by 36 Vic. c. 31, s. 13 (C. S., c. 37, s. 13), that every writ of summons, whether served by the sheriff or his deputy, *or by any other person*, shall be returned through the office of the sheriff of the county in which such writ is served, and such sheriff shall be entitled to the same fees thereon, *whether served by him or not*, for service and return, exclusive of mileage, when not served by or through him.

"The attorney who issues the process, as well as the plaintiff, shall be severally

liable to the sheriff for executing the same"—C. S., c. 25, s. 9 (6 Wm. IV. c. 1, s. 12; 1 R. S. c. 131, s. 9). See as to the personal liability of the Attorney General for sheriff's fees on the execution of Crown process, *White* v. *Peters* (2 Kerr, 329). The attorney is liable for the fees for executing a *fi. fa.* (*Palmer* v. *Harding*, 3 P. & B. 281).

Notices of Motion for new Trials.

3. It is ordered (*e*), That in future, the attorney for the party intending to move for a new trial, or for setting aside a verdict (*f*), shall cause to be delivered to the judge before whom the cause was tried, a note, in writing, specifying the name of the cause, the time and place of the trial, and the general grounds (*g*) of the intended motion; such note, in writing, to be delivered to the judge in causes tried in vacation, on or before the first day of the next ensuing term (*h*), and in causes tried in term on or before the Monday in the second week of term.

(*e*) See R. G., K. B., M. T. 40 Geo. III.

(*f*) Even though the point be reserved (*Flaherty* v. *Sayre*, Bert. p. 84; and see *Turner* v. *Hammond*, 2 Kerr, 536).

(*g*) The notice must now state particularly the grounds of the intended motion. See R. Hil. 1867, *post*.

42 Vic. c. 8, s. 10, enacts: "In cases tried at the Nisi Prius sittings, or at any Circuit Court, it shall not be necessary to move for a rule to set aside the verdict, or for judgment *non obstante veredicto*, or for a repleader, as is now the practice, but the party intending to move the Court shall give notice of motion to the judge who tried the cause and to the opposite party, or his attorney, and shall also deliver to the opposite party, or his attorney, a statement of the grounds of the motion, and the authorities relied upon, which shall be printed when the same exceeds five folio, and shall file with the clerk of the pleas five copies of such statement, for the use of the Court, on or before the first day of the term so next following the trial. provided always that the Court may, for good cause shewn, extend the time for the giving of such notice and statement to a later day in the term, or until the term following; and provided further, that the party moving may, with leave of the Court, cite any authority which may have been given to the counsel or attorney of the opposite party before the cause comes on for argument."

Sec. 11: "All causes in which statements have been filed with the clerk, as in the preceding section mentioned, shall be entered on the special paper, in the order in which the statements are so filed, and shall come on for argument in the order in which they are so entered, without any rule *nisi* having been granted, provided, that when the Court shall sit in two divisions, two special papers shall be made up, if necessary, so that each cause shall be heard before the division of which the judge who tried the cause shall be a member, as herein provided" (... s. 2).

Where a counsel fails to make out such a case as would have entitled him to a rule *nisi* under the former practice, the motion will be refused, without hearing the counsel for the opposite party (*Peabody* v. *North West Boom Co.*, 3 P. & B. 495).

The Court has no power to extend the time for giving the notice, &c., beyond the

term next after the term following the Circuit at which the cause was tried (*Woodman v. Town of Moncton*, 4 P. & B. 12).

Where the notice stated that the defendant would move to enter a nonsuit or a verdict for the defendant, but no leave had been reserved at the trial, the Court refused to allow the defendant to amend the notice and move for a new trial (*Mullin v. Frost*, 4 P. & B. 112).

The Court, in Trinity term, 1880, directed the clerk not to enter any cause unless the statement required by the above Act be filed at the time of entering.

The notice may be in the following form :

(*Title of the court and cause.*)

The [defendant] will move to set aside the verdict in this cause and for a new trial [and also, in case a new trial be refused, that the judgment may be arrested], on the following grounds :

I. Improper rejection of evidence.

(*a*) In the evidence of A. B., in refusing to allow (*&c., as the case may be*).

II. Improper admission of evidence.

(*a*) In the evidence of C. D., in allowing the witness to state (*&c.*).

III. Misdirection.

(*a*) In telling the jury that (*&c.*).

(*a*) In not directing the jury that (*&c.*)

IV. Improper refusal of the learned judge to permit an amendment by (*&c.*)

V. Verdict against law and evidence.

VI. Excessive damages.

(*&c. &c. Stating the grounds, according to the facts.*)

The following authorities will be relied on.

D. A., *defendant's attorney.*

(*h*) The remainder of this rule is obsolete.

MICHAELMAS TERM, 1835—6 WM. IV.

Nisi Prius Sittings.

1. IT IS ORDERED, That there shall be sittings of Nisi Prius for the county of York (*a*), after the respective terms of this Court, on the following days in each and every year, that is to say: Sittings after Hilary term, on the third Tuesday in February; sittings after Trinity term, on the fourth Tuesday in June; sittings after Michaelmas term, on the fourth Tuesday in October. The said respective sittings to continue for so long a time as, in the opinion of the judge holding the same, may be necessary for the dispatch of the business depending.

(*a*) Appointed under the authority given by 5 Wm. IV. c. 37. Alterations in the times for holding the sittings were made by R. Mich. 1847, r. 2, *post*, and the Acts 17 Vic. c. 19, and 22 Vic. c. 2. Both these Acts are repealed by the Con. Stats. and see c. 32, s. 2, under which the sittings and circuits are now held.

2. Ordered, That the sheriff of the county of York do summon and return grand jurors and petit jurors to attend at the several

sittings in that county, now appointed or hereafter to be appointed, in like manner as has been heretofore accustomed with regard to the terms of this Court (*b*); and that hereafter no jurors be summoned to attend at the terms without special order (*c*).

(*b*) See C. S., c. 45, s. 8.

(*c*) When a trial at Bar may be had, see 1 Ch. Arch. (12 *ed.*), 376.

3. It is ordered, That all general rules of this Court, which relate to the entering of causes, the filing of nisi prius records, or other proceedings at Nisi Prius, shall apply to, and be in force at the Nisi Prius sittings in the county of York.

4. It is ordered, That in all actions in which the issue (*d*) is made up and the *venire facias juratores* is awarded, as of the last return day, that is to say, the second (*e*) Saturday after the first Tuesday, in any term, such writ of *venire facias juratores* may be awarded (*f*) and made returnable forthwith.

(*d*) The issue roll is not used in this Court (*McLauchlin* v. *Wilson*, 2 Kerr, p. 627; *Beardsley* v. *Dibble*, 1 Kerr, 646), the pleadings are transcribed directly into the *nisi prius* record.

(*e*) The *third* Saturday is now the last return day—C. S., c. 31, s. 3 (5 Wm. IV. c. 37, s. 3; 19, Vic. c. 40, s. 2).

(*f*) No award of *venire* is now to be entered on the record, R. Hil. 1875, r. 1, pl. 7, *post*.

See stat. 3 & 4 Wm. IV. c. 67, s. 2. When the sheriff is a party, or is of kin or affinity (*Stiles* v. *Gilbert*, 3 All. 262, though the party through whom the affinity was traced be dead, *Oulton* v. *Morse*, 2 Kerr, 77) to either party (*Wetmore* v. *Levy*, 5 All. 180), within the "second degree" (C. S., c. 45, s. 21), or interested in the event of the suit (*Doe* d. *Grant* v. *Boyne*, 1 Han. 431; *Murchison* v. *Marsh*, 2 Kerr, 608; *Woodstock R. R. Co.* v. *Tupper*, 1 Han. 437). the *venire* is to be issued to one of the coroners (C. S., c. 45, s. 12), or if all the coroners be disqualified by any of the above causes to two elisors, to be appointed by the Court; in sufficient time before the Circuit to permit of six days notice being given to the jurors (*New Bk. R. R. Co.* v. *Murray*, 2 P. & B. 43; 3 *Chit. Gen. Pr.* 799).

The defendant cannot pray process to the coroner, because he can challenge (*Co. Lit.* 157); but the Court will, on his application, in a case where the objection to the sheriff is not a ground of challenge, as where he had married the sister of the person who was security for costs, and who aided the plaintiff in carrying on the suit, award the *venire* to the coroner (*Murchison* v. *Marks*, *supra*).

If the defendant wishes to rely on his strict legal right to challenge the array, he should, on his challenge being overruled, move for a *venire de novo* instead of a new trial (*New Bk. R. R.* v. *Murray*).

The writ in common use in this Province has the following form (see *Chit. Forms*, 6 *ed.*, 73; *Tidd's Forms*, 280; *Hazen* v. *Boyne*, 4 All. 580; 3 *Chit. Gen. Pr.*, 797; R. Hil. 1875, r. 2, Form No. 3, *post*):

"Victoria (&c.) To one of the coroners of [*or*, "to and elisors, duly appointed in this behalf], Greeting. We command you, that you cause to come before the honorable , Her Majesty's Chief Justice assigned to hold Pleas in the Court of our Lady the Queen, at Fredericton, on , the day of , in the year of our Lord 18 (*the first day of the nisi prius sittings. If the cause is to be tried at a Circuit Court, instead of the above, state as follows*), before the honorable , one of the Justices of our Lady the Queen, assigned to hold the Circuit Court and take the assizes in and for the said county of on (&c., *the first day of the Circuit Court*), seven good and lawful men of the body of your county, qualified according to law, by whom the truth of the matter may be the better known, and who are no wise of kin either to A. B., the plaintiff, or to C. D., the defendant, to make a certain jury of the country between the parties aforesaid, in an action on promises (*or* 'of debt,' &c., *as the action may be*], because as well the said C. D. as the said A. B., between whom the matter in variance is, have put themselves upon that jury, and have there then the names of the jurors and this writ. Witness (&c.)."

The number of jurors named in the writ is not the rule for the officer's guidance in summoning, but the number to be sworn for the trial of the cause, and he should, it would seem, summon twenty-one (*Hazen* v. *Bryson*, *supra*; C. S., c. 45, s. 8).

In an action by an assignee of a limit bond, the common *venire* to try the issue is sufficient, and the plaintiff need not have the damages assessed (*McElroy* v. *Getty*, 1 Han. 261).

Crown and Special Paper.

5. It is ordered, That the matters contained in the Crown paper and special paper, respectively, shall come on to be argued on the second day in each term, any former rule (*g*) to the contrary notwithstanding.

(*g*) R. Hil. 1826, r. 3, *ante*, p. 31, and see R. Hil. 1836, r. 1, and R. Trin. 1846, *post*.

Motions for new Trials.

6. It is ordered, That no motion for a new trial shall be made (*h*) after the first Saturday in any term.

(*h*) See *Orpwood* v. *Morrisey*, 1 P. & B. 3.

Applications to set aside a verdict, for judgment *non obstante*, or for a repleader, are entered on the special paper, and heard in the order in which they are entered. See 42 Vic. c. 8, ss. 10, 11, *ante*, p. 50.

A motion in arrest of judgment could, by the practice of the Queen's Bench, prior to R. K. B., C. P. & Ex., Hil. 2 Wm. IV. pl. 65, have been made at any time before judgment was actually signed, and after a rule for a new trial had been discharged (*Taylor* v. *Whitehead*, Doug. 745; 2 Tidd, 928).

An application for a *venire de novo* must be made before judgment, and it has been entertained at the same term at which a rule to arrest the judgment has been made absolute (*Corner* v. *Shew*, 4 M. & W. 163, 6 Dowl. 688).

For the time for moving to set aside an award, see r. 12, note, *infra*.

Assessment of Damages by Judge.

7. It is ordered, That in all cases, where application shall be made to a judge in vacation after judgment by default, to make

inquiry or assessment, under the Act of Assembly 5 Wm. IV. c. 37, s. 9 (*i*), there shall be produced to the judge a certificate or memorandum of the day on which interlocutory judgment was signed, or judgment by default entered, signed by the clerk of the pleas or his deputy; and that no such inquiry or assessment shall be made, unless such certificate or memorandum be so produced (*j*).

(*i*) See this Act, *post*, R. Trin. 1838. *n.*

Damages cannot be assessed *in vacation* before the expiration of twenty days after judgment (C. S., c. 37, s. 115).

(*j*) The cause of action itself, as stated in the declaration, and the right to some damage in respect of it, is admitted by suffering judgment by default (*East India Co.* v. *Lutman*, 1 Stra. 612, and see 2 Wms. Saund. 107, *n.* 2), consequently, if the declaration set out a contract, whatever it be, the contract is admitted (*McDonald* v. *Cummings*, 2 Pugs. p. 289). Thus, if in an action on a deed, agreement, &c., it be expressly declared on, it need not be proved (*Hasluck* v. *McMasters*, A. C., MS. 5; *Collins* v. *Rybot*, 1 Esp. 157; *Cooper* v. *Blick*, 2 Q. B. 915; *Stephens* v. *Pell*, 2 Dowl. 629; *DeGaillon* v. *L'Aigle*, 1 B. & P. 368; *Shepherd* v. *Charter*, 4 T. R. 275), nor in an action on a bill or note, is it necessary to prove any allegation in the declaration, stating the plaintiff's right to sue (*Green* v. *Hearne*, 3 T. R. 301; *Anon.*, 3 Wils. 155; *Bevis* v. *Lindsell*, 2 Stra. 1149), nor, since the new pleading rules, even to produce it (*Lane* v. *Mullins*, 2 Q. B. 254), unless, perhaps, for the purpose of getting interest from the time it became due (*Hutton* v. *Ward*, 15 Q. B. 26).

It has been held by the highest authority (*Doran* v. *O'Reiley*, 5 Dow, 233), that an averment in the declaration of the sterling value of an amount of foreign coin sought to be recovered, though under a *videlicet*, was admitted by the judgment. Where the claim is upon the common counts, the admission has very little effect (see *Falls* v. *Sargent*, 3 Kerr, 248; distinguishing *DeGaillon* v. *L'Aigle*), and it seems that in such actions "the plaintiff is not, in strictness, relieved by a judgment by default from the necessity of proving the delivery of each article, or the extent of the work done, or the particular sum of money paid, though certainly, in practice, when a defendant has not, by plea, denied the plaintiff's action, there is generally a strong feeling on the part of the jury, when executing a writ of enquiry, to be satisfied with slighter evidence than on a trial" (3 *Chit. Gen. Pr.* 673). In *Falls* v. *Sargent*, *supra*, where *DeGaillon* v. *L'Aigle*, 1 B. & P. 368, and *Chapel* v. *Hicks*, 2 C. & M. 214, were considered, the defendant was permitted to shew that he contracted merely as the agent of a third party, to whom the credit was given. See further as to the extent of the admission, *Hasluck* v. *McMasters*, A. C. MS. 5, *n.* (*a*), and the cases on the effect of payment into court cited, Ros. Ev., 13 *ed.*, 77; Tayl. Ev., 7 *ed.*, 694; 2 Chit. Pl., 17 *ed.*, 448; Bull. & Leake, 664.

When the amount of the plaintiff's claim is not admitted on the record, the necessary facts must be brought before the judge by affidavit. In *Scoullar* v. *Webb* (1 Kerr, 520), the affidavit, to which an account was annexed, stated that "the whole of the articles mentioned in the annexed account were sold and delivered to the above named defendant at the prices therein stated, &." (*qu.* by the plaintiff), "and that the

said defendant is justly and truly indebted to the said plaintiff in the sum of £373 14 4½." The account was headed in the usual way, and the first item was as follows: "Sept. 29, 1838, To amount of agreement to date, £52 6 8." It then enumerated goods sold and delivered, &c., the whole amounting to £377 14 4. The defendant's application, on his own affidavit, to set aside the assessment and proceedings thereon, on the ground of falsity of the affidavit, was refused, but the amount was reduced by striking off the first item of the account, to which the affidavit did not apply. See *Mitchell* v. *Lowther* (1 Pugs. 79), where an affidavit to assess damages, under 18 Vic. c. 25, s. 1 (C. S., c. 37, s. 15; Stat. 15-16 Vic. c. 76, s. 18), which requires the plaintiff "to prove the amount of the debt or damages," and *Rankin* v. *Weldon* (6 All. 220), where an affidavit, to be used, under Stat. 5-6 Wm. IV. c. 62, s. 15, as evidence on the trial, were held to be insufficient. A motion to deprive the plaintiff of full costs, on the ground that a payment had been made before action, reducing the claim to an amount cognizable by a justice's court, was refused, though the payment being admitted, the amount was deducted from the judgment (*Bennett* v. *Morse*, 2 Kerr, 624), and see *Collins* v. *McCarthy*, 3 All. 504, where the Court refused, after final judgment was signed, to stay proceedings upon payment of the sum due and summary costs. Where the plaintiff tore off a condition, written under a promissory note, avoiding it on the performance of an award, which was afterwards made in favor of the plaintiff for an amount less than that in the note, and held the defendant to bail and signed judgment on the note for the full amount thereof, the judgment was set aside, with costs, as fraudulent (*McLoon* v. *Lowell*, A. C. MS. 67).

Mesne Process.—Names of Defendants.

8. It is ordered (*k*), That every *mesne* process, in any action, shall contain the names of all the defendants (*l*), if more than one, in the action.

(*k*) Taken from R. G., K. B., E. T. 8 Geo. IV., and see R. G., K. B., C. P. & Ex., M. T. 3 Wm. IV. r. 1, as to writs of summons and *capias*, under stat. 2 Wm. IV. c. 39. The stat. 15-16 Vic. c. 76, s. 4, re-enacted in this Province by C. S., c. 37, s. 3 (36 Vic. c. 31, s. 4), is confined to writs of summons.

(*l*) A defendant may be sued by the name he is commonly known by (*Davidson* v. *King*, 2 Pugs. 5; *Williams* v. *Bryant*, 5 M. & W. 447). See as to the use of initials or contractions of Christian name, C. S., c. 37, s. 164 (13 Vic. c. 35, s. 1; 36 Vic. c. 31, s. 166; 7 Wm. IV. c. 14, s. 18; 12 Vic. c. 39, s. 8; Stat. 3-4 Wm. IV. c. 42, s. 12); *McLellan* v. *Millmore*, *infra*. In the case of a corporation, it is sufficient if the name be substantially the same (see *McKenzie* v. *Wiswell*, 1 Han. p. 513; *Stafford* v. *Bolton*, 1 B. & P. 40; as to amendment, see *Woodman* v. *Moncton*, 3 P. & B. 338). In a non-bailable action, a misnomer cannot, it seems, be objected to until declaration, when an application may be made under the above Act to compel the plaintiff to amend (*Chit. Arch.*, 12 *ed.*, 187).

If the defendant appears by the name in which he is sued, the plaintiff may declare against him by that name; if he appears by his true name, the plaintiff ought to declare against him by that name, stating, also, the name by which he is sued in the writ. A defendant is estopped by the judgment against him from saying he was sued by a wrong name (*Crawford* v. *Satchwell*, 2 Stra. 1218; *Fisher* v. *Magnay*, 5 M. & G.

...and in an action against him by his true name on such a judgment, it is sufficient to aver that the defendant and "A. B." (the name in the judgment) are the same person (*Young* v. *Woodcock*, 3 Kerr, 554). If the defendant do not appear, the plaintiff may, it seems, declare against him by his right name, stating in the declaration that he was sued by the wrong name (1 *Chit. Arch.* 12 *ed.*, 226).

Where the process is bailable, and the defendant, in a case not within C. S., c. 37, s. 164, *supra*, is arrested by initials (*Reynolds* v. *Hankin*, 4 B. & A. 536; *Parker* v. *Bent*, 1 L. J., K. B. 14; *Heath* v. *Chatterley*, *id.* 56), or by a wrong Christian (*Callum* v. *Leeson*, 2 Dowl. 381; *Smith* v. *Innes*, 4 M. & S. 360; *Wilkes* v. *Lorck*, 2 Taunt. 399), or surname, not *idem sonans* (*Webb* v. *Lawrence*, 1 Cr. & M. 806; *Ahitbol* v. *Benidditto*, 2 Taunt. 401; *Homan* v. *Tidmarsh*, 11 Moore, 231; *Dickenson* v. *Bowes*, 16 East, 110; *R.* v. *Shakespeare*, 10 East, 83; ——— v. *Rennolls*, 1 Chit. R. 659, *n.*; *Macdonald* v. *Mortlock*, 2 D. & L. 963; *R.* v. *Calvert*, 2 C. & M. 189; *Shaw* v. *Titherleigh*, 2 Price, 328); or without a Christian name (*Margetson* v. *Tugghe*, 5 Dowl. 9), the Court, or a judge, will order him to be discharged out of custody, or the bail-bond, if any, to be delivered up to be cancelled (1 *Chit. Arch.* 767; *Ladbrooke* v. *Phillips*, 1 H. & W. 109), and he may maintain an action for false imprisonment (*Finch* v. *Cocken*, 2 C. M. & R. 196; *Clark* v. *Laurence*, 3 Kerr, 152).

The application should be made, it seems, before the expiration of the time for putting in bail (*Tucker* v. *Colegate*, 1 Dowl. 574; *Firley* v. *Rallett*, 2 *id.* 708; *Fownes* v. *Stokes*, 4 *id.* 125; *Newnham* v. *Hanny*, 5 *id.*, p. 263), on affidavit, entitled (as should be the summons *Nathan* v. *Cohen*, 3 Dowl. 370) in the defendant's right name, "sued by the name of" the wrong name (*Finch* v. *Cocker*, 2 Dowl. 383; *Shaw* v. *Robinson*, 8 D. & R. 423), and stating the misnomer with the same certainty that is required in a plea of abatement (*Thompson* v. *Oviatt*, 2 All. 118).

The plaintiff may oppose it, by shewing that the defendant had allowed himself to be called by the name used (*Newton* v. *Maxwell*, 2 C. & J. 215), or has, on several occasions, gone by that name (*Walker* v. *Willoughby*, 6 Taunt. 530; *Mestaer* v. *Hert*, 3 M. & S., p. 453), or has represented such name to be his real one (*Morgans* v. *Bridges*, 1 B. & A. 647; and see *Brunskill* v. *Robertson*, 9 A. & E. 840; *Fisher* v. *Magnay*, 5 M. & G. 778), or that he was known as well by one name as the other (*Finch* v. *Cocker*, 3 Dowl. 678. Evidence that he entered into the contract, which is the subject matter of the action, in the name by which he is sued, is, it has been said, sufficient to support the latter allegation (*Walker* v. *Willoughby*, *Newton* v. *Maxwell*, *supra*; *Gould* v. *Barnes*, 3 Taunt. 504), but see *McLellan* v. *Millmore*, where an attachment, designating the defendant as "A. P. Millmore," was set aside, because it was not alleged in the affidavit on which it was grounded that the defendant signed the note by that name, and see *Lush*, 597, where there is a *quary*, whether it must not be stated in the affidavit that the party signed his name in that way, citing *Worley* v. *Cunningham*, 8 Dowl. 139; *Hilbert* v. *Wilkins*, *id.*)

The Court held, in *McLellan* v. *Millmore*, that they could not assume that either a vowel or a consonant initial could be the defendant's name,* and that affidavits shewing that the name sued was in fact so executed, could not be used to aid the original affidavit—1 P. & D. 291.

The English R. G., H. T. 2 Wm. IV. r. 32; Practice Rules, 1853, r. 82, has never

* *McMonagle* v. *Grant* (3 Pugs. 231), *contra*, was not cited.

been acted on this Province, and it is no answer to shew that due diligence has been used to discover the true name (*McLellan* v. *Millmore*).

"If the defendant sign the bail bond in the full name by which he is described in the writ, he will, in general, be precluded from getting his discharge out of custody, or cancelling the bail bond, but not if he sign it by his real name, describing himself also as sued by the wrong one. But if a defendant be arrested by the initials of his Christian name, and he executes the bail bond even by his full name (*Budd* v. *Graham*, K. B., H. T. 1826; *Taylor* v. *Rutherman*, 6 Moore, 264; *Lake* v. *Silk*, 3 Bing. 296; *Grindall* v. *Smith*, 1 M. & P. 24), or by the initials (*Reynolds* v. *Hankin*, 4 B. & A. 536; *Parker* v. *Bent*, 1 L. J., K. B. 14; *McBeath* v. *Chatterley*, *id.* 56; *Ogden* v. *Barker*, 1 Dowl. 125; *Kingston* v. *Llewellyn*, 1 B. & B. 529; but see *Howell* v. *Coleman*, 2 B. & P. 466), the Court or judge will, it seems, order it to be cancelled, unless the case be within the Stat." (3-4 Wm. IV. c. 42, s. 12, *supra*) *Chit. Arch.* 767.

(*l*) All the defendants, where the action is against joint debtors, need not be served with the writ (see R. Hil. 1839, r, 12, *post*). The misjoinder of defendants may be amended under C. S., c. 37, s. 100 (36 Vic. c. 31, s. 103; Stat. 15 16 Vic. c. 76, s. 37); see *Ayre* v. *Mayne*, 6 All. 516; *Morrow* v. *Hamilton*, H. T. 1872, Stev. Dig. 23, before this Act. A nonjoinder may be rectified after it has been pleaded in abatement (*Balmain* v. *Lickfold*, L. R., 10 C. P. 203), under the 101st sec. (36 Vic. c. 31, s. 104; Stat. 15-16 Vic. c. 76, s. 38), and see R. Mich. 1843, *post*, as to pleas abatement. The plaintiff may declare against some only of the defendants, but then all proceedings against the others must be dropped, and he is liable to be *non-prossed* by the latter (*Day's C. L., P. Acts*, 96; *Chit. Arch.* 227).

Subpœna.

9. It is ordered, That the names of any number of witnesses may be put in one writ of subpœna (*m*).

(*m*) For the former practice see *Doe* d. *Jupp* v. *Andrews* (Cowp. 846). The number of subpœnas allowed on taxation of costs depended on the particular circumstances of each case (*Roberts* v. *White*, T. T. 1831, Stev. Dig. 110). Witnesses may be subpœnaed immediately upon notice of trial being given, and the costs thereof will be allowed (A. C. MS. 153).

The subpœna should state the names of all the plaintiffs and defendants (*Doe* d. *Clark* v. *Thompson*, 9 Dowl. 948), and specify the place of trial (*Milson* v. *Day*, 3 M. & P. 333; *Chapman* v. *Davis*, 1 Dowl. N. S. 239). A subpœna requiring the party to attend the trial of a cause on the commission day of the assizes, extends to the whole assizes, and it need not go on, to require his attendance from day to day until the cause be tried (*Scholes* v. *Hilton*, 10 M. & W. 15), but this clause may sometimes be of use, as in *Johnston* v. *Williston* (2 All. 171), where the Court held that its insertion distinguished that case from *Alexander* v. *Dickson* (1 Bing. 366), and they granted an attachment, though the day for appearance mentioned in the writ was anterior to that on which it was served, the witness having attended for several days, and knowing that the cause was not tried. When the writ is so served, after the day named for appearance, the witness should be notified that the cause has not been tried (*Alexander* v. *Dixon*, *supra*, and see *Blandford* v. *DeTastet*, 5 Taunt. 260). If the witness be required to produce any books or papers in his possession, a clause to that

effect is inserted in the writ, and it must specify, with reasonable distinctness, the particular document required; a general direction to produce all papers relating to the subject in dispute will not be enforced (*Lee* v. *Angas*, L. R. 2 Eq. 59; *Atty. Gen.* v *Wilson*, 9 Sim. 526). A Clerk of the Peace cannot be required, by virtue of this writ, to produce the original records of the sessions (*Wetmore* v. *Harding*, 2 P. & B. 338).

When the Court is adjourned under C. S., c. 27, s. 6 (17 Vic. c. 19), a subpœna to attend the adjourned Court is necessary—s. 7. It is sufficient to insert in each copy the name of the witness on whom it is to be served, although there are other names in the original (*Lush*, 460), but care must be taken that the copy is in other respects correct (*Doe* d. *Clerk* v. *Thompson*, 9 Dowl. 948).

A copy of the writ, or at least a statement of its substance, duly certified (2 Tayl. Ev., 7 *ed.*, 1035) must be personally served on (see *Smith* v. *Truscott*, 1 D. & L. 530; *Barnes* v. *Williams*, 1 Dowl. 615), and left with (*Thorp* v. *Gisbourne*, 11 Moore, 55), the witness, and at the same time the *subpœna*, must, in order to ground an attachment, be produced and shown to him (*Wadsworth* v. *Marshall*, 1 C. & M. 87; *Marshall* v. *York R. R.*, 11 C. B. 398; *Jacob* v. *Hungate*, 3 Dowl. 456; *Johnson* v. *Williston supra*), and this, whether he requires to see it or not (*R.* v. *Sloman*, 1 Dowl. 618), but not for the purpose of supporting an action, unless it be demanded (*Mullett* v. *Hunt*, 1 C. & M. 752). His expenses must also be paid or tendered him, though, if he accepts the sum tendered without objecting to the amonnt, but refuses to attend on a different and untenable ground, he cannot urge, in answer to an application for an attachment, that he was entitled to a greater sum under the ordinance of fees (*Gilbert* v. *Campbell*, 1 Han. 258; and see *Dixon* v. *Lee*, 1 C. M. & R. 645; *Newton* v. *Harland*, 9 Dowl. 16; *Goff* v. *Mills*, 2 D. & L. 23, there cited).

The rule *nisi* for an attachment for disobedience to the writ must be applied for at the term next after the contempt (*Thorp* v. *Graham*, 3 Bing. 223; *Doe* d. *Howe* v. *Mealy*, Bert. 121; see R. Hil. 1852, *post*). It is not necessary to shew that the witness was called on his subpœna, if it appear, by other satisfactory evidence, that he did not attend (*Lamount* v. *Crook*, 6 M. & W. 615; *Meloney* v. *Morrison*, 1 All. 241). Any matter which goes to negative the supposition of a wilful disobedience to the writ will be an answer to the rule, such as the dangerous illness of the witness (*Re Jacobs*, 1 H. & W. 123), or his being in custody (*R.* v. *Wetmore*, Bert. 244). The excuse must be *bona fide*, not merely colorable (*Johnston* v. *Williston*, *supra*; *Doe* d. *Cogswell* v. *Smith*, 3 Pugs. 468). The duty of attending is paramount to the private interests of the witness (*Gilbert* v. *Campbell*, *supra*). If his disobedience is wilful, it is immaterial whether he was a necessary witness or not; that will not be enquired into (*Doe* d. *Cogswell* v. *Smith*; *Meloney* v. *Morrison*, *supra*).

See as to issue of writs of attachment, R. Trin. 1860, *post*.

Ejectmeut.—Notice to Appear.

10. It is ordered, That in all actions of ejectment, the notice to appear may be for any return day (*n*) specifically, but when the notice to appear is for the term generally, the day of appearance shall be the first day of the term (*o*).

(*n*) In the first week in term, R. Trin. 1836, *post*.

(*o*) The proceedings in ejectment in this Province are by bill. By 36 Vic. c. 31, s.

202 (C. S., c. 37, s. 199), they shall "continue as heretofore established." The action is commenced (*Doe* d. *Laurence* v. *Shaweross*, 3 B. & C. 752; see *Doe* d. *Bixon* v. *Roe*, 7 C. B. 134) by the service of a declaration in ejectment (see *Tidd's Forms*, 622, s. 26), to which the notice referred to is subjoined.* The declaration is usually entitled as of the preceding term, though the demise may be laid subsequently, but a mistake, or omission in, the title is not in general material, if the notice state correctly when the appearance is to be made (*Chit. Arch.*, 8 *ed.*, 918). The venue is local, and should, it seems, be stated in the body as well as in the margin (*Doe* v. *Bath*, 2 N. & M. 44; *Doe* d. *Goodwin* v. *Roe*, 3 Dowl. 323). Where any doubt exists as to the party in whom the legal title is vested, it is usual to declare, on several distinct demises by the several persons concerned in interest (*Adams Ej.*, 3 *ed.*, 211), their authority for so doing being first obtained (*Doe* d. *Shepherd* v. *Roe*, 2 Chit. R. 171; *Doe* d. *Hammick* v. *Fillis*, *id.* 170), and the plaintiff may then, at the trial, recover on any under which he can prove title. In the case of joint tenants, or tenants in common, a separate demise may be laid for each (*Adams*, 210), but a joint demise could be laid by joint tenants only, before 14 Vic. c. 20, s. 2 (C. S., 37, s. 198), by which a joint demise "shall, in all cases, be sufficient, and shall be deemed to be joint or several, as the facts of the case may require, and shall have all the force and effect that several demises now have or heretofore have had."

The day on which the demise is stated to have been made must be subsequent to the time when the claimant's right accrued (*Doe* d. *Gardner* v. *Kennard*, 12 Q. B. 244; *Goodtitle* v. *Herbert*, 4 T. R. 680; 2 *Chit. Arch.*, 8 *ed.*, 918). A demise by a husband and wife of the wife's property laid previous to the marriage is bad (*Doe* d. *Thomson* v. *Barnes*, Bert. 426). It is usual to lay the demise as far back as the lessor's title will admit of, with a view to the action for *mesne* profits.

The term should be of a length sufficient to admit of the lessor's recovering possession before its expiration, though the courts are now very liberal in permitting amendments in this respect (*Adams*, 215); *Doe* d. *Hill* v. *Todd*, 1 All. 601). It may be of longer duration than the lessor's interest (*Doe* d, *Shore* v. *Porter*, 3 T. R. 13).

The notice to appear is directed to the tenant in possession of the premises, *e. g.* to the sub-tenant, in the case of a sub-lease, instead of the lessee (*Doe* d. *Darlington* v. *Cock*, 4 B. & C. 259), and not to a mere bailiff (*Goodtitle* v. *Badtitle*, 1 B. & P. 385), or servant (*Doe* d. *Atkins* v. *Roe*, 2 Chit. R. 179). For the proceedings, where the name of the tenant cannot be ascertained, see *Doe* d. *Fitzwygram* v. *Roe* (2 Dowl. N. S. 672). Where there is no tenant on the premises, and the possession has been actually *abandoned*, the claimant must proceed as on a vacant possession; but if the tenant retains virtual possession, the proceedings must be in the usual way (*Chit. Arch.*, 12 *ed.*, 1029; 8 *ed.*, 928). The name of the tenant should be correctly stated, but, it seems, the same exactness is not required as in a writ (*id.* 919).

The tenant must be designated in the affidavit of service as "the tenant in possession" (*Doe* d. *Fraser* v. *Roe*, 5 Dowl. 720), styling him "occupier" (*Doe* d. *Jackson* v. *Roe*, 4 Dowl. 609), or "*person* in possession" (*Doe* d. *Oldham* v. *Roe*, *id.* 714),

* See, as to when possession must be previously demanded, *Doe* d. *Cliff* v. *Connaway*, Bert. 382; *Doe* d. *Fields* v. *McKay*, 2 Kerr, 435; *Doe* d. *Livingston* v. *Corrie*, 3 Kerr, 450; *Doe* d. *Estabrooks* v. *Harris*, 2 All. 42; *Doe* d. *Holderness* v. *Little*, 2 All. 558; *Doe* d. *Crookshank* v. *Denny*, 3 All. 50; *Doe* d. *Murray* v. *Murray*, 2 Pugs. 361; R. Trin. 1845, *n. post.*

or tenant in possession, *as executor*" (*Doe* v. *Roe*, 2 C. & J. 45) will not do. Nor is it sufficient to state it argumentatively (*id.*, and see *Doe* d. *Jones* v. *Roe*, 5 Dowl. 226), nor "as deponent believes" (but see *Doe* d. *George* v. *Roe*, 3 Dowl. 22).

See R. Trin. 1836, *post*, as to the rule for judgment.

Ejectment.--Serving Declaration.

11. It is ordered, That in all actions of ejectment, there shall be fourteen days exclusive between the day of serving (*p*) the declaration and the day of appearance, whether the person served with the declaration lives within the county where the Court sits or not, any former rule to the contrary notwithstanding.

(*p*) Service may be made (1) on the tenant personally, at any place, here or abroad (*Doe* d. *Daniell* v. *Woodroffe*, 7 Dowl. 494), (2) on the tenant's wife on the premises, or at the husband's dwelling house (*Doe* d. *Peabody* v. *Roe*, Bert. 347), or elsewhere, provided she be living with her husband (*Tidd*, 1210; *Chit. Arch.*, 8 *ed.*, 923), (3) or on one of the tenant's family, or his servant, or, perhaps, any person on the premises, if the tenant can be shewn, by his acknowledgment (*Doe* d. *Kirk* v. *Roe*, 2 All. 453), or other sufficient evidence (*Doe* d. *Eaton* v. *Roe*, 7 Sc. 124), to have received the copy before the day for appearance (*Tidd*, 1211).

The affidavit of service should be entitled in the Court and cause, "Between John Doe, on the demise of A. B.," *or*, "on the several demises of A. B., C. D.," &c., "plaintiff, and Richard Roe defendant," and may be as follows:

"I (*&c.*) that I did, on personally serve [G., the wife of] E. F., tenant in possession (*ante*, p. 59) of the premises mentioned in the declaration in ejectment hereunto annexed, with a true copy of the said declaration and of the notice thereunder written [by delivering the same to the said G. upon the premises aforesaid," *or*, "at the dwelling house or place of residence of the said E. F., situate at "], and at the same time read over to the said E. F. [*or* G.] the said notice, and explained to him [*or* her] the intent and meaning of the said declaration and notice, and of the service thereof." [*If the wife be not served on the premises, omit the place of service, and add*, "2. And I further say that, at the time of serving the said declaration and notice, as aforesaid, the said E. F. and G. were living together as man and wife."

The affidavit of service on one of the tenant's family on the premises is similar to that of service on the wife in such case, describing the party served as "son," &c., and adding:

"2. That afterwards, on , I saw the said E. F. (*tenant*), and conversed with him upon the subject of this action, when the said E. F. told me that he had received a copy of the declaration and notice last aforesaid, on (*a day before the day for appearance*)."

If the service cannot be effected in either of the modes above stated, the best service must be made that can, as by delivering the copy to a son, servant, &c., of the tenant, and obtaining an admission from him (*Doe* d. *Disbrow* v. *Fen*, Bert. 234; *Doe* d. *True* v. *Fen*, 1 Kerr, 458) that he delivered it to the tenant (*Doe* d. *James* v. *Roe*, 1 M. & Sc. 597); or, where the tenant cannot be found, and there is no person in actual possession of the premises (see *ante*, p. 59), by posting it on the most conspicuous part of the premises (*Doe* d. *Tredwell* v. *Roe*, 1 All. 585); or, where the tenant being in the house, but refusing to open the door, or listen to the explanation, by read-

ing the declaration and notice in a loud voice, and passing the copy under the door (*Doe* d. *Beatty* v. *Roe*, 2 Kerr, 169; and see the cases collected in *Fish. Dig.*; *Har. C. L. P. Acts;* 2 *Chit. Arch.* 12 *ed.*, 1020); and on motion in Court, on an affidavit, stating the particular manner of the service, the Court will decide as to its sufficiency.

See as to service, where the action is brought on a proviso for re-entry on non-payment of rent, C. S., c. 83, s. 19 (*post*, R. Trin. 1836, *note*); *Doe* d. *Stephenson* v. *True*, 1 P. & B. 743; *Doe* d. *Crothers* v. *Roe*, 3 P. & B. 138.

Awards and Warrants of Attorney.

12. It is ordered (*q*), That when a rule to show cause is obtained to set aside an award (*r*) or warrant of attorney, or a judgment entered upon an award or warrant of attorney, the several objections, intended to be insisted upon at the time of making such rule absolute, shall be stated in the rule to shew cause (*s*).

(*q*) Taken from R. G., K. B., E. T. 2 Geo. IV; Practice Rules of 1853, r. 169 with the exception of so much as relates to the warrants of attorney and judgments.

(*r*) This includes the certificate of an arbitrator (*Carmichael* v. *Houchen*, 3 N. & M. 203.)

(*s*) In the note to *Forbes* v. *Lord*, A. C. MS., p. 66., it is said: "The decisions upon this rule have not been very uniform. In some of the cases it has been considered not sufficient to state a general head of objection, but that the fault imputed should be specifically pointed at in the rule, and therefore it was insufficient to state "that the arbitrator has exceeded his authority" (*Boodle* v. *Davies*, 3 A. & E. 200), or "that he has made his award under a misapprehension of the terms of the reference" (*Allenby* v. *Proudlock*, 4 Dowl. 60), or "that the award is not final—that it is uncertain—and that the arbitrator has not awarded on all matters referred to him" (*Gray* v. *Leaf*, 8 Dowl. 654). In *Ravesthorne* v. *Arnold*, 6 B. & C. 629, the ground stated in the rule was, "that the arbitrator had not decided all matters in difference," and *Lord Tenterden* was of opinion that the rule, coupled with the affidavit, sufficiently explained the objection. *Lord Denman*, in *Boodle* v. *Davies*, declined to adopt this construction of the rule, and *Coleridge, J.*, in *Gray* v. *Leaf*, says: "I am inclined to say that *Ravesthorne* v. *Arnold* is not an authority on which I am disposed to act." However, in *Dunn* v. *Warlters* (5 M. & W. 293), it was held, that a statement in the rule *nisi*, that the arbitrator "had not awarded on a matter in difference submitted to him," was sufficiently specific; and *Alderson, B.*, said: "Here the affidavits direct the attention immediately to that matter in difference, which, it is alleged by the rule, has not been awarded upon." And in *Boodle* v. *Davies*, *Patteson, J.*, seemed to consider that the affidavit might be referred to to explain the objection to the award. In *Staples* v. *Hay*, 1 D. & L. 711, 8 Jur. 325, where the ground stated in the rule was, "that the arbitrator had exceeded his authority," and which was objected to as being too general, *Wightman, J.*, said: "If the defendant's affidavits had specifically pointed out any objection of this nature, though it was not specified in the rule, I should have considered myself bound by the authorities to have allowed him to explain his rule by them, but as this is not the case, the rule must be discharged." An objection not stated in the rule *nisi* cannot prevail (*Grenfell* v. *Edgcome*, 7 Q. B. 66."

An application to set aside an award on a submission made pursuant to 9 10 Wm. III. c. 15, must be made before the last day of the term next after the publication of the award (*Carter* v. *Adam*, 2 All. 211; *In re Smith*, 8 Dowl. 133). Where a cause is referred by order of *nisi prius*, the statute does not apply, and the motion can be made any time before judgment, if within twenty days after the award is filed, under C. S., c. 37, s. 184 (1 Vic. c. 13, s. 1; 12 Vic. c. 39, s. 10; 36 Vic. c. 31, s. 186), with the clerk of the Circuit Court (*Brown* v. *Harding*, 3 All. 351—see *Foulis* v. *Kinnear*, Bert. 26, before that Act). It was considered, in the earlier case of *Nugent* v. *Brown* (2 All. 621), that where the order contained a clause for making the submission a rule of Court, the case was within the Stat., and the motion ought to be made before the last day of term, and by the English practice, where the reference is of the cause *and all matters in difference*, the statutory limitation is the proper guide (*Allenby* v. *Proudlock*, 4 Dowl. 54). The submission must be made a rule of Court before moving (*Nugent* v. *Brown*, *supra*).

See further, as to setting aside awards, notes to *Forbes* v. *Lord*, A. C. MS. 60.

Admission of Barristers.—Graduates.

13. It is ordered, That any attorney, who, on his being admitted an attorney, was a graduate of any college, may be called to the Bar after the expiration of one year from the time of his admission as an attorney (*t*).

(*t*) See R. Hil. 1823, r. 3, note, *ante*, p. 26.

HILARY TERM, 1836—6 WM. IV.

Motion Paper.

1. IT IS ORDERED, That in future the clerk of the pleas do keep a paper, to be called the "Motion Paper," in which shall be entered all motions (*a*) of which notice may have been given, such entries to be made on or before the first day of each term (*b*), and to stand in the said paper in the order in which they may be made, and the matters contained in such motion paper shall come on to be heard on the second (*c*) day of the term, before the special paper (*d*) is gone into.

2. It is ordered, That if notice of any motion (*e*), and a copy (*f*) of the affidavit or affidavits, on which it is intended to be grounded, shall be served on the opposite party, his attorney or agent, as the case (*g*) may be, fourteen days (*h*) before the term at which the motion is intended to be made, a rule absolute may be made in the first instance, if the Court shall see fit, and in all such cases the cause shall be entered on the motion paper.

(*a*) A rule to compel a sheriff to pay over money in his hands cannot be had on notice and motion under this rule, and *semble* that this mode of proceeding only applies where there is an "opposite party" to be served with notice (*Ex parte Graham*, 6 All. 209). See *O'Regan* v. *Robinson*, 3 Kerr, 224, *infra*, *n.* (*n*), as to entering motions for judgment, as in case of nonsuit.

Where a cause has not been entered on the motion paper according to notice, the party to whom notice was given may apply to the Court for leave to enter it, in order to obtain costs, immediately after the motion paper is finished (*Jones* v. *Snodgrass*, 1 All. 603, re-considering *Sadye* v. *Williams*, *id.* 442, where it was held that such application should be made on the second day of term).

A motion made under this rule, which has been dismissed, cannot be renewed, though the failure was caused by insufficiency of affidavits; the application should, in such case, be withdrawn (*McLaughlin* v. *Wilson*, 3 Kerr, 177).

A counsel making a motion is bound to state on whose behalf he moves (*Gillespie* v. *Fogarty*, 1 Kerr, 162). It must be assumed that he has the authority of the person on whose behalf he professes to be acting, and he need not produce his authority (*In re Hunter*, 1 Han. 233). A motion cannot be made by an attorney (R. Hil. 1823, *ante*, p. 26).

If the affidavit in support of the motion and that in shewing cause are contradictory, greater credence is to be given to the latter, unless there are circumstances in the case to throw discredit on it (*Doe* d. *Johnston* v. *Roe*, 3 Kerr, 400; *Ellis* v. *Newton*, Bert. 77; *Ray* v. *Desbrisay*, M. T. 1866, Stev. Dig. 19; 3 Chit. Gen. Pr. 596). By C. S., c. 37, s. 173 (19 Vic. c. 41, s. 20; 36 Vic. c. 31, s. 175; Stat. 17-18 Vic. c. 125, s. 45), either party may, with leave of the Court or a judge, make affidavits in answer to the affidavits of the opposite party upon any new matter arising out of such affidavits. There is no arbitrary rule that an application for leave to make affidavits under this Act should be made before the argument commences on the affidavit containing the new matter (*Mitchel* v. *Sawther*, M. T. 1871, Stev. Dig. 19; and see *Swinfen* v. *Swinfen*, 1 C. B., N. S. 364, and Stockton's note to *Ellis* v. *Newton*, Bert. 77). Leave will not be granted where the facts sought to be answered must have been within the knowledge of the party at the time he made his affidavit, and should have been stated by him at that time (*Ex parte Gilbert*, 1 Pugs. 231). See as to the production of documents and examination of witnesses on the hearing of a motion, C. S., c. 37, ss. 174-5 (19 Vic. c. 41, ss. 21 22; 36 Vic. c. 31, ss. 176-177, Stat. 17-18 Vic. c. 125, ss. 46-47), *Morgan* v. *Alexander*, L. R., 10 C. P. 184.

If a rule dischargeable without costs is moved with costs it will be discharged with costs (*Doe* d. *Johnston* v. *Roe*, 3 Kerr, 400; *Porter* v. *Burnes*, 1 All. 106; *Lang* v. *Gilbert*, 4 All. 360; *McIntosh* v. *Hamilton*, *per Wetmore*, *J.*, 2 P. & B. 654), but there is no rule in this Province corresponding to R. G., K. B., M. T. 37, Geo. III (Pr. Rules, 1853, r. 137), so that the costs of opposing a rule to set aside proceedings for irregularity with costs do not follow as of course; the successful party should apply for them at the time of discharging the rule (*Kelly* v. *Wilson*, 1 All. 199).

Where the motion is to set aside proceedings for fraud and collusion, and the charge is satisfactorily answered (*Doe* d. *All Saints Church* v. *Crowley*, 3 Kerr, 295; *secus*, if there was some ground for the application, *Hardy* v. *Prince*, 3 All. 264), or material facts are misstated in the affidavits (*Doe* d. *Johnston* v. *Jardine*, 2 Pugs. 7), or withheld (*Ex parte Gilbert*, 1 Pugs. 231), or the attorney is charged with misconduct (*Foulis* v. *Kinnear*, Bert. 26), the rule will be discharged with costs. Costs were refused

where the rule was discharged on the authority of a recent English case (*Simonds* v. *Simonds*, 2 All. 468).

Where a rule had been made absolute to set aside proceedings with costs, the Court refused, at a subsequent term, to amend the rule, by ordering the attorney to pay the costs (*Hasluck* v. *Watson*, 2 Kerr, 362).

Where a rule for a nonsuit or a new trial is obtained in a superior Court, there is no necessity to mention the costs, but where the cause is tried in an inferior Court, costs cannot be obtained unless mentioned in the rule (*Phillips* v. *Bridge*, L. R. 9 C. P. 324; see *McIntosh* v. *Hamilton*, *supra*). If the rule for a new trial is silent as to costs, the successful party on the second trial is not entitled to the costs of setting aside the first verdict (*Weldon* v. *Weldon*, 3 All. 148). Where the costs are "to abide the event of the suit," and the same party succeeds on the second trial, he is not entitled to the costs of showing cause against the rule (*Nice* v. *Coyle*, H. T. 1832, Stev. Dig. 114). If a plaintiff consents to reduce his verdict in lieu of submitting to a new trial, he is substantially unsuccessful, and is not entitled to the costs of shewing cause (*Derry* v. *Derry*, 4 P. & B. 90).

See further, as to costs on motions and rules, *Doe* d. *Firth* v. *McLeod*, 2 Pugs. 1; Harrison's C. L. P. Acts, 678; Day's C. L. P. Acts, 57.

(*b*) Before the opening of the Court, R. Mich. 1866, *post*.

(*c*) R. Mich. 1866, *post*, so far as it alters this practice, is rescinded by R. Hil. 1876, *post*. When the Court is sitting in two divisions, the motion paper is to be heard before such division as the Chief Justice or senior Puisne Judge shall direct (42 Vic. c. 8, s. 4).

(*d*) See R. Hil. 1826, r. 2, *ante*. See as to common motions, R. Hil. 1877, *post*.

(*e*) A notice of motion to discharge bail on the ground of delay, should shew on whose behalf the application is made (*per Parker, J., Ritchie* v. *Porter*, 2 All. 361).

(*f*) See *Belyea* v. *Hamm*, 2 Han. 26, *infra*, r. 3, *n*. (p. 65).

(*g*) This must be construed with reference to R. East. 1785, r. 15 (*ante*, p. 7), and if the party appears by an attorney, the service should be on him.

(*h*) Service on Tuesday, the fourteenth day preceding the term, is sufficient (R. Trin. 1849, r. 1, *post*).

Judgment as in case of Nonsuit.

3. It is ordered, That no motion shall be made for judgment, as in case of a nonsuit, pursuant to the Statute, 14 Geo. II. c. 17, without notice (*i*) having been first given thereof to the plaintiff, his attorney or agent, as the case may be (*j*), together with a copy (*k*) of the affidavit (*l*) on which the same is grounded, at least fourteen days (*m*) before the term at which such motion is intended to be made, and without entering the same on the motion paper (*n*).

4. It is ordered, That on motion made in open Court, pursuant to the said entry, and on due proof of the service of notice and copy of affidavit, as directed by the preceding rule, the de-

fendant shall be entitled to a rule absolute for judgment as in case of a nonsuit, unless the Court, on just cause and reasonable terms, shall allow a further time for the trial of the issue, or unless the Court should think fit to enlarge the time for shewing cause to the next term.

(*i*) (*Title of court and cause.*)

"Take notice, that this honorable Court will be moved on in next Term, that the like judgment may be entered for the defendant as in the case of a nonsuit, pursuant to the statute in that case made and provided. Dated, &c. D. A., defendant's attorney. To Mr. P. A., plaintiff's attorney" (*Chit. Forms*, 6 *ed.*, 607).

If this notice be given in a case where the defendant was not entitled to move, the motion cannot be varied into one for costs of the day, and it will be dismissed with costs (*Kinnear* v. *Watts*, 3 Kerr, 300).

(*j*) See *n.* (*g*). *supra*, and *Murphy* v. *Close*, 3 All. 83.

(*k*) Where the name of the commissioner was omitted from the *jurat* in the copy of the affidavit served, the rule was refused without costs (*Belyea* v. *Hamm*, 2 Han. 26).

(*l*) See the form of affidavit, R. Mich. 1859, *post.* 5u 6 147

(*m*) Service on Tuesday, the fourteenth day preceding the term, is now sufficient (R. Trin. 1849, *post*).

(*n*) The defendant must proceed under this rule, giving notice and entering the cause on the motion paper, and an application for a rule *nisi* will not be entertained (*Harris* v. *Beaumont*, 2 Kerr, 172; *James* v. *McLeod*, 2 P. & B. 300). See as to a motion for judgment absolute for breach of a peremptory undertaking (*O'Regan*, v. *Robinson*, 3 Kerr, 224, *post*, p. 70). The motion cannot be made until the term after the sittings at which the plaintiff undertook to try (*Groves* v. *Sisson*, 1 Kerr, 102).

A counsel fee is taxable on the motion, though the motion be not opposed (*York C. M. I. Co.* v. *Hartley*, E. T. 1865, Stev. Dig. 109).

The earlier Provincial cases (Stev. Dig. 247) on the question as to what constitutes a neglect to bring a cause to trial, according to the course and practice of the Court (where notice of trial has not been given), cannot be easily reconciled, but in the late case of *Oliver* v. *Campbell* (2 Han. 251), the Court stated that they would, in future, hold that the defendant may move for judgment as in case of nonsuit, when two sittings or circuits have elapsed after issue joined, at either of which the plaintiff might have tried the cause. Obtaining the costs of the day for a previous default does not waive the defendant's right to this judgment for a subsequent default (*Thompson* v. *Keith*, 6 All. 509). But, as a plaintiff may try as soon as he pleases after issue joined, if he *gives notice of trial*, and fails to proceed on it, the default is complete, and the defendant may move in the following term for judgment (*Lush*, 546). The defendant cannot rely, in support of this motion, on an insufficient notice of trial, which he has refused to accept (*Clarke* v. *Goldsmid*, 5 B. N. C. 120; *McDonald* v. *Rider*, 3 Kerr, 218, *post*, note to R. Mich. 1859).

There is no limit in point of time within which to apply for this judgment (*Curtis* v. *Tadraw*, 4 Dowl. 600; *Cromer* v. *Brown*, *id.* 288; *Scoullar* v. *Payson*, T. T. 1833, Stev. Dig. 246; All. Rules, 27 *n.* (*v*), nor where four terms have elapsed without any proceedings is a term's notice necessary (*Scoullar* v. *Payson*; *Shinfield* v. *Laxton*, 2 Dowl. 778). But where upwards of three years had elapsed, the Court dismissed the

motion, on the plaintiff giving a peremptory undertaking, it appearing that he had a good cause of action, and the defendant not stating any defence (*Doe* d. *Scovil* v. *Sentill*, 4 All. 58).

Where two defendants appear by different attorneys, the motion may be made at the instance of one (*Lush*, 548), though the other has suffered judgment by default (*Murphy* v. *Doulan*, 5 B. & C. 178), whether in an action in contract (see *Stuart* v. *Rogers*, 4 M. & W. 649) or tort (*Hadrick* v. *Haslop*, 25 L. J., Q. B. 442), or has compromised the suit with the plaintiff (see *Rankin* v. *Anderson*, 4 All. 635, where the rule was discharged on the plaintiff paying costs and entering a *stet processus*); and in such case the motion must be for judgment generally, and not confined to the defendant moving (*McGlynn* v. *Falconer*, 5 All. 103; *Sawyer* v. *Hodges*, 1 Dowl. N. S. 16; *Jones* v. *Gibson*, 5 B. & C. 768). But where the defendants join in pleading, and raise a joint issue, they put themselves on the same terms, and one having settled the suit, the other cannot move for judgment for not proceeding to trial (*McGlynn* v. *Falconer*, *supra*).

A rule to discontinue on payment of costs is no stay of proceedings, therefore, where such a rule, with an appointment to tax costs, was served, and on the following day the defendant obtained a rule for judgment *qu.* nonsuit, it was held he might have such judgment (*Baker*, or *Beeton*, v. *Jupp*, 15 M. & W. 149); and, it would seem, that taxation of costs alone, without payment, is no answer to the motion (*White* v. *Barton*, 1 Han. 1: but see *contra*, *Cooper* v. *Holloway*, 1 Hodges, 76, cited, *Chit. Arch.*, 8 *ed.*, 1299).

An offer, under C. S., c. 37, s. 127 (R. Trin. 1859, *post*), to suffer judgment by default, which the plaintiff did not accept, does not preclude the defendant from obtaining this judgment (*Thomas* v. *Demill*, 3 All. 407). Where the cause had not been entered or papers filed, it was held that judgment could not be given, though the default was upon a peremptory undertaking (*Miller* v. *Weldon*, 1 Han. 376).

The statute does not extend to any case where the plaintiff could not be nonsuited if he had proceeded to trial (*Weller* v. *Govton*, 1 Burr. 358). Thus, trials by the record are not within it (*Kelly* v. *Coughlan*, 3 Kerr, 104). Nor are actions of replevin, because the defendant can himself take down the record without a proviso (*Chit. Arch.*, 8 *ed.*, 1291; 2 *Wms. Saund.* 336*c*), and where such judgment was inadvertently granted in that action, the Court set it aside (*McGeehan* v. *Hale*, 3 All. 507). The statute is confined to cases where there is neglect on the part of the plaintiff. If he once regularly take down the cause for trial, and does nothing to prevent its being tried, though it be made a remanet (*Embree* v. *Hathaway*, T. T. 1827, Stev. Dig. 245; *Gilbert* v. *Dunham*, 2 Kerr, 361; *Graham* v. *Wetmore*, 5 All. 218, *per Carter*, *C. J.*, and see *Shepherd* v. *Hallett*, 1 Han. 43), and it makes no difference whether it is made a remanet by the distinct order of the judge or is ordered to stand over among a number of others, because there was not time to try them (*Mills* v. *Leach*, 4 All. 355); or it is withdrawn under an agreement to refer to arbitration (*Hanson* v. *Gove*, 5 All. 433), even though a subsequent notice of trial be given on which default has been made (*Bennett* v. *Stockford*, 1 Kerr, 300; *Mills* v. *Leach*; *McLelland* v. *Mason*, 2 Pugs. 3, 59); or if it has been tried and the verdict set aside (*Turner* v. *Crane*, T. T. 1831, Stev. Dig. 245); the defendant cannot have the judgment, and his only remedy is to try by proviso, or where notice of trial has been given, to move for costs of the day. See as to the course a defendant should take where the cause is improperly entered

at the Circuit and made a remanet (*McLelland* v. *Masson*, 2 Pugs. 59, *ante*, p. 30). And where the trial went off by reason of an insufficient number of jurors being summoned, the rule was discharged with costs (*Hazen* v. *Bryson*, 2 All. 580); and see *Doe* d. *McCullough* v. *Dowd*, 5 All. 381, where the objection to the jury arose under the repealed Act, 21 Vic. c. 25, relating to dower. It cannot be moved for pending a demurrer, though notice of trial has been given (*Milton* v. *Griffiths*, 1 Dowl. N. S. 769; *Kinnear* v. *Watts*, 3 Kerr, 300, 440).

The defendant is not entitled to this judgment, where he or his attorney has been the cause of the delay, or has assented to it (*Chit. Arch.* 8 *id.* 1300; *Gilbert* v. *Dunham*, 2 Kerr, 361), as by demanding particulars after notice of trial, and thereby staying proceedings (*O'Brien* v. *Tait*, 2 Pugs. 4).

And it has been refused, where he induced the plaintiff, after notice of trial, to refer to arbitration (*McDonald* v. *McIntyre*, Bert. 280, and see *Hanson* v. *Gove*, 5 All. 433), and where he gave notice of trial by proviso, and then, after it was too late for the plaintiff to give notice, countermanded it (*per Botsford, J.*, *Gilbert* v. *Dunham*, 2 Kerr, 361; and see *Gilbert* v. *Gooden*, *id.* 374). So, where he denied the existence of relationship between the sheriff and himself, and then challenged the array on the ground of such relationship (*Hoyt* v. *Stockton*, 1 Han. 327).

If the defendant becomes insolvent after action, and the plaintiff is willing to enter a *stet processus*, the motion will be dismissed without costs, if the defendant agrees to the *stet processus*—with costs if he does not (*Ketchum* v. *Murray*, 2 All. 94; *Smith* v. *Badcock*, 5 Dowl. 91; *Holland* v. *Henderson*, 4 M. & W. 587; *Gingell* v. *Bean*, 1 M. & G. 555; see *McGarrigle* v. *Smith*, 1 All. 509, where the affidavit of the insolvency was deemed insufficient). In *Faulkner* v. *Whittall*, (1 M. & G. 472), where the plaintiff was aware of the insolvency before he gave notice of trial, the costs were made costs in the cause, in case the *stet processus* was not agreed to. If the insolvency existed before action, the plaintiff, in order to have the motion dismissed on these terms, must shew that the proceedings were taken in ignorance of it (*Bailey* v. *Elgie*, 1 Dowl. N. S., 853; *Smith* v. *Davis*, 9 Dowl. 50; *Symes* v. *Amyr*, 8 *id.*, 773; *Mann* v. *Williamson*, *id.* 859; *Lemon* v. *Hopson*, 6 *id.* 795).

If the *plaintiff* becomes bankrupt, or discharged under an insolvent Act after issue, and the cause of action thereby becomes vested in his assignees, it would seem that the defendant cannot have this judgment unless the assignees refuse to proceed in the action (*Chit. Arch.* 1301, citing *Cross* v. *Robertson*, 7 M. & G. 640; *Taylor* v. *Montague*, 2 M. & W. 315, and *Gingell* v. *Bean*, 1 M. & G. 555.. In *Hammond* v. *Wheeler*, 2 Kerr, 569, it was granted for not proceeding to trial pursuant to notice, given, it would seem, after the bankruptcy. The mere poverty of the plaintiff will not in any way prevent such judgment, and, if permanent, will not furnish an excuse for not proceeding to trial (*Chit. Arch.* 1301).

Where the defendant, by fraudulently representing himself to be of age, induced the plaintiff to enter into a contract, and in an action thereon pleaded his infancy, on which the plaintiff joined issue, but then, discovering that the plea was true, took no further steps, the Court would not grant this judgment (*Newton* v. *Farrell*, 2 L. M. & P. 139; 29 L. J. Ex. 201).

Peremptory undertaking.] Even though the plaintiff has been guilty of neglect, the Court, by the terms of the statute and the above rule, may allow further time for the trial, "on just cause *and* reasonable terms." The latter usually are, giving a peremp-

tory undertaking by the plaintiff to try at the next, or other named opportunity, and where notice of trial has been given, payment (but not, however, as a *condition*, *Chit. Arch.* 1309) of the costs of the day, but the Court will add such other terms as they may think reasonable, where the justice of the case requires it (*id.* 1308). Where it is sought to discharge the rule on this undertaking, a very slight ground is sufficient to excuse a first default (*Doe* d. *McTavish* v. *Roulston*, 3 Kerr, 222; see *Katham* v. *Hawkes*, 1 Kerr, 525), though it must be such as to satisfy the Court that there was some reasonable cause for the delay (*Thompson* v. *Keith*, 6 All. 509), and it should appear that the plaintiff intends to proceed to trial if the motion is dismissed (*Katham* v. *Hawkes*; *Estabrooks* v. *Tapley*, 2 All. 454; *Wetmore* v. *Wood*, 1 All. 703).

The plaintiff need not state that he has a good cause of action (*Faulkner* v. *Whittall*, 1 M. & G. 472; see *Doe* d. *Scovil* v. *Sentill*, 4 All. 58).

An excuse will be admitted in a *qui tam* action, but the Court will not altogether lose sight of the nature of the action (*Curran q. t.* v. *Gilmour*, 2 All. 87; see *Doe* d. *Scovil* v. *Sentil*, *supra*, where two separate actions and a suit in Equity were brought in respect of a mortgage security). It has been held to be sufficient cause for discharging a rule for judgment for not proceeding to trial pursuant to notice, that a material and necessary witness, who was named, was absent from the Province during the Circuit, and his attendance could not be procured (*Kirk* v. *Payne*, 1 Kerr, 525); that the plaintiff was advised by counsel that the testimony of one A. B. was material and necessary, and that the said A. B. resided at Boston, U. S. A., and the plaintiff hoped to procure his testimony at the next Circuit (*Desmond* v. *Yeomans*, 3 Kerr, 71, and see *Samuel* v. *Saunders*, Bert. 278, and *Scovil* v. *Eaton*, 3 Kerr, 73, cited *infra*). The following excuses were held insufficient—that a witness resided at Calais, and that the plaintiff was advised by his attorney not to proceed to trial without his testimony (*Nicholson* v. *Marks*, 3 All. 21); that the plaintiff resided in a distant part of the Province, and did not appear or send his witnesses (*Katham* v. *Hawkes*, 1 Kerr, 525); that a material witness was absent, and the belief of the deponent (the plaintiff's attorney) that his attendance would be procured at the next Circuit, without stating the grounds of belief, or that an attempt had been made to procure the attendance (*Mitchell* v. *Cuppage*, Bert. 277); that the plaintiff was a material and necessary witness, and that he left the country on important business, expecting to return in time for the trial, but was unable to do so, without shewing circumstances causing such inability (*Desbrisay* v. *Livingstone*, 5 All. 240); that a commission was "obtained last summer, and forwarded to Great Britain in sufficient time, as deponent (the plaintiff's attorney) believes, to be executed and returned in time for the last Circuit," the cause having been at issue for upwards of a year (*Ritchie* v. *Porter*, 2 All. 360). The absence of material documentary evidence, which belonged to a person who was willing to produce, but who could not produce it in time for the trial, is a sufficient excuse (*Doe* d. *Scott* v. *King*, 3 Kerr, 72). So a mistake by the plaintiff's attorney, in laying the venue in a local action in the wrong county (*Peters* v. *Drawyer*, 3 All. 432), or in giving notice of trial, the plaintiff being ready and willing to try (*McDonald* v. *Rider*, 3 Kerr, 218), or in directing the *venire* to a coroner who was related to the plaintiff, but of which the attorney was ignorant, whereupon the defendant challenged the array (*Styles* v. *Gilbert*, 3 All. 262; see *Oulton* v. *Morse*, 2 Kerr, 77, *ante* p. 37, note (*e*). But the rule was made absolute, where the excuse was, that the plaintiff's attorney sent the nisi prius record to the Circuit for entry, but when he arrived there, he

discovered that it had not been received, without stating when or how it was sent (*Kinnear* v. *Watts*, 3 Kerr, 440); that the plaintiff instructed his attorney to send him subpœnas for his witnesses after the opening of the Circuit, and that, in consequence of not receiving them, he was unable to get the necessary witnesses (*Curran* v. *Gilmour*, 2 All. 87); and that the plaintiff's attorney was so much engaged in the House of Assembly as to be unable to attend the trial, and that the counsel spoken to on the previous day to try the cause was occupied in another court, it not appearing that the counsel was prevented by any unforseen cause, or that other sufficient counsel could not be procured (*Estabrooks* v. *Tapley*, 2 All. 454; see *Shepherd* v. *Hallett*, 1 Han. 43, *infra*). Where the cause had been at issue, and noticed for trial for more than three years, and the excuses offered were, a hope that had been entertained of avoiding the expense of a commission, by getting the cause referred to arbitration, but which was finally refused, an intention to apply for a commission, and a belief that the cause would be ready for trial at the next Circuit, the rule was made absolute (*Fletcher* v. *Hippsley*, 3 Kerr, 299; and see *Doe* d. *McTavish* v. *Roulston*, *id.* 221; *Wetmore* v. *Wood*, 1 All. 703, *infra*). So, where the excuse was that the case arose out of circumstances similar to those in another case of W. against the defendant, tried at the same Circuit, and that the record was withdrawn, because of the judge having decided the question of law in that case in favor of the defendant, his decision having been sustained by the Court (*White* v. *McDonald*, 3 Kerr, 220).

A motion for judgment *quasi* nonsuit for not proceeding to trial according to the *course and practice of the Court* was discharged, on a peremptory undertaking and payment of costs of the application, where the plaintiff was prevented from going to trial by the temporary mental derangement of a witness, who had subsequently become capable of giving testimony (*Samuel* v. *Sanderson*, Bert. 278). So, where a material and necessary witness was in a distant part of the Province, and was unable to attend without serious loss and inconvenience, greatly disproportional to the amount in controversy (*Scovil* v. *Eaton*, 3 Kerr, 73). So, where notice of trial was twice countermanded, first, because the judge could not try the cause, and secondly, in consequence of the absence of the plaintiff's counsel from the Province (*Shepherd* v. *Hallett*, 1 Han. 43). And it is a sufficient excuse that a commission has been issued to examine plaintiff's witnesses in the U. S. A., which he had been informed had been received and would be executed, and that he was obliged to countermand the notice of trial, because it had not been returned, though issue had been joined for nearly three years (*Doe* d. *McTavish* v. *Roulston*, 3 Kerr, 221). Issue was joined in 1854, and, with the consent of the defendant's attorney, the cause was not tried in the following year, and no further proceedings were taken; the Court dismissed a motion in Hil. T. 1858, on a peremptory undertaking and the usual terms as to costs, it appearing that the plaintiff had a good cause of action, and the defendant not stating any defence (*Doe* d. *Scovil* v. *Sentill*, 4 All. 58). But it is no excuse that the defendant expressed a wish to the plaintiff's attorney to settle the suit amicably, the plaintiff not appearing to have assented thereto, and not stating any intention to go to trial (*Wetmore* v. *Wood*, 1 All. 703).

If the rule is discharged upon the peremptory undertaking, either party may draw it up, but if the plaintiff omits to do so, the defendant is bound to draw up and serve it within the time limited for proceeding to trial, otherwise he cannot avail himself of it (*Chit. Arch.*, 8 *ed.*, 1310; *Sawyer* v. *Thompson*, 9 M. & W. 248).

If the plaintiff neglects to proceed in pursuance of the peremptory undertaking, the Court will, on affidavit of the fact, grant a rule absolute in the first instance (*Chit. Arch.* 1312; *Willis* v. *Oakely*, 6 Dowl. 766). The motion should not be entered on the motion paper, nor should copies of affidavits be served, and where this course was adopted, the costs occasioned thereby were disallowed (*O'Regan* v. *Robinson*, 3 Kerr, 224).

Enlarging peremptory undertaking.] When the plaintiff has not tried according to his undertaking, he ought, in order to prevent the rule being made absolute, to anticipate the application of the defendant, by moving to enlarge the peremptory undertaking until a subsequent Circuit, on affidavit of the facts which prevented him from proceeding to trial (*Ward* v. *Turner*, 5 Dowl. 22; see *Gilbert* v. *Gooden*, 2 Kerr, 374). He must shew that he has used all reasonable and ordinary means to fulfil the undertaking (*McDonald* v. *Thompson*, 2 Kerr. 700). It is sufficient ground for enlarging the rule, that suspicion attaches to the defendant that he has been instrumental in keeping a material witness out of the way (*Robertson* v. *Crandall*, 1 Kerr, 56; and see *Trustees of Greenock* v. *Love*, 3 Kerr, 179). Or that the defendant gave notice of trial by proviso, and afterwards countermanded it, when it was too late for the plaintiff to give notice, the plaintiff appearing to have been misled thereby (*Gilbert* v. *Gooden*, *ante*, 67); or that the plaintiff's attorney understood that an objection to the legality of the jury had been sustained by the Court, and he expected that the defendant would take the objection (*Siddell* v. *Best*, 3 Kerr, 640); or that the plaintiff claimed under a will, and was unable to discover the residence of the subscribing witness (*Connell* v. *Haley*, 4 All. 636). But it will not be enlarged merely on the ground, that when the cause was called on a witness, who resided in town, was not in court, and that the record was therefore withdrawn (*Doe* d. *Kinnear* v. *Wiswell*, Bert. 127). Nor is it a ground that plaintiff's counsel advised, on the first day of the Circuit, that the declaration must be amended, in consequence of which the cause was not tried (*Marshall* v. *Winslow*, M. T. 1833, Stev. Dig. 251; *Haines* v. *Taylor*, 2 Dowl. 644). And the undertaking will not be discharged, or even enlarged, on account of the defendant having gone out of the jurisdiction (*Leslie* v. *Rae*, Bert. 32).

The rule for enlarging the undertaking is, in general, only granted on payment of costs (*Chit. Arch.* 1313) and the payment of costs may be made a condition precedent (*Dennehaye* v. *Richardson*, 4 Dowl. 564; and see *Siddell* v. *Best*; *Trustees Greenock Church* v. *Love*, *supra*).

Non Pros.—Demand of Declaration.

5. It is ordered, (*o*) That no judgment of *non pros.* shall be signed for want of a declaration, replication, or other subsequent pleading, until ten days next after a demand thereof shall have been made in writing upon the plaintiff, his attorney, or agent, as the case may be (*p*).

(*o*) The English R. G., T. T., 1 Wm. IV., r. 8, from which this rule was taken, required the demand to be made four days before judgment.

(*p*) See as to judgment of *non pros*, for not declaring, *ante*, p. 3. Ten days demand is necessary before signing judgment for want of any pleading (R. Hil. 1839, r. 13, *post*), other than a plea (see R. Trin. 1842, r. 1, *post*).

Delivery of Demurrer Books.

6. It is ordered, (*q*) That demurrer books be delivered to the judges on or before the first day of the term at which the demurrer is to be argued, the books for the chief justice and senior puisne judge to be prepared and delivered by the plaintiff's attorney, and the books for the two junior judges by the defendant's attorney (*r*); and that the same rule do also apply to other cases (*s*) in which paper books are required by the practice of the Court to be delivered to the judges.

(*q*) See the English R. G., H. T., 4 Wm. IV. r. 7, and Practice Rules 1853, r. 16.

(*r*) See, as to the effect of the default by either party in delivering demurrer books, R. Mich. 1845, *post*; and see R. Trin. 1831, *ante*, p. 39, for the mode of making them up. A demurrer book should be handed to the reporter (3 P. & B. 646, *note*).

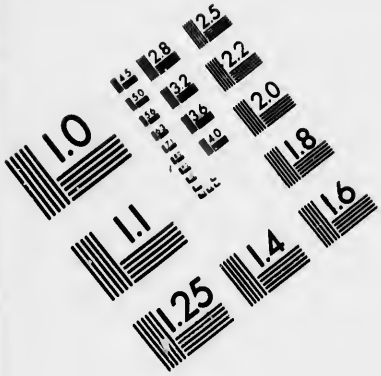
(*s*) Trials by the record excepted—see R. Trin. 1840, r. 4, *post*.

Bills of Particulars.

7. It is ordered, That a copy of the bill of particulars of the plaintiff's demand, and also of the defendant's set-off (if any), shall be filed by the plaintiff's attorney, with every record of nisi prius, at the time of entering the same (*t*).

(*t*) See the English R. G., T. T. 1 Wm. IV. r. 6; Practice Rules 1853, r. 19. The copy must now be annexed to the record, as required by the English practice (C. S., c. 37, s. 94; 36 Vic. c. 31, s. 97). The object of the rule is to save the defendant the trouble of proving the particulars at the trial (*McCarthy* v. *Smith*, 8 Bing. 145; and see *Morgan* v. *Harris*, 2 C. & J. 41, as to the effect of a variance between the particulars annexed and those delivered). But the particulars are not thereby made part of the nisi prius record and incorporated with the pleadings (*Booth* v. *Howard*, 5 Dowl. 438; *Ferguson* v. *Mahon*, 9 A. & E. 245; *Roche* v. *Champain*, 1 Exch. 10); thus the plea of payment, or payment into Court, admits, *pro tanto*, the causes of action in the declaration, but does not admit those stated in the items of the particulars (*Meager* v. *Smith*, 4 B. & Ad. 673; *Taylor* v. *Barker*, 3 Kerr, 614; see, however, *Turner* v. *Collins*, 2 L. M. & P. 99). A defective notice of defence (set-off) may, it has been held, be aided by the particulars (*Bugbee* v. *McDonald*, 2 Kerr, 61). The 13th rule of the Pleading Rules of 1853, whereby the plaintiff may, by giving credit in the particulars for a particular sum, avoid the expense of a plea of payment or set-off, was enacted in this Province by 36 Vic. c. 31, s. 86, r. 9 (C. S., c. 37, s. 83). See the cases thereon, 1 Sel. N. P., 13 *ed.* 160; Rosc. Ev., 13 *ed.*, 654. If the particulars are not annexed, the judge may order the plaintiff to annex them at nisi prius. The particulars may refer to a fuller account already delivered, without re-stating it (*Hatchet* v. *Marshall*, Peake, 229; *Palmer* v. *Harding*, 3 P. & B. 281), and the plaintiff then ought to annex the account also to the record, or prove it at the trial (*Rosc. Ev.* 99).*

* By C. S., c. 37, s. 94 (12 Vic. c. 39, s. 41; 36 Vic. c. 31, s. 97) in all cases wherein particulars may be required, a demand of particulars has the like effect as a judge's order, see *O'Brien* v. *Tait*, 2 Pugs. 4. A demand of particulars is not such a step in the cause as will prevent the defendant obtaining security for costs (*Johnson* v. *Glasier*, A. C. MS. 141; *Andrews* v. *Hanson*, 1 All. 509).



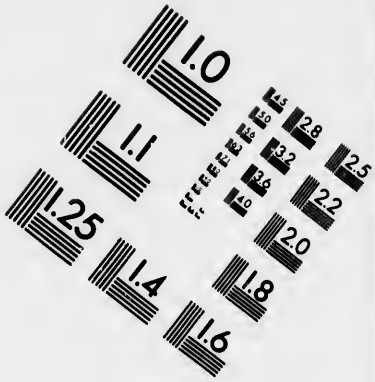
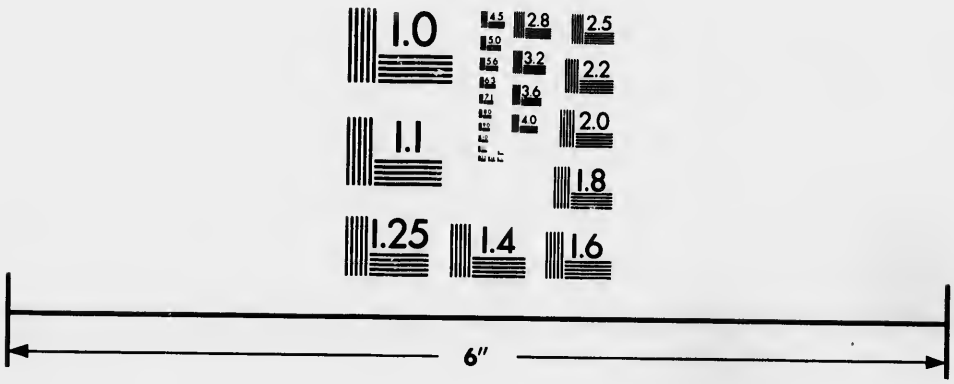
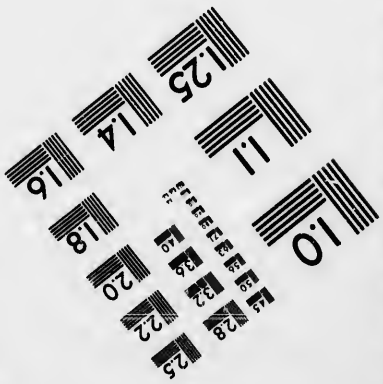


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

Particulars which give substantial information of the plaintiff's demand, and do not confine the claim to any particular count, or mislead the defendant, are sufficient to let in evidence under any count to which the same may be applicable (*Grant* v. *Aiken*, Bert. 259; see *Harris* v. *Montgomery*, 11 C. B., 393, 397). Though the particulars give the items of the account as the ground of the demand, the plaintiff can recover under a count on an account stated (*Grant* v. *Aiken*). A promissory note was received in evidence under the account stated, though no particulars thereof were attached, under the summary practice, to the process (*Steadman* v. *Holstead*, 3 Kerr, 355). Particulars, dated at Liverpool, England, and made up in sterling money, are sufficient to warrant the jury in giving a sum sufficient to cover the difference of exchange, in the absence of an affidavit shewing that the defendant was misled (*Campbell* v. *Wilson*, Bert. 265). Particulars, stating that the "action is brought to recover damages for the breach of the special agreement stated in the declaration, and the plaintiff intends to rely on all or any of the counts in the declaration for the recovery of the same," will not permit of the plaintiff, on failing to prove the special agreement, giving evidence under the account stated of an acknowledgment of a sum due independently of the special agreement, but connected with the transaction to which it related (*Jackman* v. *Brown*, M. T. 1831, Chip. MS.; *Stev. Dig.* 42; 2 Kerr, p. 59, citing *Wade* v. *Beasley*, 4 Esp. 7). So, where, by the particulars, the claim is for work done, in pursuance of an agreement under seal, evidence is not admissable under the common counts (see *Lakin* v. *Nuttall*, 3 Duval, S. C. R. 685). The particulars stated that the action was brought to recover the amount of a promissory note, and the plaintiff having failed in proving the count thereon (*endorsee* v. *endorser*), was not permitted to give evidence under the common counts (*Tapley* v. *McHenry*, 2 Kerr, 57). If the particulars are applicable to both special and common counts, the plaintiff does not lose the benefit of the latter by the omission of his counsel to claim under them in his opening (*Carrick* v. *Atkinson*, 5 All. 515). An amendment may be had, subject to such terms as the judge considers proper (C. S., c. 37, s. 161; *Lakin* v. *Nuttall*, *supra*).

Judge's Summons.

8. It is ordered, (*u*) That it shall not be necessary to issue more than one summons for attendance before a judge upon the same matter, and the party taking out such summons, shall, if the judge see fit, be entitled to an order on the return of the summons, unless cause is shewn to the contrary.

(*u*) See the English Rules, Trin. 1 Wm. IV. r. 9; Prac. Rules of 1853, r. 153. The 136th of the latter rules, requiring a summons to set aside proceedings for irregularity, to specify objections; and T. T. 35 Geo. III. (K. B.), by which an attendance for half an hour after the return of the summons is considered a sufficient attendance, though not formally adopted in this Province, are very generally acted on. The party obtaining a summons cannot avail himself on the argument of any grounds, except those on which he obtained it (*McLellan* v. *Barnes*, 3 P. & B. 374). As to the jurisdiction of a judge at chambers, see R. Trin. 1840, r. 6, *post*; *R.* v. *Almon*, Wilmot's Notes, 264).

An order may, in some cases, be obtained without a previous summons, *e. g.*, to hold a defendant to bail; that the plaintiff may sue in *forma pauperis*; to compel the at-

tendance of witnesses before an arbitrator; to render in discharge of bail; to return writs; to enter up judgment on a warrant of attorney (see R. East. 1848, r. 1, pl. 2, *post*); to appoint a guardian; to assess damages (see R. Mich. 1835, r. 7, p. 53, for full costs, under 4 Wm. IV. c. 41, s. 8; or the Justices' Act, 1 R. S., c. 137, s. 43; C. S., c. 60, s. 42), whether, on grounds appearing on the trial (*semb. Coombes* v. *Caldwell*, 1 Kerr, 127), or brought before the judge by affidavit (*Seelye* v. *Styles*, 3 All. 246) A defendant, after judgment against him on demurrer, was allowed to withdraw his demurrer and plead, without notice to the plaintiff (*Paran* v. *Barnett*, 3 P. & B. 497).

But "it is a general rule in the administration of justice, that a judge's order should not be made in judicial proceedings, unless the party to be affected by it has an opportunity of being heard" (*per Allen, C. J.*, in *Bell* v. *Moffat*, 2 P. & B. 151); thus, an order, under C. S., c. 37, s. 76, as to whether the issue in law or in fact should be first tried (*id.*); for the execution of a writ of enquiry at nisi prius (*Cunard* v. *Fraser*, M. T. 1834, Stev. Dig. 343; for a rule for a *certiorari* (*Ex parte Howell*, 1 All. 584); or to restore the property taken under a writ of replevin (*Ellis* v. *Marooney*, 1 P. & B. 7); to revoke submission to arbitration (*Clarke* v. *Stocken*, 2 B. N. C. 651); or to extend the time for appeal, under Stat. Can. 38 Vic. c. 11, s. 21 (*Jackson* v. *McLellan*, 3 P. & B. 494), should not be granted, except on summons.*

A summons does not operate as a stay of proceedings, unless it be part of the application, "why, in the mean time, all further proceedings be stayed," except where the applicant has to take the next step, and the application relates thereto (2 *Chit. Arch.*, 12 *ed.*, 1602).

A judge at chambers has the same power to award costs as the Court would have in the same case (*Bridge* v. *Wright*, 2 A. & E. 48; *Hughes* v. *Brand*, 2 Dowl. 131; *Doe* d. *Prescott* v. *Roe*, 9 Bing. 104; *Clement* v. *Weaver*, 3 M. & G. 551; Table of Fees, Con. Stat., p. 955–6), and he may name a specific sum as the amount of them, instead of having them taxed by the clerk (*Sheriff* v. *Gresley*, 5 N. & M. 591; *Collins* v. *Aron*, 4 B. N. C. 233). "Costs are not a punishment, but an indemnification" (*Allen, C. J.*, in *Vanwart* v. *Shepherd*, 2 P. & B. 227). "When a party has to come before a judge or the Court, and succeeds, he should have costs, unless there is something to except it" (*Wetmore, J., id.*). In 2 *Chit. Arch.* 1605, it is said, it is not usual to give costs on the discharge of a summons, unless it was vexatious or against good faith, or clearly ought not to have been taken out, or unless it was taken out asking for costs. See the practice as to rules in the latter instance, *ante*, p. 63, and as to the principles on which costs should be allowed or refused (3 *Chit. Gen. Pr.*, 31, 78, 511; *Milner* v. *McKenzie*, 2 P. & B. 383). The Court will never interfere with the judge's discretion in the matter of costs, unless he decided upon a wrong principle (*Vanwart* v. *Shepherd*, *supra*), or in an extreme and clear case (*Hargrave* v. *Holden*, 3 Dowl.

* See further, as to *ex parte* proceedings, *Baggs Case*, 11 Co. 99*a*; *R.* v. *Chandler* 1 Ld. Raym. 545; *R.* v. *Benn & Church*, 6 T. R. 198; *Harper* v. *Carr*, 7 T. R. 275; *R.* v. *Gaskin*, 8 T. R. 209; *Capel* v. *Child*, 2 C. & J. 558; *Painter* v. *Liverpool G. L. Co.*, 3 A. & E. 433; *R.* v. *Smith*, 5 Q. B. 614; *Ex parte Kinning*, 10 Q. B. 730; *Webb* v. *Batchelour*, 1 Vent. 273; *Re Hammersmith Rent Charge*, 4 Exch. 87; *Wood* v. *Ward*, L. R. 9 Ex. 190; *Ex parte Albert Mining Co.*, 3 All. 39; *Glencross* v. *Wark*, 6 All. 201; *Commercial Bank* v. *Price*, 1 Pugs. 97; *In re Pollard*, L. R., 2. P. C. App. 106; *R.* v. *Smith*, L. R. 10 Q. B. 604; *In re McLeod's Estate*, 2 Han. 409.

176; *Sheriff* v. *Gresley*, *supra*; *Giroud* v. *Austin*, 1 Dowl. N. S. 703; *Tiggin* v. *Langford*, 10 M. & W. 556; *Davey* v. *Brown*, 1 B. N. C. 460).

An application cannot be made to the Court respecting a matter pending before a judge (*Abbott* v. *Hopper*, 8 Dowl. 19; *Trego* v. *Tatham*, 9 *id.* 379). The Court may be moved to rescind an order to hold to bail, on the ground of the insufficiency of the affidavit, though an application to a judge to set aside the arrest for irregularity in the writ is pending (*Means* v. *Cole*, 2 Han. 398).

The order should be drawn up and served forthwith, or it may be considered as waived (*Charge* v. *Farhall*, 4 B. & C. 865; *Joddrel* v. ————, 4 Taunt. 253; *James* v. *Roach*, 6 All. 28, 42). See, as to enforcing the order, R. Mich. 1878, *post*. How far the authenticity of the order may be enquired into, see *Blades* v. *Lawrence*, L. R. 9 Q. B., 374.

Where an order has been made under a mistake, or where new circumstances arise, which render it clearly essential to the justice of the case, the judge will vary or amend his order, or will sometimes even rescind it, when it appears to have been irregularly and improperly obtained (*Chit. Arch.*, 12 *ed.*, 1608, citing *Oldershaw* v. *King*, 35 L. J. Ex. 384; *Clark* v. *Manns*, 1 Dowl. 656; *Hall* v. *West*, 1 D. & L. 412). In *Jarvis* v. *Burns*, 3 Pugs. 327, the Court refused to set aside an *ex parte* order for leave to plead several matters, holding that the judge should have been first applied to; and see *Day* v. *Vincent*, Day's C. L. P. Acts, 350, but, in *Bell* v. *Moffat*, 2 P. & B. 151, a motion was entertained without such previous application; and see *Jackson* v. *McLellan*, 3 P. & B. 494.

In general, no judge will hear a summons relating to the order of another judge, or indeed interfere in any way with such order (*Tomlinson* v. *Harvey*, 2 Chit. R. 83; *Wright* v. *Stevenson*, 5 Taunt. 850), unless the judge who made the order is not in town, or some new matter is to be considered, or when urgent or peculiar circumstances render it obviously necessary for the purposes of justice (*Bag. Cham. Pr.* 29).

If the party elects to apply to the judge who made the order, instead of to the Court, to set it aside, no appeal lies from his decision to the Court (*Thompson* v. *Fecke*, 4 Q. B. 759); but it is, it seems, otherwise where the second application was not by way of appeal (see *In re Stretton*, 14 M. & W. 806).

Unless the order be made under a statute giving the judge exclusive and final jurisdiction (see R. Trin. 1840, r. 6 *n. post*), or, in ordinary cases, in a matter left entirely in his discretion (*R.* v. *Archb. of York*, 1 A. & E. 397; *Brennan* v. *Howard*, 34 L. J. Ex. 289; *Cartwright* v. *Frost*, 3 H. & N. 278; *Schuster* v. *Wheelwright*, 8 C. B., N. S. 383; *Tait* v. *Stromach*, 3 P. & B. 96; *Mc Hister* v. *Day*, 4 All. 37; *Jackson* v. *McLellan*, 2 Han. 323; *Parks* v. *Edge*, 1 C. & M. 429), either party may move the full Court to set aside or rescind it. The application should, in general, be made within the following term (*Orchard* v. *Moxsy*, 2 E. & B. 206; *Collins* v. *Johnson*, 16 C. B. 588; *Craske* v. *Smith*, 4 C. B., N. S. 446; see *Doe* d. *Hill* v. *Todd*, 3 Kerr, 295; *Meredith* v. *Gittins*, 18 Q. B. 257), and a refusal to make any order is within this rule (*Meredith* v. *Gittins*; *Craske* v. *Smith*). The order need not be made a rule of Court preparatory to moving (*Spicer* v. *Todd*, 2 C. & J. 165; it is otherwise in the case of an order of Nisi Prius, *Smith* v. *Gerow*, 2 Pugs. 430; *Ladds* v. *Vernon*, *id.* 462). The affidavits used before the judge should be produced on the motion (*Riorden* v. *Dunn*, 3 All. 124; *Needham* v. *Bristow*, 1 Dowl. N. S. 700;

Pocock v. *Pickering*, 18 Q. B. 789; *Bennett* v. *Benham*, 15 C. B., N. S. 616; *Holmes* v. *Mountstephen*, L. R. 10 C. P. 474), for which purpose notice of intention to move should be given to the judge (*Riordan* v. *Dunn*).

Additional materials may be used in renewing to the Court an application unsuccessfully made at chambers (*Foster* v. *Amiraux*, 2 All. 541; *Peterson* v. *Davis*, 6 C. B. 235; *Sanderson* v. *Proctor*, 10 Exch. 189; *Gibbons* v. *Spalding*, 11 M. & W. 173; *Pike* v. *Davis*, 6 M. & W. 546; but see *Alexander* v. *Porter*, 1 Dowl. N. S. 299; *Flight* v. *Cook*, 1 D. & L. 714; *Edwards* v. *Martin*, 17 Q. B. 693).

A copy of the order should be verified by (*Hobby* v. *Pritchard*, 5 Dowl. 300; *Barrett Nav.* v. *Shower*, 8 Dowl. 173), or the substance thereof stated in (*Shirley* v. *Jacobs*, 3 Dowl. 101) an affidavit.

Where a defendant has been held to bail by a judge's order, made upon an insufficient affidavit, the application should be made to set aside the order, not merely the writ (*Hopkinson* v. *Salenbier*, 5 M. & W. 423; and see *McLellan* v. *Milmore*, 1 P. & B. 291; *South-Eastern Ry. Co.* v. *Sprot*, 11 A. & E. 167; *Thompson* v. *Langridge*, 5 D. & L. 213).

Where an application against a judge's order is successful, it is not the practice to give costs (*Hargrave* v. *Holden*, 3 Dowl. 176; but see *Jackson* v. *McLellan*, 3 P. & B. 493), and, as a general rule, where it is discharged, it is discharged with costs (*Hawkins* v. *Carr*, 6 B. & S. 995; *Vanwart* v. *Shepherd*, 2 P. & B. 225).

TRINITY TERM, 1836—6 WM. IV.

Ejectment.—Notice to Appear.

IT IS ORDERED, That the notice to appear in ejectment, shall not be made in future for the return day in the second week (*a*) of the term, but for the term generally, or the Tuesday or Saturday in the first week (*b*).

(*a*) See R. Mich. 1835, r. 10, *ante*, p. 58.

(*b*) The plaintiff must, in order to compel the tenant to appear and plead, or to obtain judgment against the casual ejector, enter a rule for judgment at the term in which the tenant is required by the notice to appear,* otherwise a fresh ejectment must be served *Doe* d. *Wilson* v. *Roe*, 4 Dowl. 124; *Doe* d. *Morrice* v. *Roe*, 3 All. 84). In *Doe* d. *New Brunswick & Nova Scotia Land Company* v. *Roe*, 6 All. 285, where he had omitted to do so, by reason of negotiations for a settlement pending with the tenant, the Court, on the authority of *Doe* d. *Fell* v. *Roe*, (1 Dowl. N. S. 777), granted the rule at the next term.

If the affidavit of service and declaration and notice be strictly correct, and in the ordinary form (*ante*, *p. 60*), the rule is a side bar rule (*Doe* d. *Welchon* v. *Roe*, 5 Dowl. 271), obtainable on production of counsel's hand ("To move for judgment against the casual ejector, L. M., *Col. for Plff.*," endorsed on the affidavit of service), otherwise a motion must be made, and the Court will, if they grant the rule, either make it abso-

* By the Q. B. practice, a rule could have been obtained in *country* causes at the ensuing term (*Chit. Arch.*, 8 *ed.*, 932).

lute (that is, a rule for judgment *nisi*, see *Doe* d. *Stephenson* v. *True*, 1 P. & B. 743), in the first instance, or a rule *nisi*, according to circumstances, the alternative generally depending on the question of service; and if a rule *nisi*, direct how it is to be described.

The rule is not served, or even taken out, nor is any notice thereof given to the tenant, who must search for it at the clerk's office. It need not state the name of the tenant or the number of days* allowed him to appear (*Doe* d. *Taylor* v. *Roe*, 1 All. 1). In *Doe* d. *Stephenson* v. *True*, *supra*, it was considered that he had twenty days. If no plea and consent rule have been delivered (see *ante*, p. 33), judgment may be signed against the casual ejector the day next after the expiration of the time given by the rule; or, if a rule *nisi* only has been obtained, upon the rule being made absolute by the Court, on affidavit of service of, and compliance with, the terms of the rule, Common bail must be filed (*Tidd*, 1244; *ante*, p. 5).

Ejectment for non-payment of rent.] If the action is brought under C. S., c. 83, s. 19 (50 Geo. III. c. 21, s. 22; 13 Vic. c. 53, s. 26; 1 R. S., c. 126, s. 24, taken from the Stat. 4 Geo. II. c. 28, s. 2, which is re-enacted by Stat. 15-16 Vic. c. 76, s. 210), on a clause for re-entry for non-payment of rent, the Court should be moved (see *Doe* d. *Stephenson* v. *True*, 1 P. & B. 743; *Doe* d. *Chipman* v. *Roe*, 3 Pugs. 470), on affidavits setting out the facts relied on, as entitling the lessor to judgment under the Act. The affidavit may be made either by the landlord or a third party (*Doe* d. *Charles* v. *Roe*, 2 Dowl. 752). The form given in the books of practice is defective as to the allegation of the insufficiency of the distress (*Doe* d. *Gilbert* v. *Roe*, 2 Han. 5); it is not unusual to issue a distress warrant, taking care to confine it to the arrears for the non-payment of which the action is brought (*Brewer* v. *Eaton*, 3 Doug. 230; 6 T. R. 220; *Cotesworth* v. *Spokes*, 10 C. B., N. S. 103), and the bailiff then swears to the search for goods and its results. If the goods on the premises are not sufficient to satisfy the half year's rent, the landlord is not bound to realize part by distress before bringing the action (*Doe* d. *Boyd* v. *Roe*, 2 Han. 49). It was held in *Cross* v. *Jordan*, 8 Ex. 149, that the landlord could proceed under the English statute, if the distress was not sufficient to countervail all arrears of rent, though exceeding half a year, and a like construction has been given (*Doe* d. *Chipman* v. *Roe*, 3 Pugs. 470) to 1 R. S., c. 126, notwithstanding the important change in phraseology made in the revision. See further as to this Act, *Chit. Arch.*, 12 *ed.*, 1061; *Day's C. L. P. Acts*, 4 *ed.*, 201; *Ros. Ev.*, 14 *ed.*, 951; and 1 *William's Notes to Saund. Rep.* 436, *Duppa* v. *Mayo*.

In the following form, the statement of the rent being in arrear, and of the right to re-enter, is taken from *Chit. Forms*, 10 *ed.*, 581; it has, however, been usual in this Province to use greater particularity, and to set out the provisions of the lease, or to annex a copy, as in *Doe* d. *Boyd* v. *Roe*, *supra*:

(Title of the court and cause.)

"I, L. P., of , lessor of the above named plaintiff, and I, P. A., of *(&c.)*, severally make oath, and say,

And first, I, the said P. A., for myself, say as follows:

1. *(State the service of the declaration. See ante, p. 60.)*

2. That on *(a day after the right of entry accrued)*, and at the time of serving the

* In the Queen's Bench, in town causes, four days after the granting of the rule, in country causes, four days after the term (*Tidd*, 1220; and see as to the extent of rules adopted from the English practice, *Gilbert* v. *Sayre*, 2 All. 513-14).

said declaration as aforesaid, I did make diligent search on and over the premises, for which the action is brought [for goods and chattels wherewith to satisfy the sum of , arrears of rent hereinafter mentioned], and that there was not at either of the said times any distress whatsoever to be found on the said premises;" [*or*, "that no sufficient distress could be found on the said premises to satisfy said sum; and that the value of the whole amount of property then on the premises available for distress did not exceed dollars" (*Doe* d. *Boyd* v. *Roe*, *supra*)].

And I, the said L. P., for myself say as follows,

3. That, at the time the said declaration was so served as aforesaid, there was due to me, as landlord of the said premises, from the said C. D., who was then tenant thereof (*see Doe* d. *White* v. *Roe*, 2 *Kerr*, 36) dollars, for a half year's rent of the same, which became due on last past [and also the further sum of for previous arrears of rent of the said premises, then and still remaining unpaid, making together dollars], under and by virtue of an indenture of lease, dated , and made between me and said C. D.

4. That at the time of the said service of the said declaration, I had power to re-enter upon the said premises by virtue of the said lease, and a condition or proviso for re-entry in that behalf contained therein, for the non-payment of the rent so in arrear, as aforesaid.

HILARY TERM, 1837—7 WM. IV.

Agents.—Clerk's Office.

1. WHEREAS, it is deemed improper that any clerk in the office of the clerk of the pleas of this Court should act as an agent of any attorney, with or without any remuneration or gratuity,

It is ordered, That henceforth no attorney of this Court do employ any such clerk as his agent in any suit or matter pending in this Court, or in the transaction of any business in the office either of the clerk of the Crown or clerk of the pleas; and that the clerk of the pleas do not allow or suffer any clerk or other person employed in his office to act as such agent, under any pretence whatsoever.

Filing Entry Dockets, &c.

2. It is ordered, That from and after this present Hilary term, every attorney of this Court enter the return and file the writ or process (*a*) in all actions which have not at or before such return been settled or discontinued (*b*), and make and file with the clerk a docket (*c*) of all such returns and rules, on or before the last return day of the term at which such writs are returnable, or within thirty days thereafter (*d*); and that the clerk do not, in future, receive or file any docket, or enter any such rule after the said thirty days, without the special order of the Court or a judge, to be made on affidavit or affidavits, properly accounting for the delay (*e*).

(*a*) By R. Trin. 1840, *post*, the writ must be filed before interlocutory judgment. It may be disobedience in the attorney not to file the writ according to the strict letter of the rule, but it was no ground for setting aside proceedings against bail, if the entry docket was filed within the thirty days (*Gilmour* v. *Simpson*, 5 All. 213). "The entry docket was filed in time, and that is the material thing; the non-filing of the writ cannot put the cause out of court, if it is properly entered." "The rule does not say, that the clerk shall not file the writ after the thirty days" (*per Ritchie, J., id.*). In *Mitchell* v. *Lawther* (1 Pugs. 84), *Wetmore J.*, says: "It is quite usual to file the writ as a matter of course, after the time pointed out by the rule in this respect, if the entry docket has been duly filed;" and see *Palmer* v. *Dinsmore* (2 Pugs. 150), and *Taylor* v. *Gerow* (*id.* 364), cases on the Statute of Limitations.

Compare R. Hil. 1820, r. 2, *ante*, p. 22,

(*b*) If the plaintiff intends to proceed (see R. Hil, 1820, r. 2), he is bound to file the writ and enter the cause, even if the writ has not been served (*Palmer* v. *Dinsmore*, 2 Pugs. 150).

(*c*) "In the Supreme Court
Of Term Victoria.
Mr. P. A.'s entry docket.

A. B. v. C. D. } Summons issued day of A. D. 1880.
Served day of A. D. 1880.

E. F. v. G. H. } Capias to [Saint John], issued day of , A. 1880. { Rule for body
Returned ["*capi corpus*"].

P. A., *plaintiff's attorney*."

See *Riorden* v. *Dunn* (3 All. 124), and *Mitchel* v. *Lawther*, *supra*, judgments of *Weldon*, *Fisher*, and *Wetmore*, *JJ.*, as to the form and sufficiency of the entry docket.

(*d*) The cause shall be entered before or at the time of filing the declaration (C. S., c. 37, s. 48). The omission to comply with this rule is to be considered in the same light as a case where, under the general practice, the plaintiff omits to declare in due time, and the cause must be deemed out of court (*Muldoon* v. *Beveridge*, 2 Kerr, 532; *Miller* v. *Weldon*, 1 Han. 376; *Mitchel* v. *Lawther*, 1 Pugs. 79). A defendant could not, after unsuccessfully defending the action, apply to set aside the proceedings for non-compliance with this rule (*Read* v. *McLellan*, 1 All. 3; *Lynott* v. *Seely*, *id.* 35; and see *Kerlin* v. *Bailie*, 2 All. 115). In *Lynott* v. *Seely*, the plaintiff's attorney was deprived of his costs. By R. East. 1848, r. 1, pl. 2, *post*, the plaintiff cannot sign judgment before entry. In *Miller* v. *Weldon*, *supra*, a rule for judgment, *quasi* nonsuit, was refused because of the non-entry, and it was there said, that judgment of *non pros.* could not be signed; but see now, C. S., c. 37, s. 48. In *Oulton* v. *Milner*, 3 Pugs. 221, the Court, under the special circumstances of that case, on the application of the defendant, ordered the plaintiff to enter the cause, to enable judgment on demurrer to be signed. Bail are discharged by neglect in entering the cause (*Muldoon* v. *Beveridge*, 2 Kerr, 531; *Read* v. *McLellan*, 1 All. 3; *Gilmour* v. *Simpson*, 5 All. 213; *Palmer* v. *Dinsmore*, 2 Pugs. 150).

(*e*) The affidavit must shew satisfactory reasons for the delay (*Wetmore* v. *Briggs*, 4 All. 590; *McAuley* v. *Geddes*, *id.* 591; *Doherty* v. *McGrath*, 6 All. 403). The Court is unwilling to disturb the order of a judge allowing an entry *nunc pro tunc* (*Palmer* v. *Dinsmore*, *supra*; *Taylor* v. *Gerow*, 2 Pugs. 364); and see, as to setting aside the

order, *Kerlin* v. *Baillie* (2 All. 115). See, as to proceedings under C. S., c. 37, s. 15, against non-residents, *Mitchel* v. *Lawther*, 1 Pugs. 79.

Examining Witnesses before Trial.

3. It is ordered, That the party applying for the examination of a witness, or witnesses, *de bene esse*, under the Act 26 Geo. III. c. 20 (*f*), or for an order for such examination, or for the issuing a commission, under the Act 5 Wm. IV. c. 34 (*g*), do state in the affidavit or affidavits upon which such application (*h*) is founded, the nature of the action, the venue, and the state of the pleadings or proceedings at the time of such application; also the name of the opposite attorney or agent (*i*); and do also, whenever time will permit, give notice of such application, together with a copy of the affidavit or affidavits, to such attorney or agent (*j*).

(*f*) 36 Vic. c. 31, s. 187-189 (C. S., c. 37, s. 185-187).

(*g*) 36 Vic. c. 31, s. 190-196 (C. S., c. 37, s. 188-194). The first Provincial Act was 31 Geo. III. c. 10, and see Stat. 1 Wm. IV. c. 22.

(*h*) The application cannot be made until after issue joined, unless where a case of necessity is made out; and it should be made within a reasonable time thereafter (*Chit. Forms*, 10 *ed.*, 177-8). Under s. 185 of C. S., c. 37, a judge may take the deposition "after declaration filed."

(*i*) The affidavit should also, in general, state the name of the witnesses proposed to be examined, or otherwise describe who they are. This, however, is not absolutely necessary, and, under circumstances, may be dispensed with (*Chit. Forms*, 185). It was held, at chambers, by *Carter, J.*, in the case of *Furlong* v. *Akerly*, on the authority of *Scott* v. *Van Sandau*, 8 Jur. 1114, that an affidavit to obtain a summons need not state the name of the witness; and in *Hillyer* v. *Cronk*, Chip. MS., an order was made for a commission to examine witnesses in New York, without the names of the witnesses being stated (All. Rules, 30). And see further, as to the requisites of the affidavit, *Chit. Forms*, 178-185; 1 *Chit. Arch.* 12 *ed.*, 329, 337; 1 Tayl. Ev. 447.

(*j*) A second commission, to examine the same witness on matters not enquired into on the first, can only issue under special circumstances, and the necessity for it must be clearly shewn, and it should be limited in its terms, and not in the ordinary form (*Light* v. *Abel*, 6 All. 286).

To let the depositions in evidence, the seal of the commissioners need not be proved (*Doe* d. *Heathcote* v. *Hughes*, 2 P. & B. 296), nor that they have been sworn (*Wilmot* v. *Hawes*, 1 Kerr, 351); and see, as to proving the absence of the witness at the time of trial, *Burpee* v. *Carvill*, 3 Pugs. 141; *Doe* v. *Hughes*, *supra*. Evidence improperly received by the commissioner, but without objection, may be objected to on the trial (*Boston Belting Co.* v. *Gabel*, 4 P. & B.). Execution of commission by three of four commissioners (*Gilbert* v. *Campbell*, 1 Han. 474)—Return of, by one of the commissioners, *Burpee* v. *Carvill*, *supra*—Return and direction of, to the Court, *Doe* v. *Hughes*, *supra*; *Waterhouse* v. *Marine Ass. Co.*, 3 Kerr, 639; *Doe* d. *James* v. *McLaughlin*, 5 All. 54—Waiver of irregularity in, by examining witnesses under, *McKay* v. *Commercial Bank*, 1 Pugs. 1—by not applying to suppress, *Gilbert* v. *Campbell*, 1

Han. 474—Costs of, *Fergus* v. *McIntosh*, Bert. 91; *Andrews* v. *Wilson*, 3 Kerr, 127; *McGivern* v. *Stymest*, 5 All. 340; *Wood* v. *Stymest*, *id.* 429—Proof of documents by, *Burpee* v. *Carvill*, *supra*; *Thompson* v. *Reed*, 5 All. 7; *McKay* v. *Commercial Bank*, *supra*; *Lawton* v. *Tarrett*, 4 All. 1—Suppressing deposition under, for misconduct of witness, *Doe* d. *Beatty* v. *Keillor*, 2 Kerr, 643—Cannot be opened before jury sworn, *Burpee* v. *Carvill*, *supra*—Plaintiff not bound to read defendant's evidence under, *Burpee* v. *Carvill*, *supra*.

By Stat. 5-6 Wm. IV. c. 62, s. 15, amending 5 Geo. II. c. 7, in any action wherein any party in Great Britain or Ireland is a party, &c., any matter may be proved by solemn declaration, which shall be of the same effect as if the party had sworn the matter under a commission. See *Rankin* v. *Weldon*, 6 All. 220; *Champion* v. *Long*, H. T. 1834, Stev. Dig. 182.

Warrants of Attorney.—Filing

4. It is ordered (*k*), That no judgment be signed upon any warrant authorizing any attorney to confess judgment without such warrant being delivered to, and filed by the clerk (*l*).

(*k*) Taken from R. G., K. B., M. T. 42 Geo. III.; see Practice Rules of 1853, r. 25.

If the warrant is executed by an agent, the power of attorney, &c., must also be filed (R. Trin. 1857, r. 2, *post*).

(*l*) See *Haslack* v. *Watson*, 2 Kerr, 362.

A judge's order is necessary before signing judgment on an old warrant (R. East. 1848, r. 1, pl. 2, *post*).

Warrants of Attorney—Defeazance.

5. It is ordered (*m*), That every attorney of this Court who shall prepare any warrant of attorney to confess any judgment which is to be subject to any defeazance, do cause such defeazance to be written on the same paper or parchment on which the warrant of attorney shall be written, or cause a memorandum in writing to be made on such warrant, containing the substance and effect of such defeazance (*n*).

(*m*) Taken from R. G., K. B., M. T. 42 Geo. III.; and see Stat. 3 Geo. IV. c. 39, s. 4; Practice Rules 1853, r. 27.

(*n*) The disregard of this rule subjects the attorney to censure, but does not avoid the security (*Lunt* v. *Estabrooks*, 3 Kerr, 144; *Partridge* v. *Fraser*, 7 Taunt. 307; *Sansom* v. *Goode*, 2 B. & A. 568; *Joel* v. *Dicker*, 5 D. & L. 1). The defeazance need not be under seal, though the warrant is, but it should be signed (*Lush*, 725). Part of the defeazance may be written on a separate paper, annexed (*Burdekin* v *Potter*, 1 Dowl., N. S. 134). The defeazance may, it appears, be so prepared as to dispense with the necessity of applying for leave to sign judgment, under R. East. 1848, r. 1, pl. 2, after the lapse of a year from the date of the warrant (*Sherran* v. *Marshall*, 1 D. & L. 689). See, as to construing the defeazance as a continuing security, *Eaton* v. *Lawrence* (2 Han. 85).

tised since his admission by any other Court; and if he have been engaged in any other profession, business, or employment, he must state the particulars of the same, with any other matters explanatory of his conduct and pursuits as he may deem necessary or advisable.*]

That your petitioner is at present resident at and is desirous of being admitted an attorney of this honorable Court, at the ensuing term, and prays that your honors will make such order touching his examination or admission as by the rules of the Court are required, or as to your honors may seem meet.

Dated the day of 18 .

* If the petitioner's full time of study has not expired at the time of application, he must further state his intention to continue a student in the barrister's office until such time expires, and will be required to produce an additional certificate to that effect at the ensuing term.

(*k*) See r. 4, *supra*.

New Trials—York Sittings.

10. Whereas, it is desirable that arguments on rules for new trials, or the like, made in causes tried at the sittings for the county of York, should be heard and disposed of more speedily than can be done under the present practice of the Court—

It is ordered, That, in future, any party intending, after trial had at the said sittings, to move the Court for a rule to shew cause why a new trial should not be granted, or for any rule of a like description, do give notice to the opposite party of such his intention, together with a note, in writing, specifying the general grounds of the intended motion, thirty days before the ensuing term, and that rules nisi granted on such motions be made returnable in the same term, unless the Court should see fit, with the consent of parties, or for other good reason, to extend the time for shewing cause to the ensuing term (*l*).

(*l*) See *Turner* v. *Hammond*, 2 Ker. 536; *Wright* v. *Merrithew*, 2 All. 520; Rules East. 1855; Hil. 1860, and Hil. 1867, *post*). The Act 42 Vic. c. 8, by which motions for new trials are now governed, is cited, *ante*, p. 50.

TRINITY TERM, 1838—1 VIC.

Judgment roll in Debt.

IT IS ORDERED, That the entry of the judgment on the record, in actions of debt (*a*), where the amount to be recovered is ascertained and assessed by the Court, under the Act of Assembly, 7 Wm. IV. c. 14, s 6, shall be in the following form, or of the like tenor and effect, viz. (*b*):

"And the said A. B. (*the plaintiff*) prays that the amount to be recovered in this action may be ascertained and assessed by the Court here, according to the form of the Act of Assembly, in such case made and provided; and thereupon it is suggested and proved, and manifestly appears to the Court here, that the said A. B. ought to recover for his debt in this action, the sum of £——: therefore it is considered that the said A. B. do recover against the said C. D. (*the defendant*) the said sum of £———, for his debt, so ascertained and assessed by the Court here, and also, &c. (*proceed with the entry in regard to costs, in the usual form*), and the said C. D., in mercy, &c."

(*a*) At common law the plaintiff might, in actions of debt, whether on a simple contract, or on a common bond, or on a bail (*Moody* v. *Pheasant*, 2 B. & P. 446), or replevin bond (*Middleton* v. *Bryan*, 3 M. & S. 155), at once enter up final judgment and issue execution, taking, at his peril, no more than was due him, but if he sought to recover interest on the debt, or damages in any shape, the judgment must, in the first instance, have been interlocutory, and the damages assessed (see *Blackmore* v. *Flemyng*, 7 T. R. 446; *Roe* v. *Apsley*, 2 Sid. 442; *Bale* v. *Holgetts*, 1 Bing. 182; *Arden* v. *Connell*, 5 B. & A. 885; *Messin* v. *Massareene*, 4 T. R. 493; *Maunsell* v. *Massareene*, 5 T. R. 87).

But by 7 Wm. IV. c. 14, s. 6, it was enacted, that in all actions of debt, the amount to be recovered, in case of judgment by default, or on demurrer, should be ascertained, and assessed either by the Court or a jury before judgment signed, actions on bonds conditioned for the payment of a single sum of money, not by instalments, excepted. The Court was, by a previous Act (26 Geo. III. c. 21), empowered to assess damages on judgments by default in actions on the case, and by 8 Geo. IV. c. 4, to enquire the truth of and assess damages on breaches assigned or suggested, under Stat. 8 9 Wm. III. s. 11, where such breaches consisted of the non-payment of money, and the defendant did not apply for a jury. By 5 Wm. IV. c. 37, s. 9, a judge could, in vacation, make enquiry and assess damages at the expiration of twenty days after judgment by default, in cases where the Court could have so done. The provisions of 26 Geo. III. c. 21, and 5 Wm. IV. c. 37, s. 9, were extended by 7 Wm. IV. c. 14, s. 6, to actions of covenant for the payment of a certain sum, and of debt, and to judgments on demurrer in such actions and actions on the case. These Acts were, with some alterations and additions, incorporated into 12 Vic. c. 39, ss. 24-26, which was repealed by s. 215 of 36 Vic. c. 31, and re-enacted by ss. 118-120 (C. S., c. 37, ss. 115-117), with a proviso excepting cases where the particulars of demand are indorsed on the summons. See also C. S., c. 37, s. 106.

At common law the Court may, *ex officio*, assess the damages as against the defendant (*Hewit* v. *Mantell*, 2 Wils. p. 374; *Bruce* v. *Rawlins*, 3 Wils. 61; *Mallory* v. *Jennings*, Fitz. 162; *Holdipp* v. *Otway*, 2 Wms. Saund. 106; see *Fowlie* v. *Stronach*, Bert. p. 61, *per Carter, J.*)

(*b*) See the form, R. Hil. 1875, *post*, by which the above form is superseded.

MICHAELMAS TERM, 1838—2 VIC.

Summary Actions (*a*).

ORDERED, That in future, in summary actions tried at Nisi

Prius, a copy of the plea, instead of the original plea, may be filed in the Court of Nisi Prius as a part of the record.

(*a*) Abolished by 30 Vic. c. 10, *ante*, p. 47.

HILARY TERM, 1839—2 VIC.

Prisoners—Supersedeas for not Declaring.

1. IT IS ORDERED (*a*), That from and after the last day of this term, in all cases where a prisoner is or shall be taken, detained or charged in custody by *mesne* process thereafter returnable, issuing out of this Court, and the plaintiff shall not cause a declaration against such prisoner to be delivered to such prisoner, or to the sheriff in whose custody such prisoner is or shall be detained or charged, within three (*b*) calendar months after the return of the process by virtue whereof such prisoner is or shall be taken, detained, or charged in custody; and cause an affidavit to be made and filed with the clerk of this Court, of the delivery of such declaration, and of the time when, and the person to whom, the same was delivered, before the last day of the term next after the delivery of such declaration, the prisoner shall be discharged out of custody by writ of *supersedeas*, to be granted by this Court, or one of the judges thereof, upon filing common bail; unless, upon notice given to the plaintiff's attorney, good cause shall be shewn to the contrary—and in case of a commitment or render in discharge of bail, after the return of process, and before a declaration delivered, unless the plaintiff shall cause a declaration to be delivered, and an affidavit thereof made and filed; before the end of the term next after such commitment or render shall be made, and due notice of such render given, the prisoner shall be discharged out of custody by writ of *supersedeas*, to be granted as aforesaid, upon filing common bail, unless, upon notice given to the plaintiff's attorney, good cause shall be shewn to the contrary.

(*a*) Taken from the R. G., K. B., H. T. 26 Geo. III.; and see R. H. T. 3 Wm. IV.

(*b*) If any defendant shall be taken or charged in custody upon any writ of *capias*, and imprisoned for want of bail for his appearance thereto, the plaintiff shall, within *two* calendar months after the arrest of the defendant, declare against him, and proceed thereon in the manner directed by these rules—C. S., c. 37, s. 52 (36 Vic. c. 31,

s. 52); and see C. S., c. 38, s. 4. The day of the arrest is excluded in the computation of time; the plaintiff has the whole of the 11th of September in which to serve a declaration on a prisoner arrested on the 11th July (*Weldon* v. *O'Sullivan*, 3 P. & B. 402). The word "declare" in the Act, read in connection with these rules, does not require the declaration to be filed as well as served within three months (*id.*).

The defendant may be discharged for unnecessary delay on the part of the plaintiff (C. S., c. 38, s. 4).

2. That on every declaration so to be delivered against a prisoner as aforesaid, a rule to appear and plead shall be indorsed according to the form following, that is to say:

"The defendant, C. D., is to appear and plead hereto at the suit of the plaintiff, A. B., within twenty days after service of this declaration, otherwise judgment will be entered against him by default."

G. H., *plaintiff's attorney.* ——— 18 .

And that judgment shall not be entered against such defendant by default until the expiration of the said rule.

3. That the sheriff who shall have received a copy of a declaration against any prisoner in his custody, shall indorse thereon the time of his so receiving the same, and shall forthwith deliver the same to the said prisoner, and shall also enter in a book, to be by him kept for that purpose, the time of receiving such declaration, and of delivering the same to the prisoner.

4. That (*c*) where the plaintiff declares against the prisoner, it shall not be necessary to make more than two copies of the declaration, of which one shall be served, and the other filed, with an affidavit of service, and a copy of the rule to appear and plead indorsed thereon.

(*c*) See English R. G., H. T. 2 Wm. IV. r. 36.

5. That upon application made by the plaintiff, before the time at which the defendant may be supersedable, and good and sufficient cause, shewn by affidavit, further time to declare may be given by rule of Court or order of a judge.

6. That upon every application for a *supersedeas* for want of declaring in due time, in addition to the certificate of the sheriff that no declaration has been delivered to him for the prisoner, there shall be an affidavit of the defendant that, he has not been served with such declaration.

Supersedeas for not proceeding to Trial.

7. That unless the plaintiff shall proceed to trial or final judg-

Warrants of Attorney—Prisoners.

6. It is ordered (*o*), That no sheriff, bailiff, or sheriff's officer, shall presume to exact or take from any person or persons being in his custody by arrest (*p*), any warrant to confess judgment (*q*), but in the presence of an attorney for the defendant, which attorney shall then subscribe his name thereto; and that no attorney do acknowledge or enter any judgment by color of any warrant given by any defendant being under arrest, otherwise than as is aforesaid.

(*o*) The R. G., K. B., E. T. 15 Car. II. r. 2, from which the above rule appears to have been taken, differs from it materially, only in not mentioning the sheriff, in requiring the production of the warrant when judgment is acknowledged, and in directing that the officer shall be severely punished if he offends. It was held to be sufficient under it, for the plaintiff's attorney to be present, and subscribe the warrant as attorney, for the defendant (*Watkins* v. *Hanbury*, 2 Stra. 1245). By the subsequent rule of the Court of Queen's Bench (E. T. 4 Geo. II.), reciting that this rule was ineffectual for the purpose thereby intended, it was ordered, that "no warrant of attorney, executed by any person in custody of any sheriff or other officer, for the confessing of judgment, shall be valid or of any force, unless there be present some attorney (*Verge* v. *Dodd*, 8 L. J. Q. B. 302; *Cox* v. *Cannon*, 4 B. N. C. 453; *Ieyes* v. *Booth*, 1 B. & P. 97; *Wallace* v. *Brockley*, 5 Dowl. 695; *Gillman* v. *Hill*, Cowp. 142), on the behalf of such person in custody, to be expressly named by him, and attending, at his request (*Walker* v. *Gardner*, 4 B. & Ad. 371; *White* v. *Cameron*, 6 Dowl. 476; *Bligh* v. *Brewer*, 1 C. M. & R. 651), to inform him of the nature and effect of such warrant of attorney before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof."

The practice in England was again altered by 72d rule of M. T. 2 Wm. IV., and by Stat. 1-2 Vic. c. 110, s. 9, after the Supreme Court of this Province was established.

(*p*) Under *mesne* process (*Crompton* v. *Steward*, 7 T. R. 19; *Weatherall* v. *Long*, 6 Dowl. 267; *France* v. *Clarkson*, 5 Dowl. 699; Tidd, 9 *ed.*, 550). Where a prisoner agreed to execute a warrant of attorney to the plaintiff, for the express purpose of being released from confinement, whereupon the gaoler discharged him from the room in which he had been confined, and he went into another room in the gaol and executed the warrant, it was held that he was substantially in custody (*Leddon* v. *Hanson*, 1 Kerr, 90), but where the warrant was executed in pursuance of a promise made by the defendant while he was under arrest, he having been actually discharged before executing it, and not being then in any confinement, the presence of an attorney was considered unnecessary (*Scoullar* v. *Grass*, *id.* 527).

The onus is on the party applying to set aside the warrant to show that he was in custody (*Lewis* v. *Gompertz*, 6 Dowl. 7, 269). The rule only extends to warrants given by a defendant to a plaintiff at whose suit he is in custody (*Holcombe* v. *Wade*, 3 Burr. 1792; *Finn* v. *Hutchinson*, 2 Ld. Raym. 797; *Churchey* v. *Rosse*, 5 Mod. 144; *Gillman* v. *Hill*, Cowp. 142; *Smith* v. *Burlton*, 1 East. 241; *Weatherall* v. *Long*, 6 Dowl. 267).

(*f*) If a *cognovit* be taken from a prisoner, an attorney for him should be present (*Parkinson* v. *Caines*, 3 T. R. 616).

MICHAELMAS TERM, 1837—1 VIC.

Admission of Attorneys.

WHEREAS, it is expedient that every person desirous of being admitted as an attorney of this Court, should, before such admission, be examined as to his fitness and capacity to act as such attorney—

It is ordered, That the judges of this Court, together with four barristers of not less than five years standing, to be for that purpose appointed by rule of Court in Hilary term in every year, or any two of them, whereof a judge to be one, shall be competent to conduct the examination of any person who may have made application for admission as an attorney of this Court in the form hereafter mentioned; and that from and after the last day of next Hilary term, subject to such appeal as hereafter mentioned, no person shall be admitted to be sworn as an attorney of this Court without the production of a certificate signed by such examiners, testifying his fitness and capacity to act as an attorney (*a*).

(*a*) See R. Hil. 1867, Bye-law 21, *post*.

2. It is ordered, That the said examination shall be held at such times and places respectively, and under such regulations, as the judges, or any three of them, may from time to time appoint (*b*).

(*b*) See R. Hil. 1867, Bye-law 21, *post*.

3. That, in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty to apply for such admission by petition, in writing, to the judges, which application shall be heard by not less than three of the judges, at such time and place as they may appoint (*c*).

(*c*) See R. Mich. 1847, rr. 1–2, and R. Hil. 1867, Bye-law 22, *post*.

4. That every person who may desire to be admitted an attorney, shall, on or before the Thursday in the first week of the term immediately preceding that at which he shall propose to be admitted (*d*), make application, by petition, to the Court, in the

form hereunto annexed, or to the like effect (*e*), which petition shall be accompanied by the requisite certificates of the age, moral character, and service of the applicant (*f*); and the certificate of moral character shall be full, positive and explicit, and shall contain particular testimonials to the sober and temperate habits of the applicant, and the Court, if satisfied with the certificates, will, during such term, make order for the examination of such applicant.

(*d*) The petition is now presented at the term in which application is made. A term's notice must be given (R. Hil. 1867, Bye-law 21, *post*).

(*e*) This rule is considered to be still in force, and the form of petition here prescribed is required to be presented by students applying for admission (*Bots. R.* 130, *n. to R. Mich.* 1847).

(*f*) See R. Mich. 1878, *post*, requiring delivery of these certificates to the Court.

Attorneys of other Courts.

5. That the foregoing rules touching examination, shall extend to persons who may apply for admission upon certificates from any other part of Her Majesty's dominions (*g*), as well as to persons who may have pursued their studies in this Province; and any person coming from any other part of Her Majesty's dominions shall produce a certificate from the Court in which he may have become a practitioner, or one of the judges thereof, that he has conducted himself with credit and reputation since his admission there.

(*g*) See R. Hil. 1823, r. 2, *ante*, p. 25; *infra*, r. 9.

Re-admission of Attorneys.

6. That no attorney of this Court, who shall have been absent (*h*) from the Province, or have discontinued (*i*) the practice of the law for the space of five years together, shall hereafter be permitted to commence or resume practice as an attorney until he be re-admitted and re-sworn.

(*h*) See R. Hil. 1820, r. 1, *ante*, p. 21.

(*i*) See R. G., K. B., M. T. 1654, as to the effect of discontinuance of practice on the privileges of an attorney.

7. That every attorney who may desire to be re-admitted, shall apply, by petition to the Court, stating therein the place or places in which he may have resided, and the business, profession or employment in which he may have been engaged or concerned

since his first admission; which petition shall be verified by the affidavit of the petitioner, and shall be presented to the Court on or before the Thursday in the first week of the term, immediately preceding that at which he may desire to be re-admitted.

8. That every applicant for re-admission shall be examined as to his fitness and capacity to act as an attorney, in the same manner as if applying for a first admission, unless the Court shall see fit, in any case, to dispense with such examination, and shall make order accordingly.

Attorneys of other Courts.

9. That from and after the present Michaelmas term, no attorney of any other part of Her Majesty's dominions (*f*) shall be admitted as an attorney of this Court, unless he shall have entered as a student with one of the attorneys of this Court, having the rank of barrister, and resident and practising in the Province, and shall have continued as such student for one year; the entry of every such student to be registered with the clerk, as in the case of other students; and a certificate of such year's study from the barrister with whom the same may have been performed shall be one of the testimonials necessary for the admission of such applicant.

(*f*) See R. Hil. 1823, r. 2, *ante*, p. 25.

Form of Petition for Admission as an Attorney (*k*).

To the honorable the Chief Justice and Justices of the Supreme Court.

The petition of A. B., humbly sheweth, That your petitioner was born in on (*state the place and day of birth*), as by the accompanying certificate (*or* affidavit) will appear. That on he entered as a student in the office of C. D., esquire, a barrister of this Court, at in this Province, and has continued as such from that time hitherto; during which time he has not absented himself without the permission of the said C. D., nor been engaged in any other profession, business, or employment.

[If the applicant have studied part of the time with any other barrister, or been absent without permission, or engaged in any other profession, business, or employment, since commencing his studies, he must state fully the reasons therefor, the particular time and length of such other study, or absence, or engagements in other pursuits, together with such other particulars as he may think advisable, explanatory of his conduct. If the applicant have not studied in this Province, he must state the particular grounds on which he applies for admission, the place, or places, in which he may have resided and prac-

ment (*d*) within three terms next after the delivery or filing of declaration (*e*), if by the course of this Court the plaintiff can so proceed; of which three terms, the term wherein such declaration shall be delivered shall be taken to be one; or if, by the course of the Court, the plaintiff cannot so proceed to trial or final judgment within the time above limited; then, unless the plaintiff shall proceed to trial or final judgment, as soon after as by the course of this Court he may so proceed, the prisoner shall be discharged out of custody by writ of *supersedeas*, to be granted as aforesaid, upon filing common bail, unless upon notice given to the plaintiff's attorney, good cause shall be shewn to the contrary.

(*d*) See R. G., K. B., H. T. 26 Geo. III. r. 2; H. T. 2 Wm. IV. r. 85; Practice Rules 1853, r. 124.

(*e*) *Heaton* v. *Wittaker*, 4 East. 549; *Baxter* v. *Bailey*, 3 *id.* 415.

Supersedeas for not charging in Execution.

3. That (*f*) in all cases after final judgment obtained against a prisoner, unless the plaintiff shall cause such prisoner to be charged in execution, within three calendar months next after the day on which such final judgment shall be signed, in case no writ of error shall be depending, nor injunction be obtained for stay of proceedings—and if any writ of error shall be depending, or injunction be obtained, then, within three calendar months next after judgment shall be affirmed, the writ of error be *non-prossed* or discontinued, or the injunction dissolved—the prisoner shall be discharged out of custody by *supersedeas*, to be granted as aforesaid, unless, upon notice given to the plaintiff's attorney, good cause shall be shewn to the contrary.

(*f*) R. G., K. B., H. T. 26 Geo. III. r. 2; H. T. 2 Wm. IV. r. 85; Practice Rules, 1853, r. 124.

Imprisonment for debt on final process was abolished by 37 Vic. c. 7; re-enacted by C. S., c. 38.

Supersedeas for not entering up Judgment.

9. That after trial had (*g*), unless the plaintiff do proceed to have his judgment entered up and signed as soon as by the course and practice of this Court he may so do, or within one calendar month thereafter, in case no such injunction shall be obtained or order made for stay of proceedings; and if any such injunction

shall be obtained, or order made, then within one calendar month after such injunction shall be dissolved or order discharged, the prisoner shall be discharged out of custody, in like manner as in the last preceding rule is provided.

(*g*) R. G., K. B., H. T. 26 Geo. III. r. 2, *supra*, note (*f*).

Supersedeas for not charging in Execution after Render.

10. That (*h*) in case of a render in discharge of bail after final judgment obtained, unless the plaintiff shall cause the defendant to be charged in execution within three calendar months next after such render and due notice thereof given; and in case of render after trial and before judgment, unless the plaintiff do proceed to have his judgment entered up and signed within the time limited by the last preceding rule, or within one calendar month after such render and due notice thereof, the prisoner shall be entitled to his discharge in manner aforesaid, unless good cause be shewn to the contrary.

(*h*) R. G., K. B., H. T. 26 Geo. III. r. 2. See *Jackson* v. *Black*, 4 All. 79.

Waiver of Supersedeas to be in Writing.

11. That (*i*) no treaty or agreement shall be sufficient cause to prevent any prisoner having the benefit of a *supersedeas*, unless the same be in writing, signed by the prisoner or his attorney, or some person duly authorized by such prisoner,

(*i*) See R. G., K. B., H. T. 26 Geo. III. r. 4. As to what is a sufficient treaty in writing, under the above rule, see *Jones* v. *Steeves*, 1 Han. 260. The sureties on a limit bond cannot be affected by such agreement (*Gordon* v. *French*, 2 Kerr, 610).

Writ of Scire Facias under Act 26, Geo. III. c. 24.

12. Ordered, That the writ of *scire facias*, to be issued under the Act of Assembly, 26 Geo. III. c. 24 (*j*), shall be in the form following, or to that effect, adding in the body of the same any special matter which in particular cases may be deemed requisite.

Victoria, &c. To the sheriff of Greeting.

Whereas, A. B., lately in our Court before us at Fredericton, impleaded C. D. and E. F. in a plea of (the said C. D. having been duly taken and brought into Court by virtue of process issued in the said suit against the said C. D. and E. F., and the said E. F. not having been taken and brought into Court by virtue of such process), and did

afterwards, by the judgment of the same Court, recover as well against the said E. F. as the said C. D. (*state the recovery*), in the same manner as if they had both been taken and brought into Court, pursuant to the Act of Assembly in such case made and provided, whereof the said C. D. and E. F. are convicted, as by the record and proceedings thereof still remaining in our same Court manifestly appear.

And now, on behalf of the said A. B., in our same Court, we are informed, that although judgment be thereupon given, yet satisfaction of the [debt and] damages aforesaid still remains to be made to him; and he is desirous of executing an execution for such [debt and] damages against the body, or the lands or goods, the sole property of the said E. F., wherefore the said A. B. hath humbly besought us to provide him a proper remedy in this behalf: And we, being willing that what is just in this behalf should be done, command you, that by honest and lawful men of your bailiwick, you make known to the said E. F., that he be before us at Fredericton, on to shew if he has or knows of any thing to say for himself, why the said A. B. ought not to have execution for the [debt and] damages aforesaid, to be executed against the body or the lands or goods, the sole property of him, the said E. F., according to the force, form and effect of the said recovery, and pursuant to the said Act of Assembly in such case made and provided, if it shall seem expedient for him so to do; and further to do and receive what our said Court before us shall then and there consider of him in this behalf. And have you there the names of those by whom you shall so make known to him, and this writ. Witness, &c.

(*f*) This Act recited, that "creditors are often put to great trouble and difficulty in recovering debts due from joint partners, the proceeding to outlawry against such persons who cannot be taken by process not being in use in this Province, and doubts have arisen whether any one joint partner is now compellable to answer for the partnership debts, unless all are brought into Court, which many times cannot be done." It was held under it, that relief from the judgment could only be obtained on motion (*Johnston* v. *Tibbits*, Bert. 355; *Mitchell* v. *Astle*, 2 Kerr, 86), but now, by C. S., c. 37, s. 122 (1 R. S., c. 141; 36 Vic. c. 31, s. 125), the defendant not served may give in evidence in the proceeding in *scire facias* any matter which would have been a defence for him in the original action. See, as to the form of the writ before the above rule, *Johnston* v. *Tibbits*, Bert. 355, overruling *Berton* v. *Brown*, Stev. Dig. 350, All. Rules, 77, and as to procedure in *sci. fa.*, see *ante*, p. 39, note.

In *sci. fa.*, under 9 10 Wm. III., on a judgment signed under the Act, an alleged objection to a prayer for execution in the writ cannot be taken on a trial by the record in which the record of the recovery of the judgment is alone put in issue (*Kerr* v. *Kinnear*, 3 Kerr, 412).

The title of the cause is, "A. B., plaintiff, and C. D. and E. F., defendants," and the words "impleaded with" ought not to be inserted in the process (*Sears* v. *Cahill*, 2 P. & B. 301).

In *McLaughlin* v. *Ratchford*, 3 Kerr, 421 (before 14 Vic. c. 20), a new trial was granted, because the record was made up as though a judgment by default had been signed against the defendant not served. A precedent of a judgment roll on a judg-

ment by default is there quoted, with approval by the Court, from which the following form, with alterations to adapt it to the precedents given by R. Hil. 1875, *post*, and the language of C. S., c. 37, s. 122, is taken :

In the Supreme Court.

The day of , in the year of our Lord

A. B., by P. A., his attorney (*or*, "in person," *as the case may be, and as in the declaration*), sues G. B. and H. Y., who had been summoned to answer the said A. B., by virtue of a writ issued on the day of , in the year of our Lord out of Her Majesty's Supreme Court of Judicature, at Fredericton, against the said G. B. and H. Y. in this suit (the said H. Y. not having been [arrested or] served with process in this suit for that (*copy the declaration to the end*), and the said G. B. (*the defendant who was served*) has not appeared, whereupon, and by force of the Statute or Act of the General Assembly in such case made and provided, the said A. B. ought to recover as well against the said G. B. as the said H. Y., who has not been arrested or served with process as aforesaid, on occasion of the premises, in the same manner as if the said H. Y. had been arrested or served with process in this suit. And the said A. B. prays that the amount to be recovered in this action may be ascertained and assessed by the Court, and thereupon it is proved and appears to the Court that the said A. B. ought to recover against the said G. B. and H. Y. the sum of . Thereupon, and in pursuance of the said Statute or Act of Assembly in such case made and provided, it is considered that the said A. B. do recover against the said G. B. and H. Y. the said sum of , so ascertained and assessed by the Court, and also for his costs of suit, by the Court here adjudged to the said A. B., which in the whole amount to ."

Judgments by Default and Non-Pros.

13. Ordered, That in future, where the defendant, in any action, shall plead one or more special pleas, and serve copies on the plaintiff's attorney, with rule to reply in twenty days, the plaintiff shall file and deliver his replication in twenty days from the time of such service of plea and rule, and in default thereof the defendant shall be entitled to judgment of *non-pros*, a replication being first demanded after the said twenty days; and in like manner twenty days shall be allowed for every subsequent pleading, and the opposite party shall be entitled to judgment by default or *non-pros*, as the case may be, for not rejoining, surrejoining, &c., a rule to rejoin, surrejoin, &c., being served and demand made as aforesaid, unless the Court or a judge shall think proper to allow further time. Provided that no such judgment of *non-pros* or default shall be signed until ten days after demand of replication, rejoinder, &c. (*k*).

(*k*) See C. S., c. 37, ss. 57-58, *ante*, p. 6.

14. That all such rules to reply, rejoin, surrejoin, &c., may be taken out in vacation and entered as of the preceding term, the attorney delivering to the clerk a præcipe for such rule (*l*).

(*l*) Notices are substituted for these rules by C. S., c. 37, s. 58, *ante*, p. 6.

TRINITY TERM, 1839—2 VIC.

Payment of Money into Court.

1. WHEREAS, by an Act passed in the first year of Her Majesty's reign, entitled "An Act for the further amendment of the Law" (*a*), it is enacted, "that it shall and may be lawful for the defendant, in all personal actions pending or to be brought in the Supreme Court of this Province (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation or debauching of the plaintiff's daughter or servant), by leave of the said Court or a judge of such Court, to pay into the said Court a sum of money by way of compensation or amends, in such manner and under such regulations as to the payment of costs, and the form of pleading, as the said Court, or any three of the judges thereof, shall, by any rules or orders by them to be from time to time made, order and direct."

Ordered (*b*), That when money is paid into Court under the said Act, such payment shall be pleaded, and as near as may be in the following form, *mutatis mutandis*:

"C. D. } Ar. the said defendant comes by E. F., his attorney (*or* "in person," &c.) and says (*or in case it be pleaded as to part only, add* "as to —— being part of the sum in the declaration, *or* "—— count of the declaration mentioned," *or* as to the residue of the sum of ——") that the plaintiff ought not further to maintain his action, because the defendant now brings into Court the sum of ——, ready to be paid to the plaintiff; and the defendant further says, that the plaintiff has not sustained damages (*or in actions of debt*, "that he is not indebted to the plaintiff,") to a greater amount than the said sum of, &c., in respect to the cause of action in the declaration mentioned" (*or* "in the introductory part of the plea mentioned"); and this he, the defendant, is ready to verify; wherefore he prays judgment, if the plaintiff ought further to maintain his action thereof against him;"

And no other plea shall be pleaded to the said action, or to so much thereof as the said plea of payment into Court is applicable.

(*a*) 1 Vic. c. 13, s. 3. This Act, founded on the Stat. 3-4 Wm. IV. c. 42, s. 21, was repealed and re-enacted by 12 Vic. c. 39, s. 59. The C. L. P. Act 1852, ss. 70–1, which superseded the English Stat., was extended to this Province by 36 Vic. c. 31, ss. 67-9, now C. S., c. 37, ss. 66-8.

Payment into Court is now seldom resorted to, defendants usually preferring to offer to confess judgment—see R. Trin. 1859, *post*. The Provincial cases on the subject

are, *Coulan* v. *Campbell*, 3 All. 348; *McCann* v. *Kiley*, 3 All. 154; *Anderson* v. *Allison*, 3 All. 173; *Taylor* v. *Barker*, 3 Kerr, 614; and *Walker* v. *Pendleton*, 5 All. 402.

(*b*) The form given by this rule, which was taken from the English R. G., T. T. 1 Vic.; H. T. 4 Wm. IV. r. 17, is superseded by that given in C. S., c. 37, s. 68.

The direction in the latter part of the rule is still to be observed (*Bull. & L.* 444, 666).

2. It is ordered, That upon a rule, or judge's order being made for paying money into Court under the said Act (*c*), the money shall be paid to the clerk at the time of filing the plea, together with his poundage thereon, and the clerk shall make a minute of such payment in the margin of the plea, and shall also give a memorandum of such payment to be delivered with the copy of the plea to the plaintiff's attorney, which sum shall be paid out to the plaintiff's attorney on demand (*d*).

(*c*) A rule of Court is not necessary.—C. S., c. 37, s. 78.

(*d*) See C. S., c. 37, s. 67. See, as to the mode of paying money into Court, R. Mich. 1871, *post*.

3. It is ordered, That the plaintiff, after delivery of a plea of payment of money into Court, shall be at liberty to reply to the same, by accepting the sum so paid into Court in full satisfaction and discharge of the cause of action, in respect of which it has been paid in, and he shall be at liberty, in that case, to tax his costs of suit, and in case of non-payment thereof within ten days, to sign judgment for his costs of suit; or the plaintiff may reply, "that he has sustained damages" (*or*, "that the defendant was, and is, indebted to him," *as the case may be*) "to a greater amount than the said sum" (*e*); and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit; provided, (*f*) that if the sum of money paid into Court in any action not summary would have been recoverable under the summary form, the plaintiff, if he take the money out of Court in discharge of the action, shall not be entitled to more than summary costs, unless he obtain the order of the Court or a judge for the larger costs, upon good cause shewn therefor.

(*e*) "That the sum paid in is not enough to satisfy his claim in respect to the matter to which the plea has been pleaded"—C. S., c. 37, s. 69; 36 Vic. c. 31, s. 70; Eng. R. G., T. T. 1 Vic. r, 2; H. T. 4 Wm. IV. r. 19; Stat. 15-16 Vic. c. 76, s. 73).

With the exception of this alteration and the proviso relating to costs, the rule is enacted in the same terms by the Con. Stat.

(*f*) See *Peppers* v. *Johnston*, 1 P. & B. 502, R. Trin. 1859, *post*. The summary practice was abolished by 30 Vic. c. 10, s. 38, *ante*, p. 47.

TRINITY TERM, 1840—3 VIC.

Interlocutory Judgment for want of Appearance.

1. IT IS ORDERED, That interlocutory judgment shall not be signed in any case for want of appearance until the process, with the requisite affidavit of service, and (where the case requires) the order of the Court or judge for perfecting such service, shall be filed (*a*).

(*a*) If the affidavit of service is insufficient, the clerk should not sign the judgment (*Gilmore* v. *Liverpool L. & G. Ins. Co.*, 2 Han. 255; *O'Leary* v. *Graham*, 5 All. p. 110; and see R. East. 1850, as to affidavits of service).

See C. S., c. 37, s. 38, *ante*, p. 4. The cause must be entered—R. East. 1848, *post*.

Service of Process.—Form of Affidavit.

2. It is ordered (*b*), That from and after the first day of Michaelmas term next, when service of process is effected at the usual place of abode of the defendant, pursuant to the Act 7 Wm. IV. c. 14, s. 1, the affidavit of such service shall be in the following form, or to that effect, in order to entitle the plaintiff to an order for perfecting such service:

A. B. (*name, residence, and addition of deponent*) maketh oath and saith, that he, this deponent, did on the day of deliver a true copy of the annexed writ or process at the house of C. D., the defendant, named in such writ or process (*or the house of any other person, as the case may be*), situate in the parish of , in the county of , unto E. F., the wife of such defendant (*or* to G. H., an adult person residing in the said house, and known to this deponent as a member or inmate of the family of such defendant); and this deponent further saith, that the said house was, at the time of such delivery, the usual place of abode of such defendant; and that the said copy of the said process was accompanied with an English notice,* in writing, to the defendant, of the intent and meaning of the service of such process, pursuant to the statute in such case made and provided; and this deponent further saith, that at the time of making such service of the said process, the said defendant was not, as this deponent verily believes, without the limits of the said county.

* The clause as to the notice may be omitted in the service of summary writs.

(*b*) Rescinded by R. East. 1850, *post*, by which a different form was prescribed.

Demurrers.

3. It is farther ordered, That where a general demurrer shall hereafter be put in to any declaration or other pleading, the party putting in the same shall deliver at the same time to the opposite party a statement or minute of the grounds (*c*) of such demurrer; and if the opposite party intend to rely on any defects in the previous pleading (*d*), he shall deliver with the joinder in demurrer a statement or minute of such alleged defects; and such particulars shall be entered in the margin of the books delivered to the judges (*e*). This regulation to extend also to cases of special demurrer (*f*) where other grounds are intended to be relied on, than those specifically set out.

(*c*) "A statement of some substantial matter of law, intended to be argued, shall be stated thereon, or served on the opposite party, with the demurrer, and, if the opposite party intend to rely on any defects in the previous pleading, he shall deliver a statement thereof, with the joinder in demurrer, and if any demurrer is delivered without such statement, or with a frivolous statement, it may be set aside by the Court or a judge, and leave may be given to sign judgment for want of a plea"—C. S., c. 37, s. 90 (36 Vic. c. 31, s. 93; and see Stat. 15-16 Vic. c. 76, s. 89, which required the statement to be inserted in the margin).

There is an important difference between this Act and the above rule, the one requiring a statement of *some* substantial matter of law intended to be argued, to be delivered with the demurrer, the other a statement of the *grounds* of the demurrer. It has been held, under the English Stat. and R. G., H. T. 4 Wm. IV. r. 2, of which the Provincial Act is, in this respect, a copy, that only one ground need be specified (*Ross* v. *Robeson*, 3 Dowl. 779; and see *Whitmore* v. *Nicholls*, 5 *id.*, 521); but some specific point should be stated, in order to shew that the demurrer is a *bona fide* demurrer, and the party demurring is not restricted upon the argument to the grounds so stated, the object of the statement being rather to give colour to the demurrer (*Day's C. L. P. Acts*, 118), and that the want or insufficiency of the marginal statement is no ground for objecting to the demurrer being argued, but only affords ground for setting it aside (*Lacey* v. *Umbers*, 3 Dowl. 732; see *Papineau* v. *King*, 2 Dowl. N. S. 228; *Tucker* v. *Barnesley*, 16 M. & W. 56; *Hall* v. *Conder*, 2 C. B., N. S. 22). One or two of the strongest points were usually stated (*Chit., Jr., Pr.* 27). The point is thus stated in the margin of the demurrer book, "A matter of law intended to be argued is ————" (*Bull. & L.* 822).

See, as to stating the points in the demurrer book, *infra*, note (*e*).

(*d*) Where a plea to one count of a declaration is demurred to, the defendant can only rely on objections to that count, and the Court cannot notice defects in the other counts (*Crowley* v. *Wilson*, 1 All. 704). Even before the abolition of special demurrers, the objection must have been to the substance and not form of the previous pleading (*Mechanics* [illegible] v. *Whitney*, 3 Kerr, 312). It was not necessary, under the English practice to deliver it to the opposite party (*Chit. Forms*, 10 *ed.*, 495), but it had to accompany the demurrer books (*id.*; *Parker* v. *Riley*, 3 M. & W. 230).

(*e*) See R. G., E. T. 2 Jac. II.; M. T. 38 Geo. III.

The points delivered to the judges with the demurrer books were, by the English practice, altogether distinct from the marginal statement of the grounds of demurrer (*Bull & L.* 822; *supra*, *n.* (*c*).

As regards the form of the points, they should be specifically notified, or the party will not be allowed to argue them (*Scrivener's Co.* v. *Brooking*, 6 Jur. 836, *n.*; *Peake* v. *Screech*, 9 Jur. 177; *Arbouin* v. *Anderson*, 1 Q. B. 498; *Parker* v. *Riley*, 3 M. & W. 230; *Grottick* v. *Phillips*, 9 Bing. 723; *Brogden* v. *Marryott*, 2 B. N. C. 479, 2 Scott, 708; *Darling* v. *Gurney*, 2 Dowl. 101; and see *Williams* v. *St. Andrews S. M. Co.*, 1 All. 580). But the judges are not so very strict in this respect (*Frend* v. *Butterfield*, 11 A. & E. 841; *Scott* v. *Chappelow*, 4 M. & G. 336), and it would seem that the Court would adjudicate, without argument, upon a substantial point which suggests itself to the judges, though such point is not stated (see *Arbouin* v. *Anderson*, *supra*; *Devaux* v. *Anstice*, C. P., 3d Dec. 1840, in which case the Court considered they could not abstain from noticing a ground of general demurrer, even by consent). The Court of Queen's Bench, in one instance postponed a case, in order that an objection might be stated in the margin (*Colehy* v. *Graves*, cited 3 M. & W. 235; and see *Brooks* v. *Humphreys*, 17 L. J., C. P. 34)—*Chit. Forms*, 495. Though the party cannot claim to be heard, the Court may, in their discretion, give effect to apparent faults (*Shaw* v. *Shaw*, 8 U. C. L. J. 122).

(*f*) Special demurrers were abolished by C. S., c. 37, ss. 92-3 (36 Vic. c. 31, ss. 95-6; see 14 Vic. c. 20, s. 1; Stat. 15-16 Vic. c. 76, ss. 50-1), but objections, which would have been grounds of such demurrer only, may be taken on application to the Court or a judge. For instances of such objections, see *Coburn* v. *Taylor*, 2 Kerr, 120; *St. John Mechanics W. F. Co.* v. *Kirby*, *id.* 646; *Bacon* v. *Johns*, 1 All. 257; *Wilson* v. *Street*, 2 *id.* 629; *Desbrisay* v. *McLeod*, 1 Han. 122; *Gibson* v. *North B. & M. I. Co.* 3 Pugs. 83; *Clarke* v. *Harding*, 1 P. & B. 495; *Driscoll* v. *Barker*, 2 P. & B. 407: duplicity, *Boyd* v. *McLaughlin*, 1 Kerr, 210; *Watson* v. *Roberts*, 1 All. 108; *Collins* v. *McDonnell*, *id.* 250; *Ketchum* v. *Protection Ins. Co.*, *id.* 136; *Gilman* v. *Phelan*, 2 P. & B. 340.

A general demurrer is, as before the Act, admissable only when the pleading of the opposite party is bad in *substance*. It lies for a departure in pleading (*St. John Mechanics W. F. Co.* v. *Whitney*, 3 Kerr, 113; *James* v. *Roach*, 6 All. 28; *Domville* v. *Kevan*, 2 Han. 33; *Allen* v. *Bank of N. B.*, 1 P. & B. 446; *Bell* v. *Moffat*, 3 *id.*, 261; *Calhoun* v. *Mutual L. Ins. Co.*, *id.* 13; *Gilbert* v. *Raymond*, 3 P. & B. 315; *Hanington* v. *Girouard*, 3 Pugs. 156). A misjoinder of counts in assumpsit and detinue was considered a ground of general demurrer (*Allen* v. *Bank of N. B.*, *supra*). So the omission to limit a plea to that part of the cause of action to which alone it is an answer (*Willett* v. *Lockhart*, 3 P. & B. 637; *Grattan* v. *Givan*, 1 P. & B. 711; *Ash* v. *Pouppeville*, L. R. 3 Q. B. 86). A plea of lien in an action of trover (*Nevius* v. *Schofield*, 2 P. & B. 435), and a plea of payment, substantially varying from the form given by the Act (*Craig* v. *Glasier*, 1 *id.* 512) have been held bad on demurrer. See *Bank of N. S.* v. *Estabrooks*, 3 Pugs. 71; and *Dow* v. *Black*, *id.* 432, where counts on a promissory note and a judgment of the Privy Council were held demurrable.

See, as to striking out embarrassing or sham pleadings, C. S., c. 37, s. 88 (36 Vic. c. 31, s. 91; Stat. 15-16 Vic. c. 76, s. 52); *Milner* v. *McKenzie*, 2 P. & B. 383;

Gabel v. *Harding*, 2 Kerr, 71; *Wilson* v. *Atkinson*, 3 Kerr, 474; *Gilbert* v. *Graham*, 1 Pugs. 202; *Vose* v. *Duff*, 3 P. & B. 59; *Barry* v. *Hogan*, 2 *id.* 465; *Gordon* v. *Mayor of St. John*, 3 Pugs. 226.

If the objection be, that the pleading is open to general demurrer, the case is not within the 88th sec. (*R.* v. *Sadlers Co.*, 31 L. J., Q. B., p. 454).

Trials by the Record.—Paper Book.

4. It is further ordered, That in any case of trial by the record, it shall be sufficient for the party to make up and deliver to the Chief Justice one paper book, instead of delivering books to all the judges, unless the Court should otherwise order in any particular case (*g*)

(*g*) See R. Trin. 1846, *post*, establishing the "Record Trial Docket."

Agents.—Students.

5. It is further ordered, That henceforth no attorney of this Court do employ any student in the office of a barrister of this Court, as his agent in any suit or matter pending in this Court, or in the transaction of any business before a judge, or in the office either of the clerk of the Crown or the clerk of the pleas; and that no barrister of this Court do suffer any one of his students to act as the agent of any other attorney. Provided, that this rule shall not extend to prevent the employment by a barrister, who may himself be the agent of any attorney, of any student in his office in the professional business of such attorney (*h*).

(*h*) See *Estey* v. *Newcomb*, Bert. 343.

Practice at Chambers.—Students.

6. The judges will in future expect, that in the assessment of damages in vacation, as well as in other matters brought before them out of Court (*i*), where the parties do not appear in person, they be attended by a barrister or attorney of the Court; or where this cannot conveniently be done, that the clerk or student employed to attend (*j*) on behalf of any attorney, be of competent experience, skill and knowledge of the business entrusted to him.

(*i*) The common law appears to vest in a single judge the same equitable jurisdiction over the proceedings in a cause which it vests in the Court of which he is a constituent member; his act therein is potentially the act of the Court (*Lush*, 799).

He may extend the time for pleading in abatement (*Ross* v. *Hammond*, 3 Kerr, 631), and grant a rule *nisi* for a *certiorari*, returnable in term (*Ex parte McNeil*, 3 All. 493).

Where a statute in general terms, and without any special limitation, either express

or to be inferred from its terms (see *Ex parte Irvin*, 2 All. 516; *Shaw* v. *Roberts*, 2 Dowl. 25; *Jones* v. *Fitzaddams*, *id.* 111; *Lander* v. *Gordon*, 7 M. & W. 218; *Ross* v. *Gandell*, 7 C. B. 766; *Clarke* v. *East India Co.*, 6 D. & L. 278), gives any power to the Court, that power may be exercised by a judge as a delegate of the Court (*Smeeton* v. *Collier*, 1 Exch. 457; *Lawrence* v. *Hogben*, 35 L. J. Ex. 55).

On the other hand, if it speaks only of a judge, the jurisdiction cannot be exercised by the Court (see *Morse* v. *Appleby*, 8 Dowl. 203; *Harvey* v. *O'Meara*, 7 *id.* 735; *Burnett* v. *Crave*, 1 Dowl. N. S. 774; *Wearing* v. *Smith*, 9 Q. B. 1024; 25 L. J., Q. B. 1; *Sturks* v. *Malcolm*, 3 Kerr, 581—certificate for costs, under 4 Wm. IV. c. 41, s. 8; *Ex parte Chase*, 6 All. 398—application, under 19 Vic. c. 42; C. S., c. 41, for an order in lieu of a *habeas corpus*; *Muirhead* v. *Arbo*, 3 Pugs. 283—to restrain action on the bond, under the attachment Act, now repealed, and see *Smith* v. *Burk*, 3 Pugs. 599; *Kay* v. *Hanington*, 1 Pugs. 331—motion for an attachment, under 32 Vic. c. 32, (C. S., c. 5). See, however, *Wilson* v. *Street*, 2 All. 629; *Thompson* v. *Keith*, 6 *id.* 133, where the Court set aside notices of defence, under 14 Vic. c. 20. And where the power is vested in him solely, jurisdiction, even by way of appeal from his decision, is excluded (*Lenck* v. *Pargiter*, Doug. 68; *Briggs* v. *Sharp*, 6 Bing. 517; *Kilkenny R. C. Co.* v. *Fielding*, 6 Exch. 82 *n.*; *Sturks* v. *Malcolm*, *supra*; *Shortridge* v. *Young*, 12 M. & W. 5; *Domville* v. *Kevan*, 2 Han. 175; see *Wearing* v. *Smith*, *supra*), though in such cases the Court will frequently, if the judge desire it, hear the argument and give their opinion for his guidance (*Lush*, 800; *Smith* v. *Bird*, 3 Dowl. 641).

Where the matter is of trifling importance, and both the Court and a judge have jurisdiction, the application should be made to the latter (see *Bowen* v. *Evans*, 27 L. J. Ex. 38, and *Thompson* v. *Keith*, *supra*); as a motion to change venue (*Fawcett* v. *Allen*, 2 Pugs. 349), or for security for costs (*Vance* v. *Campbell*, 1 Kerr, 163), and if vexatiously made to the former, it may be discharged with costs (*Brunswick* v. *Sloman*, 5 C. B. 218).*

See as to summonses and orders, *ante*, p. 77.

(*j*) See r. 5, *supra*.

MICHAELMAS TERM, 1840—4 VIC.

Replevin.—Bonds, Posteas and Judgments.

WHEREAS, the justices of the Supreme Court, or any three of them, are authorised and required by the Act of Assembly, 3 Vic. c. 63, intituled, "An Act further to regulate proceedings in replevin (*a*) by allowing damages in certain cases to the defendant," to frame and prescribe suitable and proper forms for the replevin bonds (*b*) hereafter to be taken, and for the entering of any verdict or judgment pursuant to the said Act, such forms,

* "Authority to a justice of any court to do an act shall empower any other justice of the same court to act in his stead, when necessary"—1 R. S., c. 161, s. 2 (C. S., c. 118, s. 1; *Jones* v. *Fletcher*, 4 All. 550).

from the time of the said Act taking effect, to be observed and complied with in the same manner as if the same were in the Act specified and contained, and such forms to be applicable to the Inferior Court of Common Pleas as well as the Supreme Court. Provided, that nothing in the said Act contained, shall extend or be construed to extend, to affect any proceedings in any action of replevin commenced before the said Act goes into operation:

It is ordered, That upon and after the first day of January, 1841, being the time appointed for the said Act to commence and take effect, the following forms, framed pursuant to the said Act, shall be used, with such alterations as the description of the court, the officer to whom the writ is directed, the number and character of the parties, or the circumstances of the case may render necessary; but that any variance, not being matter of substance (*c*), shall not affect the validity of the bonds or entries.

No. 1.—Replevin Bond (*d*).

KNOW ALL MEN BY THESE PRESENTS, That we (*name and additions of plaintiff* (*e*) *and his sureties* (*f*) are jointly and severally held and firmly bound unto , esquire, sheriff of the county of (*or city and county, as the case may be*), in the sum of (*double the value of the goods to be replevied* (*g*), of lawful money of New Brunswick, to be paid to the said , his certain attorney, executors, administrators, or assigns, for which payment, to be well and truly made, we bind ourselves and each of us, our and each and every of our heirs, executors and administrators, firmly by these presents, sealed with our seals. Dated the day of , in the year of the reign of our Sovereign Lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c., and in the year of our Lord one thousand eight hundred and .

The condition (*h*) of this obligation is such, that if the above bounden (*plaintiff*) do appear before our said Lady the Queen, at Fredericton, on (*the return day of the writ of replevin*) and do then and there prosecute his suit with effect (*i*) and without delay (*j*) against (*the defendant*) (*k*) for taking and unjustly detaining his goods and chattels, to wit: (*here specify the goods to be replevied* (*l*): and do make a return of the said goods and chattels, if a return of the same shall be adjudged (*m*), and do pay all such damages (*n*) as may be awarded to the said (*defendant*), pursuant to the Act of Assembly, made and passed in the third year of Her Majesty's reign, intituled "An Act further to regulate proceedings in replevin, by allowing damages in certain cases to the defendant;" then this obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered in the presence of (*o*) }

If the writ be issued out of any Inferior Court of Common Pleas (*p*), *the condition of the bond will be as follows:*

"The condition of this obligation is such, that if the above bounden (*the plaintiff*) do appear before the justices of the Inferior Court of Common Pleas for the said county of at on (*as specified in the writ, or* before the Recorder of the said city of Saint John at the next Inferior Court of Common Pleas, to be holden for the said city and county, at the said city, on, &c.), then (*conclude as in the foregoing form*).

(*a*) See C. S., c. 37, s. 206, cited *infra*.

(*b*) The first Provincial Act (50 Geo. III. c. 21, s. 10), requiring a bond to be given for the prosecution of the suit and return of the goods, extended, like the English Stat. 11 Geo. II. c. 19, s. 23, from which it was taken, only to replevin of goods distrained for rent, but the subsequent enactments, 4 Wm. IV. c. 38, s. 2; 13 Vic. c. 53, s. 14; 1 R. S., c. 126, s. 11; and C. S., c. 37, s. 202, direct that a bond shall be taken in all cases of replevin, and forms of such bonds are given in the three latter Acts. The additional liabilities imposed on the obligors by the subsequent Acts are noticed, *infra*.

The provision in the English Stat. authorizing the Court to relieve the sureties was omitted in the last three revisions of the Acts, and the Court, consequently, has no power, unless under special circumstances, to stay proceedings (*Betts* v. *McGowan*, 1 Pugs. 155).

The assignment of the bond may be made to the defendant at the request of the attorney, and the Act requiring a subscribing witness to such assignment has been repealed and not re-enacted (*Taylor* v. *Burpee*, 5 All. 191; 4 All. 459).

(*c*) See *Pollok* v. *Gardner*, 2 Kerr, 655; *Taylor* v. *Burpee*, 5 All. 191; *Wheeler* v. *Stewart*, 3 Pugs. p. 412; *R.* v. *Millar*, 5 All. 87; *Atkinson* v. *Desmond*, *id.* 564; C. S., c. 118, s. 1, sub-s. 16.

(*d*) See the form given by C. S., c. 37, Sched. "D", No. 2, and the forms given in the Acts, for which it was substituted, cited note (*b*) *supra*.

(*e*) A bond, executed by one of several plaintiffs, may be assigned (*Wheeler* v. *Stewart*, 3 Pugs. 398). So may a bond executed by a married woman, who was the sole plaintiff in the replevin, and two sureties, and in an action against the sureties on the bond, it is no defence, under *non est factum*, that the declaration states it to be the bond of the sureties only (*Vernon* v. *Thompson*, 4 P. & B. 116).

(*f*) The Act requires two sureties, and the sheriff, or defendant, may reject a bond with one only, but the objection cannot be taken by the obligor (*Taylor* v. *Burpee*, 5 All. 191).

(*g*) It was considered by a majority of the Court, in *Wheeler* v. *Stewart* (3 Pugs. 398), that the bond should be taken before the delivery of the goods to the plaintiff, but after they had been seized by the sheriff, so that he may ascertain their value, and insert the name of the person in whose possession they were found, as defendant in the condition. The bond should not be taken for more than double the value of the goods (*Miers* v. *Lockwood*, 9 Dowl. 975).

(*h*) "In all replevin bonds there are several independent conditions—one to prosecute, another to return the goods replevied, a third, *to indemnify the sheriff*, and a

breach may be assigned upon any of these distinct parts of condition" (*per Lee, C. J.*, in *Morgan* v. *Griffith*, 7 Mod. 380). The conditions set out in the statutory form, and those only, are to be inserted (*Pollok* v. *Gardner*, 2 Kerr, 655). And a bond, omitting the stipulation for payment of damages and containing a clause for indemnifying the sheriff, is invalid (*id.*)

(*i*) This means, "to a not unsuccessful termination" (*per Park, B., Jackson* v. *Hanson*, 8 M. & W. 487; *Duke of Ormond* v. *Bierly*, Carth. 519; *Perreau* v. *Bevan*, 5 B. & C. 284; *Tunnicliffe* v. *Wilmot*, 2 Car. & K. 626; *Timmons* v. *Ogle*, 6 E. & B. 571; and see *Edmonds* v. *Challis*, 6 D. & L. 595; *Morris* v. *Matthews*, 2 Q. B. 293; *Turner* v. *Turner*, 2 B. & B. 107; *Morgan* v. *Griffith*, *supra*).

(*j*) The condition to prosecute without delay is broken by not proceeding with due diligence, though the suit is not thereby determined (*Harrison* v. *Wardle*, 5 B. & Ad. 146), as where the cause is struck off the docket, by reason of the plaintiff not appearing when the cause was called on for trial (*Steen* v. *Hanson*, 4 All. 459; and see *Betts* v. *McGowan*, 1 Pugs. 155); and it is no defence that the delay was justified by the practice of the Court, but the jury may find delay notwithstanding (*Gent* v. *Cutts*, 11 Q. B. 288; see *Brackenbury* v. *Pell*, 12 East. 585; *Axford* v. *Perrett*, 4 Bing. 586). The breach of the bond is necessarily a damage (*Steen* v. *Hanson*; *Betts* v. *McGowan*, *supra*).

(*k*) That is, the person out of whose possession the goods were replevied, who is the defendant in the action, notwithstanding he be not named in the writ (*Wheeler* v. *Stewart*, 3 Pugs. 398), and a bond to prosecute, &c., the defendant named in the writ, "or some other person," is invalid (*id.*), and see 1 P. & B. 13.

(*l*) Failure to prove title to part of the goods replevied under the writ *de pro. pro.* forfeits the bond (*Bery* v. *Mitchell*, 2 All. 380).

(*m*) The defendant, to avail himself of this condition, need not issue a writ *de retorno habendo* (*Perreau* v. *Bevan*, 5 B. & C. 285), nor does he waive it by assessing damages and signing judgment under 17 Car. II. c. 7 (*id.*; *Turner* v. *Turner*, 2 B. & B. 107).

Instead of awarding a return, the judgment may be for the value of the goods for which the obligors are liable under the next clause of the condition.

(*n*) These damages comprise (1), those awarded the defendant under C. S., c. 37, s. 206 (see *post*, p. 103–4, including, it would seem, rent and costs of distress, under the statutory "*non cepit*" (R. Hil. 1875, *Forms Nos.* 9, 10), and (2) all actual taxable (*Steen* v. *Hanson*, 4 All. 589) costs and expenses incurred by a defendant (*Smith* v. *Miller*, 6 All. 386; *Vanwart* v. *Shepherd*, 2 P. & B. 225; *supra*, *n* (*k*), for whom a verdict as to the whole or part (*Berry* v. *Mitchell*, 2 All. 380), of the goods replevied is found under the writ *de pro. pro.*, in prosecuting his claim, and such damages (see *Wheeler* v. *Stewart*, 3 Pugs. 398) as he may have sustained by reason of the writ of replevin and proceedings thereon. The remedy on the bond for the latter damages and costs was first given (see *Pollok* v. *Gardner*, 2 Kerr, 655) by 13 Vic. c. 53, s. 16, repealed and re-enacted, with some slight alterations, by 1 R. S., c. 126, of which C. S., c. 37, s. 204, is a literal copy. In the action for these damages, the inquisition is conclusive as to the property in the goods (*Wheeler* v. *Stewart*, *supra*).

(*o*) The bond is assignable, though there be no subscribing witness (*Taylor* v. *Burpee*, 5 All. 191).

(*p*) Abolished by 30 Vic. c. 10, s. 37. See 35 Vic. c. 3; 36 Vic. c. 23; C. S., c. 51, s. 73, as to issuing execution on existing judgments.

No. 2.—Verdict on Postea, where damages are awarded to the Defendant (*q*).

(*Commence in the usual form.*) Say upon their oaths, that (*stating the negative or affirmative of the pleading which concludes to the country, according as it makes for the defendant*) in manner and form as the said hath 'complained against him,' *or* 'in pleading alleged,' and they assess the damages of the said defendant, by reason of the premises, to , pursuant to the Act of Assembly in such case made and provided, besides his costs and charges, &c. (*as in the usual form*).

(*q*) See substituted form, C. S., c. 37, Sched. "D," No. 9 (13 Vic. c. 53, Sched. "N"; 1 R. S., c. 126, Sched. "M"), and the form of entry where rent and costs of distress is awarded to a landlord, R. Hil. 1875, Form No. 9, *post*. The provisions of 3 Vic. c. 63, ss 1-2, allowing damages to a defendant entitled to a return, were continued in 13 Vic. c. 53, s. 20; 1 R. S., c. 126, s. 16; C. S., c. 37, s. 206. The jury are not *bound* to give damages on finding for the defendant on a plea of property (*Fearon* v. *Murray*, 5 All., p. 12, *per Parker, J.*).

No. 3.—Entry of Judgment on the above (*r*).

Therefore it is considered, that the said plaintiff take nothing by his suit, but that the said defendant do go thereof without day, &c., and that he have a return of the said goods and chattels, to hold to him irreplevisable for ever. And it is further considered, that the said defendant do recover against the said plaintiff his said damages, costs and charges, by the jurors aforesaid, in form aforesaid assessed, and also for his said costs and charges by the Court of our said Lady the Queen, now here (*or in the Inferior Court* "by the justices here") adjudged of increase to the defendant, according to the form of the Statute in such case made and provided; which said damages, costs and charges in the whole amount to , and that the said defendant have execution thereof.

(*r*) See substituted form, C. S., c. 37, Sched. "D," No. 10 (13 Vic. c. 53, Sched. "O;" 1 R. S., c. 126, Sched. "N"), and note to form No. 2, *supra*.

No. 4.—Entry of Verdict on Postea, where the value of the goods is assessed by the Jury (*s*).

(*Commence as in form No. 2.*) In manner and form as the said hath complained against him (*or* in pleading alleged), and at the prayer of the said defendant, they further say upon their oaths aforesaid, that the said goods and chattels, at the time of the replevying thereof, were worth , according to the true value thereof, which they award to the said defendant in damages, according to the form of the Act of Assembly in such case made and provided; and they assess the defendant's other damages by reason of the premises to , pursuant to the said Act, besides his costs and charges, &c., (*as in the usual form*).

(*s*) See substituted form, C. S., c. 37, Sched. "D," No. 11 (13 Vic. c. 53, Sched. "P"; 1 R. S., c. 126, Sched. "O").*

No. 5.—Entry of Judgment on the above (*t*).

Therefore it is considered, that the said plaintiff take nothing by his suit, but that the said defendant do go thereof without day, &c. And it is further considered, that the said defendant do recover against the said plaintiff the said sum of , being the value of the goods and chattels aforesaid by the jury in form aforesaid assessed; and also for his said other damages, costs and charges, by the Court of our said Lady the Queen, now here (*or in the Inferior Court*, "by the justices here") adjudged of increase to the said defendant, according to the form of the Statute in such case made and provided; which said damages, costs and charges, in the whole amount to , and that the said defendant have execution thereof.

(*t*) See substituted form, C. S., c. 37, Sched. "D," No. 12 (13 Vic. c. 53, Sched. "Q"; 1 R. S., c. 126, Sched. "P"), and note to form No. 2, *supra*.

Admission of Barristers.

2. It is ordered, That any attorney who may, before his admission, have been an attorney of some other part of Her Majesty's dominions (*u*), and who shall have been a student in this Province for one year pursuant to the ninth rule of Michaelmas term, 1st Vic., may be called to the Bar after the expiration of one year from the time of his admission as an attorney of this Court.

(*u*) See R. Hil. 1823, rr. 2-3.

Admission of Attorneys.

3. It is ordered, That the admission and enrolment of attorneys may take place on the Thursday in the first week of the term, if there is no sufficient objection to the applicant (*v*)

(*v*) See the former rule, Hil. 1823, r. 5, *ante*, p. 26.

HILARY TERM, 1841—4 VIC.

Ex-Sheriffs.—Rule for Body.

ORDERED (*a*), That from and after the last day of this term,

* The defendant is only entitled to damages for the value of the goods replevied and delivered by the sheriff, and it should be left to the jury to determine what goods were so delivered (*Steeves* v. *Wilson*, 1 Pugs. 185; see S. C., 2 Pugs. 492). The plea of property in defendant is construed distributively, and the defendant is entitled to a verdict for such of the chattels as he proves property in (*Hanington* v. *Cormier*, 3 Pugs. 212). See the form, *Read* v. *Botsford*, 4 All. 476, where the defendant is successful as to part of the goods only. In such a case, if the plaintiff neglects to enter up judgment within a certain time, the defendant will be entitled to the *postea* (*id.*). The defendant is, in strictness, entitled to recover the whole value of a chattel, though he is a tenant in common thereof with the plaintiff (*Baxter* v. *Johnston*, 5 All. 350).

when any sheriff, before his going out of office, shall arrest any defendant, and a *cepi corpus* shall be returned, he shall and may, within the time allowed by law, be called upon to bring in the body by a rule (*b*) for that purpose, notwithstanding he may be out of office, before any such rule shall be granted (*c*).

(*a*) A copy of R. G., K. B., T. T. 31 Geo. III.; see Practice Rules 1853, r. 134. Until the above rule, the mode of proceeding against a sheriff in such case was by *distringas*, and not by attachment (*Henry* v. *Murphy*, 1 Kerr, 207).

(*b*) See C. S., c. 37, s. 196; note to R. Mich. 1844, r. 2, *post*.

(*c*) See as to ruling ex-sheriffs to return writs, R. Mich. 1844, r. 2, *post*.

TRINITY TERM, 1842—5 VIC.

Demand of Plea.

1. ORDERED, That where the attorneys for the respective parties reside in different counties, the defendant's attorney shall be allowed seven days, after demand of plea, wherein to file the plea, and serve the opposite attorney with a copy thereof, unless the demand be accompanied by a direction to deliver a copy of the plea to some person resident in the same place in which the defendant's attorney resides; in which case such copy of plea must be delivered within twenty-four hours, according to the present practice, and the plea forthwith transmitted to the clerk for filing (*a*).

When attys reside in same County but ten miles apart see R. H. T. 1884

(*a*) The demand cannot be made until after the time for pleading has expired (R. East. 1786, r. 10, *ante*, p. 5; Hil. 1875, *post*; *Passmore* v. *Turner*, A. C. MS. 103). The plaintiff cannot sign judgment after the plea is filed and a copy delivered, though it is not filed or delivered within the twenty-four hours (*Oulton* v. *Palmer*, 2 All. 364). It is not necessary that the plea should be *filed* within the twenty-four hours, therefore where the copy was delivered within that time, and the plea sent to Fredericton on the same day, and filed in the clerk's office on the following day, judgment signed on the afternoon of the day on which the plea was delivered was set aside as irregular (*McCullough* v. *Collins*, 1 All. 499).

See R. Hil. 1843, *post*, as to filing and delivery of pleas.

The demand is in the following form, entitled in the Court and cause:

"The plaintiff demands a plea in this cause, by

Yours, &c.,

D. A., *defendant's attorney*. P. A., *plaintiff's attorney*.

——— 18 ."

Admission of Attorneys.—Graduates' Certificates.

2. It is ordered, That students applying for examination, after

four (*b*) years' study, on the ground of being graduates of some college, do, in addition to the certificates (*c*) now required, produce certificates from the president, vice-president, or some resident professor of the college, stating the particular period during which their collegiate studies have been pursued.

(*b*) Now three years—see R. Hil. 1823, r. 1, note, *ante*, p. 25.

(*c*) See as to delivery of these certificates, R. Mich. 1878, *post*.

HILARY TERM, 1843—6 VIC.

Delivery of Pleas.

ORDERED, That, in future, copies of all pleas shall be delivered (*a*) to the plaintiff's attorney within the time allowed for pleading, otherwise the plaintiff shall be at liberty (demand of plea being duly made) (*b*) to sign interlocutory judgment; and that it shall not be necessary to search for a plea before such signing, after the expiration of the rule (*c*) to plead.

(*a*) It was held before this rule, that where the defendant had filed the plea, but neglected to deliver a copy, judgment could not be signed (*Lockwood* v. *Bronon*, 2 Kerr, 82). Delivery of pleadings was required in England by R. G., H. T., 4 Wm. IV. r. 1. The plea should be filed as well as served, and 36 Vic. c. 31 (C. S., c. 37) does not alter the practice in this respect (*Dever* v. *Wiley*, 1 P. & B. 507). The failure to file when it has been served is, however, merely an irregularity (*id.*).

Placing a paper under the door of the clerk's office during office hours, or handing it to him in the street, is not a sufficient filing. See *Grey* v. *Stacey*, 10 U. C. L. J. 245; *Fralich* v. *Huffman*, 1 Cham. R. 80. Where the defendant's attorney is present at the opening of the office in the morning, to file a joinder in demurrer, and the plaintiff's attorney is also present to sign judgment, the former is entitled to precedence (*id.*)—*Har. C. L. P. Acts*, 5.

The copy of the plea delivered need not be signed in the actual handwriting of counsel (*Oulton* v. *Palmer*, 2 All. 364).

(*b*) See R. Trin. 1842, r. 1, *supra*, 105.

(*c*) Now notice—see C. S., c. 37, s. 58, *ante*, p. 6.

TRINITY TERM, 1843—6 VIC.

Examination and Admission of Students.

1. WHEREAS, it is expedient that there should be an examination of persons who may hereafter desire to enter upon the study of the law, in order to their admission as attorneys of this Court

It is ordered, That such and so many barristers as may for that purpose from time to time be appointed by rule of Court, or any two of them shall be competent to conduct the examination of any person who may have made application to be admitted a student; and in order to such examination, application shall be made by petition to this Court by such person, stating his age, place of birth, and present residence; the name and place of residence of his father or guardian, and the several branches of education in which he may have been instructed; and that proper certificates as to character and habits shall accompany every such petition; and this Court will thereupon make such order for the examination or otherwise, as may appear necessary and proper (*a*).

(*a*) See R. Hil. 1867, By-law 19–21, *post*.

2. That no entry shall be made in the clerk's book (*b*) of any student, nor shall he be deemed to have commenced his study of the law with any barrister, until he produce the certificate of the examiners before whom his examination may be had, testifying his fitness and capacity.

(*b*) See R. Hil. 1823, r. 7, *ante*, p. 26.

3. That in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty to apply, by petition, to the judges, who will make such order thereupon as the case may in their opinion require.

4. That every student who may be transferred from one barrister to another, during the progress of his studies, shall forthwith deliver to the clerk a memorandum of such transfer, accompanied by a certificate of the barrister whose office he may be desirous of leaving; or, in case of his death, absence, or refusal to grant such certificate, the certificate of the barrister to whose office he is transferred, of the cause and reason of such transfer.

5. That the aforegoing rules shall not extend to persons who may already have been admitted as attorneys in any other part of Her Majesty's dominions; but that such persons, before being registered as students under the ninth rule of Michaelmas term, 1 Vic. (*c*), shall apply, by petition, to the Court, accompanied by the requisite certificates, and the Court will make order thereupon.

(*c*) *Ante*, p. 84.

6. That if any person, who may, after his commencing to study the law, have discontinued the same, shall be desirous of resuming his studies, he shall apply, by petition, to the Court for that purpose, who will make such order thereupon in regard to the time of his previous study, as may appear meet; otherwise the time of such former study shall not be allowed to such student (*d*).

(*d*) See the form of petition for admission as an attorney, *ante*, p. 84.

MICHAELMAS TERM, 1843—7 VIC.

Pleas in Abatement.

ORDERED, That no plea in abatement shall be filed after the expiration of the rule to plead (*a*).

(*a*) The time may, however, be extended by a judge (*Ross* v. *Hammond*, 3 Kerr, 631, and see *Milner* v. *Milnes*, 3 T. R. 631; *Sowter* v. *Dunston*, 6 L. J., K. B. 114; *Johnson* v. *Popplewell*, 2 C. & J. 544, *per Bayley, B.*). If not pleaded within the proper time the plea is a nullity, and the plaintiff may sign judgment (*Brandon* v. *Payne*, 1 T. R. 689; *Martendale* v. *Harding*, 1 Chit. 716; *Nolleken* v. *Severn*, 2 C. & J. 333), and he does not, by keeping the plea, recognize its validity (*Lush*, 407). A notice to plead shall be sufficient, without any rule—C. S., c. 37, s. 58, *ante*, p. 6.

For the practice relating to pleas in abatement, see 2 *Chit. Arch.*, 12 *ed.*, 909. They must be verified by affidavit—see 4 Ann. c. 16, s. 11.

Where a defendant pleaded in bar and also in abatement, he was not allowed to avail himself on the trial of the matter under the latter plea (*Mercer* v. *Cosman*, 2 Han. 240). A misnomer cannot now be pleaded in abatement (C. S., c. 37, s. 95; *ante*, p. 55, nor can the non-joinder of defendants, where one of them is out of the jurisdiction (see C. S., c. 37, s. 102—7 Wm. IV. c. 14, s. 15; 3 Vic. c. 31, s. 105; Stat. 3-4 Wm. IV. c. 42, s. 8), and see as to adding defendants, *ante*, p. 57. See as to this plea for non-joinder, *Collins* v. *McDonnell*, 1 All. 250; *Kelly* v. *Balloch*, 2 Kerr, 699; *McDonald* v. *Cummings*, 2 Pugs. 282.

MICHAELMAS TERM, 1844—8 VIC.

Security for Costs.

1. ORDERED, That the rule of Trinity term, 30 Geo. III., be rescinded, and that in future, where security for costs is ordered, such security shall be given in the sum of forty pounds in all cases (*a*), except in summary; and that in summary cases, security shall be given in the sum of twenty pounds (*b*).

(*a*) See note to *Johnson* v. *Glazier*, A. C. MS. 142. Security for costs may be ordered whenever the plaintiff, or if several, where all the plaintiffs (*McConnell* v. *John-*

son, 1 East. 431; *Thomel* v. *Roelants*, 2 C. B. 290), permanently (*Henschen* v. *Garves*, 2 H. Bl. 383; *Foss* v. *Wagner*, 2 Dowl. 499; *Taylor* v. *Fraser*, *id.* 622; *Drummond* v. *Tellinghist*, 16 Q. B. 740; *Ford* v. *Boucher*, 1 Hodges, 58) reside anywhere out of the jurisdiction (*Baxter* v. *Morgan*, 6 Taunt. 379; *Chevalier* v. *Finnis*, 1 B. & B. 277; *Kilkenny Ry. Co.* v. *Feilden*, 6 Ex. 81; *Tumbisco* v. *Pacifico*, 7 Ex. 816).* "But a distinction is made between domiciled Englishmen on the one hand and other British subjects and foreigners, so called, on the other (*Chappell* v. *Watts*, 2 E. & E. 879). In the case of an Englishman, the absence that entitles a defendant to security for costs must be voluntary, as distinguished from absence in the service of the State (*Whittall* v. *Campbell*, 5 H. & W. 601)"—*Day's C. L. P. Acts*, 419, and see the cases there cited. And if the plaintiff is a foreigner, the fact that he has property to a large amount in this Province seems to afford no ground of exemption, but in the case of a native, the possession of property of a permanent nature, as freeholds, available to process, appears to be an answer to the application (*per Crompton, J.*, *Swinburne* v. *Cavler*, 32 L. J., Q. B. 16; *Limerick Ry. Co.* v. *Fraser*, 4 Bing. 394; *Edinburgh Ry. Co.* v. *Dawson*, 7 Dowl. 573). Security may be required from foreign companies (*Limerick Ry. Co.* v. *Fraser*, *supra*; *Kilkenny Ry. Co.* v. *Feilden*, 6 Ex. 81; *Quebec & H. N. S. Co.* v. *Williston*, M. T. 1834, Stev. Dig. 115).

Where the lessor of the plaintiff in ejectment resides abroad (*Denn* v. *Fulford*, 2 Burr. 1177), or is a pauper infant (*Doe* d. *Roberts* v. *Roberts*, 6 Dowl. 556; *ante*, 36; see *Tidd*, 9 *ed.*, 536), security may also be obtained, unless some responsible person be substituted for the nominal plaintiff. And where the *prochein amy* in any action by an infant is not a responsible person, he may be removed and another appointed in his stead (see 2 *Chit. Arch.*, 12 *ed.*, 1242; *Lees* v. *Smith*, 5 H. & N. 632). But the poverty of a plaintiff is by itself no ground for ordering security (*Gregory* v. *Elridge*, 2 C. & M. 336; *Ross* v. *Jacques*, 8 M. & W. 135), though it is otherwise if the action is carried on substantially (*Tenant* v. *Brown*, 5 B. & C. 208; *McCaffrey* v. *Brennan*, Ir. Com. L. R. 10 Ex. 139) by or for the benefit of another (*Goatley* v. *Emmott*, 15 C. B. 291).

The defendant may have this security, though he also resides abroad, and the plaintiff cannot require that it shall be mutual (*Baxter* v. *Morgan*, 6 Taunt. 379; *Ford* v. *Stock*, 1 Dowl. N. S. 763), but a defendant in replevin (*Selby* v. *Cruchley*, 1 B. & B. 505; see *Hiskett* v. *Biddle*, 3 Dowl. 634), and a party seeking to come in and defend as landlord in ejectment (*Doe* d. *Hudson* v. *Jameson*, 4 M. & R. 570; see *Butler* v. *Meredith*, 11 Exch. 85) have been required to give security.

The application should be made at the earliest opportunity after appearance or justification of bail (*Tidd.*, 9 *ed.*, 534: *De La Preuve* v. *Biron*, 4 T. R. 697; *Anon.* 2 Chit. R. 150; *Carr* v. *Shore*, 6 T. R. 496; and see note to *Johnson* v. *Glazier*, A. C. MS. 144), but not before the time for excepting to bail has expired, unless the defendant is in custody (3 *Chit. Gen. Pr.* 634). It should be made before any further proceedings on the part of the defendant, such as pleading or even obtaining time to plead, and if not so made, the affidavit must state that the defendant was not aware of the plaintiff's absence at the time of taking the step (*Walters* v. *Frythall*, 5 East. 338; *Duncan* v. *Stint*, 5 B. & A. 702; *Brown* v *Wright*, 1 Dowl. 95; *Doe* d.

* A foreigner, usually residing abroad, who is temporarily residing within the jurisdiction for the purpose of enforcing a claim by action, cannot be called upon to give security (*Redondo* v. *Chaytor*, L. R. 4 Q. B. D. 453).

Somers v. *Brood*, 1 Dowl. N. S. 857; *Muller* v. *Germon*, 3 Taunt. 272; *Montellano* v. *Garcias*, 1 Bing. 67), but a demand of particulars is not a step within this rule (*ante*, p. 71, note). If the plaintiff goes abroad after issue joined, the application must be made at the earliest opportunity after knowledge of his absence (*Gibbs* v. *Deveber*, Bert. 78; and see *Kimble* v. *Mills*, 8 Dowl. 836, where he went abroad after demurrer set down for argument). Security was ordered, without stay of proceedings, after issue joined and notice of trial given, though the defendant knew of the plaintiff's absence before declaration (*Vance* v. *Campbell*, 1 Kerr, 163; and see *Quebec & M. S. N. Co.* v. *Williston*, *supra*), but this was upon the ground that such applications to a judge were then of recent practice, and no term had intervened.

In order to have a stay of proceedings in the rule *nisi* or summons for security, a demand must be made on the plaintiff's attorney a reasonable time before the Court or a judge is applied to (*Baillie* v. *De Bernales*, 1 B. & A. 331; *Jones* v. *Jones*, 2 C. & J. 207), and unless such demand is made, the costs of the application (which would otherwise be costs in the cause (*Dax's Pr.* 132) will not be allowed the defendant, and he may have to pay the costs of opposing (*Fletcher* v. *Lew*, 3 A. & E. 551; *Bohrs* v. *Sessions*, 2 Dowl. 710; see *Holmes* v. *Pemberton*, 5 Jur. N. S. 727); the rule absolute will, however, stay the proceedings until the security is given (*Day's C. L. P. Acts*, 419; *Fountain* v. *Steele*, 5 Dowl. 331; see *Bass* v. *Clive*, 3 M. & Sel. 283, overruled by *Baillie* v. *De Barnales*, *supra*, but upheld in C. P., by *Adams* v. *Brown*, 9 Bing. 81). The demand is in the following form, entitled in the court and cause (*Chit. Forms*, 10 *ed.*, 829):

"*Sir*—I hereby, on behalf of the defendant in this action, require of the plaintiff to give the defendant security for the payment of the defendant's costs, otherwise I shall apply to the Court [*or* a judge] for a rule [*order*] to compel the plaintiff to do so.

Dated, &c. Yours, &c.,

To Mr. P. A., *plaintiff's attorney*. D. A., *defendant's attorney*."

The affidavit should state, either expressly or by implication, that the plaintiff is *permanently* abroad (*Frodsham* v. *Myers*, 4 Dowl. 280), though if the plaintiff's absence is positively alleged, it *prima facie* shews that it is not merely temporary (*Hanmer* v. *Mangles*, 1 D. & L. 394; 12 M. & W. 313).

According to the case of *Joynes* v. *Collinson*, 13 M. & W. 558 (see *Sandys* v. *Hohler*, 6 Dowl. 274, *accord*; *Cardwell* v. *Baynes*, 2 C. L. R. 777, *contra*), it must be sworn positively that the plaintiff is resident abroad, and an affidavit that the defendant "has been informed and verily believes," &c., is insufficient. The same particularity has lately been required in such applications in this Province. The reason given by *Parke*, *B.*, in *Joynes* v. *Collinson*, for requiring a positive statement of the plaintiff's absence is, that the defendant might, by Stat. 2 Wm. IV. c. 39, s. 17 (15–16 Vic. c. 76, s. 7) take out a summons to be informed of the plaintiff's residence, and therefore there was no difficulty in making a positive affidavit. Though it seems to have been in the power of the Court before the Statute to require the plaintiff's attorney to give the defendant information of the plaintiff's residence (see *Johnson* v. *Birley*, 5 B. & A. 540), yet such has not been the practice in this country, and, therefore, it would probably still be sufficient, in order to obtain security for costs, for the defendant to state his belief in the plaintiff's absence. But, in such case, the affidavit should, at least, shew from what source his information was derived, and on what his belief is founded (2 *Chit. Arch.* 1059). See the observation of *Alderson*, *B.*, in *Dowling* v. *Harman*, 6 M. & W. 132, as to the difficulty of swearing positively; (and see

Doe d. *George* v. *Roe*, 3 Dowl. 22, and *Roe* v. *Bradshaw*, L. R. 1 Ex. 106)—Note to *Johnson* v. *Glazier*, A. C. MS. 146. The affidavit should, it seems, shew in what stage the proceedings in the action are (see *Huntly* v. *Bulwer*, 6 Dowl. 633; *Luzaletti* v. *Powell*, 1 Marsh. 376; *Joynes* v. *Collinson*, *supra*), but this does not appear to be clear (see *Jones* v. *Jones*, 2 C. & J. 207; *Cole* v. *Beardy*, 5 Dowl. 161; *Chit. Arch.* 12 *ed.*, 1419; *Chit. Forms*, 838; *Day's C. L. P. Acts*, 419; note to *Johnson* v. *Glazier*; Lush, 793).

Where an application at chambers failed, on account of the insufficiency of the affidavit of plaintiff's residence abroad, a new application to the Court, on amended affidavits, was permitted (*Foster* v. *Ameraux*, 2 All. 541).

The form of affidavit by the defendant and his attorney, given in *Chit. Forms*, 10 *ed.*, 829, states:

And first, I, C. D., for myself, say—

1. The residence of the above named plaintiff is at , in the kingdom [*or* "dominion," *or* "state"] of , and he [usually resides and] now resides there (*perhaps it might suffice to speak to information and belief*).

And I, D. A., for myself, say—

2. An appearance was, on last [*or* "instant"], entered in this action for the said defendant.

3. The plaintiff has not yet declared therein. (*The affidavit should, it seems, shew in what stage the proceedings are*).

4. I did, on last [*or* "instant"], for and on the part and behalf of the said defendant, demand of P. A., gentleman, the attorney in this action for the above named plaintiff, security for costs in this action, but the said P. A. refused to give any such security.

The following form of bond, taken, with some slight alterations, from *Chit. Forms*, 520, is given in All. Rules, 48.

Know all men by these presents (*the common form of a joint and several bond to the defendant*)—

Whereas, a certain action hath been lately commenced, and is now depending, in Her Majesty's Supreme Court at Fredericton, wherein is plaintiff, and the above named . is defendant, and by reason of the plaintiff's residing out of the jurisdiction of the said Court, the said defendant has applied to (*or* obtained an order for) the said plaintiff to give security for the costs in the said cause, in case the said plaintiff shall be nonsuit, discontinue, or a verdict be given for the defendant. And whereas the said (*obligors*) have agreed to enter into the above written bond as security for the payment of such costs of the said defendant, with such condition as is hereinafter contained. Now, therefore, the condition of the above written bond, or obligation, is such, that if the above bounden (*obligors*), or either of them, their, or either of their heirs, executors, or administrators, shall and do well and truly pay, or cause to be paid, unto the said (*defendant*), or his executors, administrators, or assigns, such costs as the said (*plaintiff*) shall in due course of law be liable to pay, in case he shall discontinue, become nonsuit, or a verdict shall pass against him in the said action, such costs to be first taxed by the Master in the usual manner, then the above obligation to be void, otherwise to be and remain in full force and virtue.

On the Equity side of the Court the bond is to the clerk, and is in the sum of $500 (*Walsh* v. *McManus*, *Palmer*, *J.*, October 5th, 1880). See the form, 1 *Grant*, 438.

If the defendant will not accept the security offered, it may be approved of by the clerk. For this purpose get an appointment from the clerk of a time for approving of the security, and serve a copy on the defendant's attorney, with the names of the sureties, and, at the time appointed, attend the clerk with an affidavit, to prove the sufficiency of the security offered, and if it is approved of, he will make an endorsement to

that effect on the bond, which may then be delivered to the defendant's attorney (*All. Rules*, 48).

In bailable actions, if the plaintiff does not give the security and proceed in a reasonable time, bail will be discharged (*Hill* v. *Rind*, Bert. 281).

(*b*) The summary practice was abolished by 30 Vic. c. 10, *ante*, p. 47.

Side-bar Rules for Return of Writs.

2. It is ordered, That no side-bar rule shall be taken out for the return of any writ after six months from the day on which such writ is made returnable, and that after such six months, motion be made in open Court, or the order of a judge be obtained (*c*), before any such rule do issue (*d*).

(*c*) The affidavit on which the motion is made should state the nature of the writ (*Sands* v. *Bell*, M. T. 1846, *All. Rules*, 49, *n.*).

(*d*) Side bar rules for the return of writs, or to bring in the body, may be issued in vacation, and when so issued, are to be dated on the day when drawn up, and the period within which they may issue, without a judge's order, &c., is extended to six calendar months (C. S., c. 37, s. 196). See Stat. 2 Wm. IV., c. 39, s. 15; Practice Rules, 1853, r. 132; and for the previous practice, *Porter* v. *Burnes*, 1 All. 106.

The writ should be specified in the rule (*Kingston* v. *O'Shea*, 1 All. 678).

By the English practice, where the writ was returnable on a return day in term, as is still the case in this Province, with regard to executions (C. S., c. 37, s. 124), the rule could not have been taken out before the return day (*Tidd*, 9 *ed.*, 506, 1017; *R.* v. *Sheriff of Cornwall*, 1 T. R. 552; *R.* v. *Sheriff of London*, 2 East. 241).

In the case of a *capias ad resp.*, under Stat. 1-2 Vic. c. 110, which, like that under C. S., c. 37, s. 19, was returnable "immediately after the execution," the rule could have been taken out immediately after the arrest (see *Hodgson* v. *Mee*, 3 A. & E. 770). In *Lush's Pr.* (1840) 640, it is said that the rule may be taken out immediately after the writ is lodged, or, it would seem, may be served at the same time, in order to hasten the arrest; and at p. 507, the practice as to executions is stated in the same way. Strictly speaking, no writ can be returned before it is returnable, though the Court or a judge may order a sheriff to return what he has done upon it, and so, in some sense, return the writ (*Lewis* v. *Holmes*, 10 Q. B., p. 898).

R. East. 1785, r. 3, *ante*, p. 2, directs that sheriffs endorse their returns on processes by the day of their return, and deliver them to the attorneys who issued the same.

The sheriff can only be ruled while in office, or within six lunar months after he goes out (Stat. 20 Geo. II. c. 37, s. 2; *Levy* v. *Lawson*, 4 All. 501, where a rule to compel him to hand over a writ to the new sheriff was refused after that time).

A copy of the rule must be served personally on the sheriff, or, perhaps, his deputy, appointed under C. S., c. 25, s. 6 (*R.* v. *Coles*, Doug. 420; *Cave* v. *Price*, Barnes, 22-3), and the original rule at the same time shewn (*R.* v. *Smithers*, 3 T. R. 351).

The sheriff, on being ruled, must, unless he obtains an extension of time from a judge (*Jarvis* v. *Miller*, Bert. 191), make his return within the time limited by the rule, which in this Province is twenty days, instead of six, as in the Queen's Bench (R. M. T. 5-6 Geo. II); even though the writ be executed by his deputy, without his express authority (*Armstrong* v. *Brown*, 3 All. 399), but not when the plaintiff has ap-

pointed a bailiff of his own* (*Kingston* v. *O'Shea*, 1 All. 678; *Harding* v. *Holden*, 2 M. & G. 914). In the latter instance, it seems, the objection need not be taken, except for the purpose of obtaining costs, by motion to set aside the rule, but may be used in resisting an attachment (*Kingston* v. *O'Shea*).

When the rule expired in vacation, the sheriff could, in the Queen's Bench, before R. G., M. T. 3 Wm. IV. r. 13 (Practice Rule 1853, r. 133), avoid an attachment, by making the return any time before it could be moved for in the next term (see *R.* v. *Sheriff of Berks*, 5 East. 386). The rule by which this was remedied in England has not been adopted here.

TRINITY TERM, 1845—8 VIC.

Special Consent Rule.—Co-tenants.

ORDERED, That in every action of ejectment, when any person or persons shall apply (*a*) to be made defendant or defendants in such action, and to be allowed to enter into a special consent rule to admit lease and entry, but not ouster, unless an actual ouster of the lessor of the plaintiff by him or them should be proved (*b*), on the ground that the defence to the action will involve a question of joint tenancy, or tenancy in common (*c*); the affidavit (*d*) on which such application is founded shall state the person or persons with whom the party so applying claims to be joint tenant or tenant in common; and that he is advised and believes that he is joint tenant or tenant in common with such person or persons.

(*a*) To the Court or a judge (see *Doe* d. *Richards* v. *Day*, 3 All. 440). See, as to amending the consent rule by striking out the confession of ouster, *Doe* d. *Hill* v. *Todd*, (3 Kerr, 295).

(*b*) A demand of possession by one tenant in common, and a refusal by the other, and a statement by the latter that he claimed the whole property, is evidence of an ouster (*Doe* d. *Hellings* v. *Bird*, 11 East. 49; and see further, as to proof of ouster by a co-tenant (*Brown* v. *Moore*, 2 Pugs. 42; *Allison* v. *Smith*, 1 P. & B. 199; *Rose. Ev.*, 13 *ed.*, 980; *Har. C. L. P. Acts*, 537).

(*c*) See *Doe* d. *Gigner* v. *Roe*, 2 Taunt. 397; *Oates* v. *Brydon*, 3 Burr. 1895; *Doe* d. *White* v. *Cuff*, 1 Camp. 173; *Anon.*, 7 Mod. 39; *Doe* d. *Wills* v. *Roe*, 4 Dowl. 628; *Tidd*, 9 *ed.*, 1227. Unless the defendant enters into such a rule he will be precluded at the trial, by his admission, from setting up the joint tenancy, &c. (*Oates* v. *Brydon*, *supra*; *Culley* v. *Doe* d. *Taylerson*, 11 A. & E. 1015).

(*d*) See the form used prior to this rule, *Tidd's Forms*, 639, s. 71, and order or rule thereon and the consent rule, *id.* 640, ss. 72–73.

---

* A mere request that a particular bailiff be employed, does not constitute him a special bailiff of the party (*Corbet* v. *Brown*, 6 Dowl. 749).

MICHAELMAS TERM, 1845—9 VIC.

Demurrer Books.—Delivery of

ORDERED (*a*), That if either party make default in the delivery of the demurrer books, as required by the rule of Hilary Term, 6 Wm. IV. (*b*), the other party who has complied with the rule, may move for judgment, without having delivered books to all the judges (*c*).

(*a*) The English rules, H. T. 4 Wm. IV. r. 1, pl. 7; Practice Rules, 1853, r. 16, direct that the party in default shall not be heard.

(*b*) *Ante*, p. 71.

(*c*) Where the defendant's attorney had, by mistake, delivered demurrer books to the senior instead of the junior judges, in consequence of which the plaintiff got judgment under the above rule, the Court refused to set aside the judgment without an affidavit of merits, it appearing that there was an issue in fact to be tried, in which substantially the same question was involved as that raised by the demurrer (*Collins* v. *McDonnell*, 2 All. 158). Nor would the Court allow the cause to be re-entered on the special paper for argument, though the defendant's counsel swore that he thought the books had been forwarded to his agent for delivery; that matters, which could not well be neglected, had kept him from attending at the term in which judgment was given; that he had obtained the consent of the plaintiff's attorney to the cause stand ing over, and that the plaintiff's attorney was willing to allow the cause to be re-entered, if the Court would permit (*Anderson* v. *Fawcett*, 2 P. & B. 374; there were issues in fact outstanding in this case also, see 3 P. & B. 34).

HILARY TERM, 1846—9 VIC.

Demurrers and Special Cases.

ORDERED, That twenty days from the delivery of a copy of any demurrer shall be allowed to the opposite party to join in demurrer, and furnish a note of objections to the previous pleading (if any), agreeably to the rule of Trinity Term, 3 Vic. (*a*); on failure of which the joinder in demurrer may be added by the party demurring, in making up the demurrer book; and no copy of such demurrer book need be served on the opposite attorney (*b*), nor shall any motion or rule for a *concilium* be required; but demurrers, as well as special cases (*c*) and special verdicts, shall be entered for argument (*d*) at the request of either party, of which notice shall be given to the opposite attorney eight days before the term at which such entry is made (*e*).

(*a*) *Ante*, p. 96.

(*b*) The remainder of this rule is, in substance, taken from the English R. G. H. T. 4 Wm. IV. r. 1, pl. 6 (Practice Rules of 1853, r. 15).

(*c*) See as to special cases, C. S., c. 37, s. 172 (7 Wm. IV. c. 14, s. 20; 12 Vic. c. 39, s. 43; 36 Vic. c. 31, s. 174; Stats. 3-4 Wm. IV. c. 42, s. 25; 15-16 Vic. c. 76, ss. 45-46).

(*d*) See, as to trying an issue in fact before the demurrer is disposed of, R. Hil. 1880, *post*.

An application to amend may be made on the argument of the demurrer—see *Strang* v. *Bell*, Bert. 287, and cases cited in Stockton's note thereto.

(*e*) The want of notice does not render the judgment a nullity (*Kinnear* v. *Watts*, 3 Kerr, 440). A party whose pleadings are demurred to must, if he wishes to set down the cause for argument, give this notice (*Smith* v. *Durnin*, 1 All. 263).

TRINITY TERM, 1846—9 VIC.

Trial by the Record.—"*Record Trial Docket.*"

ORDERED, That in future, all cases of trial by the record (*a*) be entered upon a separate paper, to be called the "Record Trial Docket," which shall be taken up immediately after the motion paper is concluded; the entries to be made in open Court on the first day (*b*) of each term, and to stand in the docket in the order in which they may be made, unless the Court should otherwise direct, and that eight days' notice be given (*c*) of all such trials by the record.

(*a*) See the practice on trials by the record, 2 *Tidd*, 9 *ed.*, 742, and see R. East. 1785, r. 1, note, *ante*, p. 1, as to what constitutes a record. On a trial by the record, the Court confined their consideration to the point, "whether the record produced corresponded with the record set forth in the pleadings" (*Spence* v. *Stewart*, Bert. 113; *Kerr* v. *Kinnear*, 3 Kerr, 412), and see, as to variance, *Beardsley* v. *Dibblee*, 2 Kerr, 254; *Kerr* v. *Kinnear*; *Crawley* v. *Wilson*, 1 All. 718; *Spence* v. *Stewart*, Bert. 219. An amendment may be allowed (*Roberts* v. *Watson*, 1 All. 2; C. S., c. 37, s. 161) If a proceeding be improperly enrolled as a record, in order to support an averment of such a record, it may be set aside on motion (*Watson* v. *Roberts*, 3 Kerr, 509)

See R. Hil. 1848, r. 1, pl. 5, as to pleading judgments.

Only one paper book is necessary—R. Trin. 1840, r. 4, *ante*, p. 98.

(*b*) By R. Mich. 1866, *post*, causes are to be entered before the opening of the Court.

(*c*) Either party may give the notice, R. Hil. 1850, r. 2, *post*, and see *id.*, r. 1, as to proceedings where the party giving notice omits to enter the cause.

MICHAELMAS TERM, 1847—11 VIC.

Admission of Barristers, Attorneys and Students.

1. WHEREAS, certain rules and regulations touching the ex-

amination of persons as students at law and attorneys, and the admission of attorneys and barristers of the Supreme Court, were duly made by the Barrister's Society in Hilary Term last, at a meeting of the said Society, holden at Fredericton, pursuant to the Act of Assembly, 9th Vic. c. 49 (*a*), which said rules and regulations have been sanctioned by the judges of this Court, in conformity to the said Act, and are as follows:

"At a meeting of the Barristers' Society of New Brunswick, holden in the Supreme Court room, at Fredericton, this eighth day of February, A.D. 1847, the following rules were adopted (*b*):

Rules touching the examination of persons as Students at Law and Attorneys, and regulating the admission of Attorneys and Barristers of the Supreme Court.

"1. That before any person is presented to the barristers' society for the purpose of being examined, in order to his being entered as a student in the office of any barrister of this society, he shall present a petition to the benchers, setting forth his age, place of birth, residence, place of education, the branches in which he is prepared to undergo an examination, and the name of the barrister with whom he purposes studying; which petition shall be subscribed by the applicant, and certified by such barrister, as to his character and habits, and that he verily believes him to be a proper person to be admitted as a student at law; and upon such applicant being approved of by the benchers, he shall be fully and strictly examined in the English and Latin languages, mathematics, geography and history, by the said benchers, or any three of them, at Fredericton (*c*).

"2. That upon the applicant passing such examination, and the benchers being satisfied as to his moral character, good habits, and fitness to enter upon the study of the law, he shall receive a certificate to that effect (*d*).

"3. That every student making application for admission as an attorney, shall give a term's notice thereof to this society, and shall undergo a full and strict examination before the benchers, or any three of them, in the elementary principles of the law of real and personal property, forms of action, pleading, evidence, and practice (*e*).

"4. That upon the student passing such examination, and the benchers being fully satisfied as to his moral character, habits and conduct during the term of his study, he shall be recommended for admission as an attorney (*f*); provided always, that in case any student shall not pass his examination before three of the benchers as aforesaid, such benchers shall report the fact to the whole body of benchers, and he may be heard before them against the refusal of his certificate.

"5. That every attorney applying to be called to the Bar shall give

to this society a term's notice of such his intention; and if, during the period since his admission as an attorney, his practice and conduct have been professional and honorable, and no objections are made to his moral character and habits, he shall be recommended accordingly; but if objections be made, an enquiry therein shall be instituted by the benchers, or a committee of them; and upon such enquiry, the said benchers, or a committee as aforesaid, shall either grant or withhold a certificate of recommendation for such attorney's admission as a barrister, as to them may appear just and right in the premises (*g*).

It is ordered, That the examination of persons desirous of becoming students, or being admitted as attorneys of this Court, shall be conducted by the Benchers of the Barrister's Society, as provided for by the said rules and regulations; and that no person be entered as a student, or sworn and enrolled as an attorney of this Court, or admitted as a barrister, unless he produce a certificate, to be granted pursuant to the said rules: Provided that this order do not extend to barristers from other parts of Her Majesty's dominions, applying to be admitted barristers here (*h*); and provided also, that nothing herein contained shall extend or be construed to impair or interfere with the general superintending power and authority of this Court over all or any of the matters aforesaid.

2. It is further ordered, That such of the rules and orders of this Court as are inconsistent with the said rules and regulations of the Barristers' Society, or so far as they regulate matters therein provided for (excepting as aforesaid), be suspended until the further order of the Court in the premises.

(*a*) 3 Local and Pr. Stats. 522.

(*b*) By the by-laws of the Society of Feb. 1867, sanctioned by R. Hil. 1867, *post*, all previous by-laws are repealed; see R. Mich. 1878.

(*c*) See R. Hil. 1867, By-law 19, *post*.

(*d*) See R. Hil. 1867, By-law 20, *post*.

(*e*) See R. Mich. 1837, r. 4, and R. Hil. 1867, By-law 21, *post*.

(*f*) See R. Hil. 1867, By-law 22, *post*.

(*g*) See R. Hil. 1867, By-law 25, *post*.

(*h*) See as to attorneys, R. Hil. 1823, r. 2, *ante*, p. 25; and R. East. 1856, *post*, as to barristers.

Nisi Prius Sittings in the County of York (*j*).

3. It is ordered, That after the present year there shall be sit-

tings of Nisi Prius for the county of York after the Hilary and Trinity terms of this Court only, that is to say: Sittings after Hilary term on the third Tuesday in February in each and every year, and sittings after Trinity term on the fourth Tuesday in June in each and every year; the said respective sittings to continue for so long a time as, in the opinion of the judge holding the same, may be necessary for the dispatch of business depending.

And it is further ordered, That all the parts of the general rule of Michaelmas term, in the sixth year of the reign of King William the Fourth, which relate to Nisi Prius sittings for the county of York, shall remain in force, excepting the appointment of such sittings after the Michaelmas term of this Court.

(*j*) See R. Mich. 1835, *ante*, p. 51.

Papers annexed to Affidavits.

4. It is ordered, That from and after the last day of Hilary term next, the judge, commissioner, or officer taking any affidavit to which any other paper or papers may be annexed, do, at the time of taking such affidavit, mark every such annexed paper with his name, or the initial letters of his name (*k*).

(*k*) R. East. 1848, *post*, excepts affidavits by sheriffs, &c., of service of writs. See *Milner v. Gilbert* 3 Kerr, p. 619, before this rule.

The affidavit should describe the paper as the rule, &c., "annexed" (*Fidlett* v. *Bolton*, 4 Dowl. 282). The English practice requires a certificate to be written on the document (*Re Allison*, 10 Ex. 561).

A document may also be verified by referring to it in the affidavit as an exhibit, thus—

"The paper writing [*or*, certificate,] (*&c., as the case may be*), marked with the letter A, produced and shewn to me at the time of my swearing this affidavit, is a true copy of [an entry in the register book of baptisms (*or* marriages), *&c., as the case may be*] kept in and for the parish of , in the county of , for the year , so far as relates to the baptism [*or* 'marriage' of the person therein named], and I did on examine the said copy [*or* 'extract,'] with the original entry in the said [register book] of which it purports to be a copy."

And the instrument is identified by a certificate thereon—

"This is the paper writing marked A referred to in the affidavit of C. D., sworn before me on this day of 18 . C. C., *a commissioner, &c.*"—*Chit. Forms*, 899.

This course is adopted for convenience, when it is desired to keep the document so sworn to, but though it is not in such case required to be filed with the affidavit, it is considered as part of it, so that the other party is entitled as a matter of course to a copy (*Lush*, 757).

HILARY TERM, 1848—11 VIC.

Affidavit of illiterate person.

1. IT IS ORDERED (*a*), That from and after the first day of Easter term next, where any affidavit is taken by any commissioner of this Court (*b*), made by any person unable to write (*c*) or appearing to be illiterate (*d*), the commissioner taking such affidavit shall himself read over, and, if necessary, explain the affidavit to the party making the same; and shall (*e*) certify or state in the jurat, that the affidavit was read by him (*f*) to the deponent, who seemed perfectly to understand the same, and also that the said deponent (*g*) wrote his or her signature, or made his or her mark, in the presence of the commissioner taking the said affidavit (*h*).

(*a*) Taken from R. G., K. B., E. T. 31 Geo. III., see Practice Rules of 1853, r. 141.

(*b*) The rule extends to affidavits sworn before a judge or in court (*Haynes* v. *Powell*, 3 Dowl. 599).*

(*c*) The words "unable to write" are not in the English rule.

(*d*) In the English rule, "who appears, *from his signature*, to be," &c.

A marksman ought not to sign his name in full, though his hand be guided (——— v. *Christopher*, 11 Sim. 409).

An affidavit signed in a foreign character may be read, though the jurat does not state the affidavit was interpreted (*Nathan* v. *Cohen*, 3 Dowl. 370).

In *Cotter* v. *Brownell*, 1 Pug. 356, the deponent signed his name to the affidavit, but was otherwise unable to write; the objection, if at all available as a ground of relieving bail from their recognizance, was there waived by the delay.

(*e*) "I think this rule was intended to be stringent"—*Per Carter, C. J.*, in *Ex parte Irvine*, 2 All. 472.

(*f*) A rule obtained on an affidavit, the jurat to which omitted to state that the affidavit had been read *by the commissioner*, was discharged without costs (*Ex parte Irvine*, 2 All. 472, and see *R.* v. *Sheriff of Middlesex*, 4 Dowl. 765).

(*g*) If the jurat omits to state that the mark was made by the deponent, it is bad, but it may be amended, without re-swearing (*Wilson* v. *Blakey*, 9 Dowl. 352).

(*h*) The jurat may be as follows:

"Sworn to at , in , the day of , A. D. 18 , before me, C. C., a commissioner, &c., Supreme Court. And I do hereby certify that the above affidavit was first read over and explained by me to the above named A. B., and that he seemed perfectly to understand the same, and wrote his signature [*or* "made his mark"] thereto in my presence.

"C. C., *a commissioner, &c., Supreme Court.*"

In Equity—"The affidavit of a marksman may be read, though the jurat does not certify that it was read over to the deponent, who appeared to understand the same, and made his mark thereto in the presence of the Master (*Coy* v. *Gardiner*, Parker M. R. at the Rolls, 7th Aug., 1852"—*Bots. Rules*, 103; but see 1 *Grant* (4 *ed.*), 114.

Jurats generally.] See as to jurats, where there are several deponents, and as to alterations therein, r. 2, *infra*. The place where the affidavit was taken must appear in the jurat (*Cass* v. *Cass*, 1 D. & L. 698; *R.* v. *Justices of Yorkshire*, 3 M. & S. 493; *R.* v. *Cockshaw*, 2 N. & M. 378; *contra*, *Symmers* v. *Wason*, 1 B. & P. 105), or by reference to the body of the affidavit (*Grant* v. *Fry*, 8 Dowl. 234; and see *R.* v. *Burn*, 7 A. & E. 190), and this practice prevails here (*Gilmour* v. *Downes*, 1 Kerr, 88); see 3 Vic. c. 51 (C. S., c. 35), by which general commissions for the whole Province may be issued.* The jurat must state the date of swearing (*Blackwell* v. *Allen*, 7 M. & W. 146; *In re Lloyd*, 1 L. M. & P. 545; *Bell* v. *Port of London A. Co.*, *id.* 691; *Brunswick* v. *Harmer*, *id.* 505; *Brunswick* v. *Slowman*, 8 C. B. 617); and where the day stated is a Sunday *semble*, the jurat is defective (*Doe* d. *Williamson* v. *Roe*, 3 D. & L. 328; so where it is a day not yet arrived (*Nugent* v. *Adams*, Bert., *Stock. ed.*, 34). If the words "before me" are omitted, the affidavit is a nullity (*Lyons* v. *Ellison*, 5 All. 367; *R.* v. *Bloxam*, 6 Q. B. 528).

The affidavit must not be sworn before the attorney or solicitor in the cause (*R.* v. *Wallace*, 3 T. R. 403; *Jenkins* v. *Mason*, 3 Moor, 325; *Smith* v. *Woodroffe*, 6 Price, 230; *Ex parte Brockhurst*, 1 Rose, 145; see *Horsfall* v. *Matthewman*, 3 M. & S. 154), and a rule obtained on an affidavit sworn before the attorney or his partner, will be discharged with costs (*Batt* v. *Vaisey*, 1 Price, 116; *Hopkinson* v *Buckley*, 8 Taunt. 74), but it may be sworn before the clerk to the attorney (*Goodtitle* v. *Badtitle*, 8 T. R. 638). If the commissioner acts as the attorney for the defendant, even before the appearance be entered, the affidavit cannot be used (*Kidd* v. *Davis*, 5 Dowl. 568, decided since the R. G. H. T., 2 Wm. IV. r. 1, pl. 6; see, however, *Foster* v. *Harvey*, 4 DeG. J. & S. 59, *per Turner*, *L. J.*; *In re Gregg*, L. R. 9 Eq. 137; *Northumberland*, *Duke of*, v. *Todd*, L. R. 7 Ch. D. 777; *Ross* v. *Shearman*, 2 Cooper, 172). Affidavits to hold to bail are, however, an exception (R. G., K. B., T. T. 15 Geo. II), even though the affidavit be, improperly, entitled in the cause (*Davidson* v. *O'Connell*, 3 Pugs. 684). To sustain an objection to the affidavit on this ground, it must distinctly appear by affidavit (*Hodgson* v. *Walker*, Wight. 62), or the statement of the party (*Haddock* v. *Williams*, , Dowl. 327) that the commissioner was the attorney of the party in the cause (*Williams* v. *Hockin*, 8 Taunt. 435) at the time he took it (*Kidd* v. *Davis*, 5 Dowl. 368; *Beaumont* v. *Dean*, 4 Dowl. 354), and the affidavit will not be rejected merely because it purports to have been sworn before a person of the same name (*Hodgson* v. *Walker*, *supra*; see *Doe* d. *Pryme* v. *Roe*, 8 Dowl. 340, where the objection appeared on the declaration. The want of signature to the jurat of the affidavit, upon which a warrant of attachment issued under the Absconding Debtor's Act, 26 Geo. III, c. 13, was held to be a fatal defect, which could not be waived by application for a *supersedeas* (*Ex parte Nason*, E. T. 1833, Stev. Dig. 2; see *Bill* v. *Bament*, 8 M. & W. 317; *Ex parte Heymann*, L. R. 7 Ch. 848;—omission in the copy served, see *Belyea* v. *Hamm*, 2 Han. 26). The authority of the commissioner must clearly appear (*R.* v. *Bloxham*, 6 Q. B. 528; *Fairbrass* v. *Pitt*, 12 M. & W. 453; *Howard* v. *Brown*, 4 Bing. 393), and the Court will not take judicial notice of the names of its

* An affidavit, purporting to be sworn in the county of Halifax before a judge of the Supreme Court of Nova Scotia, is sufficient, without its stating that Halifax is in Nova Scotia (*Bank of Nova Scotia* v. *Morrow*, 1 P. & B. 344). A jurat, "sworn to at the city of Bloomington, this," &c., "before me, A. B., a Notary Public for the State of Illinois," has been held to be sufficient (*id.*).

commissioners (*Frost* v. *Hayward*, 10 M. & W. 673; and see *Howard* v. *Brown*, 4 Bing. 393). An affidavit entitled "In the Supreme Court," and purporting to have been sworn before "A. B., a commissioner, &c., Supreme Court," is sufficient (*Ex parte Morse*, 3 Kerr, 366; *Burdekin* v. *Potter*, 9 M. & W. 13); and, on the other hand, an affidavit to hold to bail (*Cotter* v. *Brownell*, *supra*), and an affidavit for a rule for a *certiorari* (*Ex parte Kerr*, 2 Pugs. 62), purporting to have been taken before a commissioner for taking affidavits to be read in the Supreme Court, have been allowed to be read, though not entitled *in the Court*.

See as to defects in the formal requisites of affidavits sworn abroad, C. S., c. 36, s. 5; and see *Crane* v. *Cazenove*, 4 All. 578, under the repealed Act, 19 Vic. c. 41, s. 7.

Where copies of affidavits have been served pursuant to R. Hil. 1836, r. 2, *ante*, p. 62, any objection to the jurat must be taken before the affidavit is read (*Jarvis* v. *Peck*, 3 Kerr, 507), and see further, as to waiver, *Clothier* v. *Ess*, 2 Dowl. 731; *Barham* v. *Lee*, *id.*, 779; *R.* v. *Bloxham*, 2 D. & L. 168; *Sharp* v. *Johnson*, 4 Dowl. 324.

Where a rule has been obtained on an affidavit not having a proper jurat, the party moving cannot, on objection taken, remove the defect by producing a fresh affidavit similar to the first, with a proper jurat, he should re-swear the original affidavit, and the Court will enlarge the rule for that purpose, or allow the new affidavit to be filed (*Goodrick* v. *Turlay*, 4 Dowl. 392; and see *R.* v. *Warwickshire*, 5 *id.* 382); and see, as to enlarging the rule, where the error is on the part of the party shewing cause, *Andrews* v. *Ell*, 3 *id.* 73.

There is no inflexible practice to discharge a rule, with costs, in all cases where it has been drawn up on reading an affidavit with a defective jurat (*In re Lloyd*, 15 Q. B. 682; *Brunswick* v. *Slowman*, 8 C. B. 618).

Jurat.—Where more than one Deponent.

2. It is further ordered (*h*), That after the time aforesaid, where there are two or more deponents in the same affidavit, the names of the deponents who are sworn thereto shall be specified in the jurat (*i*).

(*h*) Taken from R. G., K. B., M. T. 37 Geo. III. (Practice Rules of 1853, r. 139); see note (*i*) *infra*.

See *Lackington* v. *Atherton*, 2 Dowl. N. S. 904. The rule is imperative (*Pardoe* v. *Terrett*, 5 M. & G. 291), and a rule granted on an affidavit defective in this respect was discharged with costs (*Cobbett* v. *Oldfield*, 16 M. & W. 469).

(*i*) In the English rule (*supra*, *n.* (*h*), and see Practice Rules of 1853, r. 140)—"and that no affidavit be read or made use of in any matter depending in this Court, in the jurat of which there shall be any interlineation or erasure." This branch of the rule has always been recognized as being in force here (*Doe* d. *Tridor* v. *McIntosh*, 2 Han. 293; and see *Doe* d. *McCullum* v. *Roe*, 2 All. 143). A line drawn through a word of a jurat by a flourish of the pen in signing the commissioner's name to the jurat was not considered an erasure (*Doe* v. *McIntosh*). A line drawn through two words in the jurat, leaving them, however, perfectly legible, is an erasure, though the omission or retention of the words would not vary the sense (*Williams* v. *Clough*, 1 A. & E. 376). So, if the date be struck out and the right date introduced (*Chambers*

v. *Barnard*, 9 Dowl. 557; and see *Finnerty* v. *Smith*, 1 B. N. C. 645). But the jurat is not vitiated by the erasure of words which form no necessary part of the jurat, and might be separated from it without altering the sense (*Dawson* v. *Wills*, 10 M. & W. 662), nor (according to *Jacob* v. *Hungate*, 3 Dowl. 456) by the alteration of a figure in the date, by writing one figure over another; nor by striking out the words "before me," and introducing the words "by the Court" (*Austin* v. *Grange*, 4 Dowl. 576). The rule does not apply where the jurat is altogether erased and a new one written (*Dawson* v. *Wills*, 10 M. & W. 663).

EASTER TERM, 1848—11 VIC.

Clerk's Office.

1. IT IS ORDERED, That the following regulations be observed in the office of the Clerk of the pleas:

Entry of Cause.

1st. No judgment, interlocutory or final, to be signed in any cause until it is ascertained, upon search, that the cause has been duly entered (*a*); provided, that where there is an interlocutory judgment, the search need not be repeated when final judgment is signed; and provided also, that entries may be made as heretofore accustomed in cases of warrants of attorney to confess judgment.

(*a*) See R. Hil. 1837, r. 2, *ante*, p. 77.

Warrants of Attorney.

2nd. No judgment to be signed on a warrant of attorney after one year from its date without the order of the Court, or of a judge (*b*).

(*b*) See 1 *Tidd*, 9 *ed.*, 552; 2 *Chit. Arch.*, 12 *ed.*, 967, and English rules H. T. 2 Wm. IV. pl. 73; Pr. Rules of 1853, r. 26. If the warrant is above ten years old, there must, it would seem, be a rule of Court founded upon a previous rule *nisi*. See R. Trin. 1857, r. 3, *post*. The affidavit on which the application is made should shew the due execution of the warrant, that the debt, or some part of it, is still due, and that the parties are living (*Tidd's Forms*, 182; *Chit. Forms*, 10 *ed.*, 512). The affidavit of the debt should, in general, be made by the plaintiff, and, if made by another, it should appear that the deponent had means of knowing the facts: but if the order be made by the judge, the judgment will not be set aside because of the insufficiency of the affidavit, particularly where the defendant's affidavit supplies the defect (*Smith* v. *Le Burgue*, 1 All. 266). In *Wiley* v. *Haslip*, 1 Kerr, 1, the Court, referring to *Eyles* v. *Warren*, 4 M. & S. 174, and R. G., C. P., T. T. 59 Geo. III., refused to grant leave on an affidavit which did not state the defendant to be alive at a day within the term; but the doctrine of relation having been abolished (C. S., c. 37, s. 109, *infra*,

n. (*h*), this statement is now unnecessary (*Cockman* v. *Hillyer*, 1 B. N. C. 3; *Robinson* v. *Lester*, 3 Dowl. 531). It is still necessary to shew that the defendant was alive within a reasonable time before application (*Chell* v. *Oldfield*, 4 Dowl. 629).

The defeasance may be so drawn as to dispense with the necessity of making the application (see *Sherran* v. *Marshall*, 1 D. & L. 689).

No one but the defendant can object to the irregularity in signing judgment without leave (*Jones* v. *Jones*, 1 D. & R. 558; see *Raymond* v. *McMackin*, 4 All. 524).

As to signing judgment on warrants executed under an old power of attorney, see R. Trin. 1857, r. 2, *post*.

Confession of Judgment.

3rd. No judgment to be signed upon any confession, cognovit (*b*). or retraxit, after one year from the date thereof, or from the term whereof the same is granted, without the order of the Court, or of a judge (*c*).

(*c*) The attorney has no authority to sign a cognovit, but the client will be bound by a cognovit so signed, if he makes no objection when informed of it (see *McNamee* v. *O'Brien*, 4 All. 548). It may be given before declaration (*id.*). If the cognovit authorize judgment to be signed, in case of default in payment on a day stated of a certain sum and costs to be taxed, judgment cannot be signed until the costs are taxed, and the amount made known to the defendant (*Snodgrass* v. *Wilson*, 1 All. 375). See as to depriving plaintiff of costs, where the sum confessed is within the jurisdiction of the inferior courts, *Foster* v. *Brown*, 1 Kerr, 200; *Hardy* v. *Parker*, 2 Kerr, 7.

(*d*) It was unnecessary before this rule to obtain leave to sign judgment on a cognovit (*Thompson* v. *Langridge*, 1 Exch. 351).

See as to the requisite statements in an affidavit for leave to sign judgment on a warrant of attorney, *n.* (*b*), *supra*.

Recognizance Roll.—Filing

4th. No recognizance roll of a recognizance of bail, to be received or filed until it is ascertained, upon search, that the recognizance or bail-piece is on file (*e*).

(*e*) See *O'Connor* v. *Mott*, 2 Kerr, 509. Now, by C. S. c. 37, s. 195 (36 Vic. c. 31, s. 197), the entry upon the roll of the recognizance of bail shall be according to the form No. 12, in Schedule A to that chapter, "but no such roll shall be made up or filed unless the bail shall appear in the action on the recognizance. This seems to have been the practice, prior to the Act, see *R.* v. *Sparrow*, 1 Han. p. 239. As to a variance in setting out the names of the parties in the bail piece and the recognizance roll, see *Estey* v. *Brown*, 2 All. 527.

Judgment Rolls.—Endorsement on

5th. All judgment rolls (*f*) to be endorsed (*g*) with the title of the term wherein final judgment is awarded; and when judgment is entered in vacation, then to be endorsed of the term

next preceding, and the rolls are to be numbered consecutively as they are brought in and filed of such term, and to be referred to in pleading as the rolls of such term (*h*).

(*f*) The Court will, in some cases, permit a judgment roll to be made up and filed *nunc pro tunc*, *ante*, p. 15.

(*g*) See the further endorsement required by R. Hil. 1875, *post*.

(*h*) See *McLean* v. *Hubble*, 3 Kerr, 685, decided prior to the rule.

All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation when signed, and shall not have relation to any other day—C. S., c. 37, s. 109 (36 Vic. c. 31, s. 112; Eng. R. G., H. T. 4 Wm. IV. r. 3; Practice Rules of 1853, r. 56; Pleading Rules of 1853 r. 32).

Affidavits.—Papers annexed.

2. It is further ordered, That the general rule of Michaelmas term last (*i*), in regard to marking papers annexed to any affidavit, shall not extend to affidavits of service of writs returned by the sheriff, or other officer, to whom the writs are respectively directed.

(*i*) *Ante*, p. 118.

MICHAELMAS TERM, 1848—12 VIC.

Writ of Inquiry.—Notice of Countermand.

IT IS ORDERED, That no notice of countermand shall be deemed sufficient to save the costs (*a*), if any there be, for not proceeding to the execution of a writ of inquiry of damages pursuant to notice, unless it be given (*b*) at least ten days before the time appointed for such inquiry.

(*a*) See 1 *Tidd*, 9 *ed.*, 580; *ante*, p. 37.

(*b*) The sheriff must also be notified of the countermand (*Wallace* v. *Scott*, 1 All. 261).

EASTER TERM, 1849—12 VIC.

Taxation . Costs.

1. IT IS ORDERED, That the following regulations be observed in the office of the Clerk of the Pleas:

1st. Every affidavit (*a*) used before the clerk, on the taxation of costs (*b*), to be retained and filed on a file to be kept for that purpose.

2nd. The names of witnesses, the days of attendance, and mileage of each witness, to be specified in every bill of costs brought for taxation (*c*).

(*a*) The party successfully shewing cause against a rule to review taxation, should not be allowed costs of opposing the rule, if he has omitted to file the affidavit (*per Wetmore, J.*, *Jones* v. *Botsford*, 1 P. & B. 585).

(*b*) In all cases between opposing parties, that is, where the proceedings are not by default, there must be notice of taxation of costs (*Turner* v. *Crane*; *Mitchell* v. *Long*, Stev. Dig. 112, *n.* to *Connick* v. *Wilson*. 3 Kerr, 110, All. Rules, 7.) Taxing costs in a contested case, without notice, is irregular, but where an offer had been made to re-tax the costs and deduct any improper charges, a rule to review taxation was discharged without costs, and an item improperly taxed ordered to be deducted from the amount to be levied under the execution (*Thompson* v. *Green*, 6 All. 53). Costs were taxed two days after the time mentioned in the clerk's appointment, and it did not appear that the opposite party attended the taxation, and no explanation being given, the Court were equally divided as to whether an execution, in lieu of an attachment, could be issued for such costs (*MacLellan* v. *Barnes*, 3 P. & B. 590). If both parties are entitled to tax costs on different issues, an appointment for taxation should be obtained from the clerk (*Crookshank* v. *MacFarlane*, 3 All. 18). A copy of the bill of costs and affidavit to increase (if any) should be served with the notice (*id.*; *Chace* v. *Fawcett*, 1 All. 566).

Costs cannot be taxed on a judgment on demurrer if there remain issues in fact to be tried (*Anderson* v. *Fawcett*, 4 P. & B. 82).

Good Friday is not a *dies non*, and a taxation of costs on that day is not irregular; the clerk, however, is not bound to attend in his office on that day (*Gillmore* v. *Gilbert*, 2 All. 50).

Reviewing taxation.] If either party be dissatisfied with the amount taxed, he may apply to the Court or a judge (*Taylor* v. *Travis*, 3 All. 505; *Levett* v. *Rothwell*, 27 L. J. Ex. 6; but see *Smith* v. *Harner*, 3 C. B. N. S. 829) to have the taxation reviewed by the Master. If the clerk, in taxing, acts on a wrong principle, the Court will review the taxation (*Hendricks* v. *Hallett*, 1 Han. 170). In England the Court will not interfere with the Master's discretion as to the allowance of days attendance to witnesses, but this rule is not observed so rigidly here, if a clear case of over allowance is made out (*Gaudin* v. *McKilligan*, 2 All. 477). A mistake in entering a rule in the minutes was held not to be a ground for reviewing taxation, it not appearing that the judgment was wrong, or that the opposite party was misled by it (*Crookshank* v. *MacFarlane*, 3 All. 18). Where the objectionable items were very small, a rule *nisi* was refused (*Bell* v. *Moffatt*, 2 P. & B. 406; see the English practice on this point, *Newton* v. *Boodle*, 4 C. B. 359).

Instead of directing a review of the taxation, the Court will sometimes order costs improperly allowed to be deducted from the judgment (*Thompson* v. *Green*, 6 All. 53; *Gillmore* v. *Gilbert*, 2 All. 50; and see *Doe* d. *McCullum* v. *Roe*, 2 All. 143; *Chace* v. *Fawcett*, 1 All. 566).

The objections must be specifically presented before the Master, otherwise a review of the taxation will not be granted (*Hore* v. *Saxl*, 17 C. B. 599; *Pook* v. *Burrows*,

2 Dowl. N. S. 358).* Where full costs were taxed on a judgment by default, in a case where the plaintiff was only entitled to summary costs, it was held that the defendant did not, by omitting to take steps to be present at the taxation, waive his right to a review (*Street* v. *St. Andrews M. & M. Co.*, 1 All. 134; and see *Snodgrass* v. *Johnston*, 2 All. 200). A review will not be granted on the discovery of facts which might have been known at the time of the taxation, unless a fraud has been practiced on the applicant, or he has been greatly misled (*Flaglor* v *Richards*, 1 All. 599).

As a general rule, notice of intention to review taxation of costs must be given to the opposite party as soon after taxation as circumstances will admit of, to prevent any further steps being taken on the taxation in ignorance of such intended proceeding (*Doe* d. *McCullum* v. *Roe*, 2 All. 144; *McLaughlin* v. *Wilson*, 3 Kerr, 177), but where the next step is to be taken by the party applying, this is, it seems, unnecessary (*Derry* v, *Derry*, 4 P. & B. 90). The applicant may move for a rule *nisi*, or pursuant to notice under R. Hil. 1836, r. 2, *ante*, p. 62.

The affidavit in support of the application should state the particular items which are incorrect, and in what respect (3 *Chit. Gen. Pr.* 602; *Aliven* v. *Furnival*, 2 Dowl. 49; see *Cudlip* v. *St. Martins*, 2 Pugs. 8), and that the Master has made his allocatur (*Cleaver* v. *Hargrave*, 2 Dowl. 689; *Sellman* v. *Boorn*, 8 M. & W. 552). Where the attorney made affidavit, on the statement of the Master, that certain items had been allowed, and it appeared by the taxed bill that they had been struck off, the rule for a review was discharged with costs (*Doe* d. *Johnston* v. *Jardine*, 2 Pugs. 7). If the affidavits are insufficient, and the party intends making a new motion on additional affidavits, he ought to withdraw the first motion; if judgment is given upon it, he is precluded from making another application (*McLaughlin* v. *Wilson*, 3 Kerr, 177). *Quære*, whether new affidavits are receivable by the Court, on an application for review, or by the clerk, in case a review is ordered (*Murray* v. *Williston*, 1 All. 492; and see *Taylor* v. *Travis*, 3 All. 505; *Morrice* v. *Wilson*, 2 Pugs. 225).

Costs on review of taxation are entirely in the discretion of the Court (*Shephard* v. *Shephard*, 2 Pugs. 453). Costs are not allowed where the mistake is with the Master (*Snodgrass* v. *Johnston*, 2 All. 200; *Ward* v. *Bell*, 2 Dowl. 76), and they were refused where there had been mistakes on both sides (*Crookshank* v. *MacFarlane*, 3 All. 18). When costs have been taxed on an erroneous affidavit, the injured party obtaining a review is entitled to the costs of the application (*Doe* d. *Firth* v. *McLeod*, 2 Pugs. 1). And where the plaintiff forced through the taxation on a clearly insufficient affidavit, costs were granted, the Court considering that the defendant should be indemnified for the costs thrown on him by the plaintiff's act (*Shephard* v. *Shephard*, 2 Pugs. 452; see also *Taylor* v. *Travis*, 3 All. 505). See *Jones* v. *Botsford*, *supra*, *n.* (*a*).

(*c*) In *Chace* v. *Fawcett*, 1 All. 566, decided before this rule, the names of the witnesses were not inserted in the bill, but reference was made to an affidavit no copy of which was served; no objection to the want of a copy, or contradiction or opposition to the affidavit having been made at the taxation, the Court would not order a review.

An affidavit that the witnesses named in the bill of costs attended the Court at

* Unless in the case of very exceptional, or improper charges (*Cudlip* v. *St. Martins*, 2 Pugs. 8), or of gross fraud or imposition (see *Chace* v. *Fawcett*, 1 All. 570; *Flaglor* v. *Richards*, 1 All. p. 601), or of the allowance of items wrong on principle (*per Duff, J.*, *Jones* v. *Botsford*, 1 P. & B. 581); no objection, for instance, can be afterwards made to the number of the folio or to the mileage or attendance of witnesses (*id.*).

which the cause was tried, is not sufficient; it should, at least, state the belief of the party that they attended the number of days charged (*Taylor* v. *Travis*, 3 All. 505). So an affidavit, stating, "that the annexed list contains a true statement of the names of the witnesses subpœnaed, attending and examined at the trial" is insufficient (*Shephard* v. *Shephard*, 2 Pugs. 452).

Where issues are found for both parties, it must be clearly shewn by the affidavit that the witnesses whose expenses are claimed were material to prove the issue found for the party claiming (*Holderness* v. *McKendrick*, 2 All. 213; *Crookshank* v. *MacFarlane*, 3 All. 18; see *Herbert* v. *Hanington*, 1 Pugs. 324; and see as to the costs of witnesses in such cases, *Read* v. *Botsford*, 4 All. 476; *Fearon* v. *Murray*, 5 All. 173).

A party who is a necessary or (*ut semb.*) material witness in his own cause, and who attends the trial only for that reason, may be entitled to his expenses like any other witness (*Howes* v. *Barber*, 18 Q. B. 588; *Dowdell* v. *Australian Mail Co.* 3 E. & B. 902); but if about to attend on his own account, he is not entitled to conduct money when subpœnaed by the other side (*Reed* v. *Fairless*, 3 F. & F. 958—*Rosc., Ev.*, 13 *ed.*, 170). The attorney in the cause is not entitled to fees as a witness, for it is his duty to attend on the trial of the cause (*Jones* v. *Botsford*, 1 P. & B. 581, *per Fisher & Duff, JJ., Wetmore, J., dis.*). It is not necessary to subpœna the witness, in order to be entitled to charge for his attendance (*Flaglor* v. *Richards*, 1 All. 599). Nor is it absolutely necessary that the witness should be examined, if it appear reasonable and necessary that he should attend (A. C. MS. 152, and cases there cited). The English practice, requiring actual payment of the fees before they can be allowed by the Master, has not been followed in this country (A. C. MS. 153). If witnesses are subpœnaed on both sides the general rule is, that they are only entitled in the whole to the same allowance for their attendance as if they were subpœnaed only on the one side, such expense ought, therefore, either to be allowed on the one side only, or apportioned between each; but if the witnesses have been subpœnaed, and paid by the opposite party without the knowledge of the party taxing, he will not be deprived of the amount paid by himself (*Benson* v. *Schneider*, 7 Taunt. 337; *Murray* v. *Williston*, 1 All. 492—A. C. MS., 153). So, if the witness attends the Court as a juror, or is too intoxicated to be examined, though he cannot recover his fees, still, if they have been paid, the party paying is entitled to have them taxed (*Murray* v. *Williston*). The ordinary affidavit of attendance and materiality *prima facie* shews payment, and it need not expressly state the payment (*id.*), though it may be advisable, in some cases, that it should do so (see A. C. MS. 154). Where the witness attended in two causes at the suit of the same plaintiff, the plaintiff was held to be entitled to full fees for mileage and attendance in each cause (*Chapman* v. *Providence W. Ins. Co.*, 3 P. & B. 496).

An attorney, who was several times subpœnaed to attend the trial of a cause, but attended once only, was ordered to refund the fees paid him on the occasions he did not attend (*In re Wetmore*, 3 P. & B. 630).

It is a matter in the discretion of the Master, subject to the review of the Court, whether he will allow the expenses of a foreign witness or only the costs of a commission (*McAlpine* v. *Coles*, 2 Dowl. 299, A. C. MS. 152). Expenses of a witness from Boston (*Boyd* v. *Sharkey*, H. T. 1844, All. Rules, 69; *Gibson* v *North British & M. Ins. Co.*, 1 P. & B. 571), from Palmyra, U. S. A., 400 miles (*Judkins* v. *Parker*, A. C. MS. 151), and from England (*Light* v. *Abel*, 6 All. 406), have been allowed. In the latter case, the affidavit of the plaintiff stated "that he was a neces-

sary and material witness on the trial on his own behalf; that he travelled from London to attend as a witness on the trial, and attended the number of days hereinafter stated, and was examined as a witness on his own behalf; that, in order to arrive here in time for the trial, he was obliged to come out by the steamer to New York, thereby making the distance he was obliged to travel for the purpose of attending said trial 3500 miles and upwards; that the distance he will have to travel in returning by the way of Halifax, which is the shortest route, is, as he is informed and believes, not less than 2,800 miles." It probably appeared by the affidavit that the residence, or usual place of abode, of the plaintiff was at London.

The Master's discretion in the allowance of witness fees is not to be brought into review as a matter of course (*Skelton* v. *Seward*, 1 Dowl. 411); but if he refuses to exercise any discretion, the taxation may be reviewed—*Stewart* v. *Slade*, 4 C. B. 460 (A. C. MS. 152; *ante*, note (*b*) p. 125).

Quære, whether allowance may be made for keeping a witness in the country who would otherwise have gone abroad (A. C. MS. 153).

Parties appearing in person.

2. It is ordered that where parties who are not attorneys of this Court prosecute or defend any action in person (*c*), no papers, writs or records be received or filed in the clerk's office, or entries made, without the fees being paid thereon at the time of such filing or entering.

(*c*) See C. S., c. 37, ss. 5-35, as to suing or defending in person. An appearance in person need not be in the own proper person of the defendant, and the memorandum required by sec. 35 may be delivered by a third person on his behalf, though he be not an attorney (*Oake* v. *Moorecraft*, L. R. 5 Q. B. 76). A party suing in person may sometimes be entitled to the costs of an attorney employed to conduct the action for him (*Bryant* v. *Wilson*, 3 C. B. N. S. 722).

TRINITY TERM, 1849—12 VIC.

Judgment quasi nonsuit.

1. IT IS ORDERED, That in the notice of motion for judgment, as in case of a nonsuit, the copy of affidavit, as required by rule 3, Hilary term, 6th William IV. (*a*), shall be deemed sufficient, if served on the Tuesday the fourteenth day preceding the term, so as to make the notice of motion in this case conform to the other notices of motion upon the motion paper.

(*a*) *Ante*, p. 64.

Subpœna to prove the execution of Deeds for Registry.

2. Whereas, by the Act of Assembly 10th Victoria, c. 42 (*b*), it is enacted, "That process of subpœna may be issued out of the

Supreme Court of Judicature as in ordinary cases (and in such form as the said Court may by general rule or order prescribe), to compel the attendance of any witness, or the production of any conveyance or instrument for the due proof thereof, in order to be registered agreeably to the provisions of this Act; and such Court shall have the like power to punish disobedience to any such subpœna, in the same manner and to the same extent as in other cases; provided, that no such witness shall be compelled to produce, under such subpœna, any writing or other document, that he would not be compelled to produce on a trial:"

It is ordered, That the several processes of subpœna to be used under and in pursuance of the above recited Act, shall be in the form or to the effect following:

No. 1. Subpœna ad Testificandum.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the faith.

To A. B., [*names of the witness or witnesses*] Greeting:

We command you that, laying aside all and singular business and excuses, you and every of you be and appear in your proper persons before [*name and description of the Court, judge, or other officer before whom proof is to be made*], at [*the place or office where proof is to be made*], on , the day of , at of the clock in the noon of the same day, to testify all and singular those things which you or either of you know concerning the execution of a certain [*describe the conveyance or instrument to be proved*], purporting to be made between [*the parties to the deed or instrument*], and bearing date the day of , A.D. 18 , to which [*deed or instrument*] you and each of you were severally a subscribing witness or witnesses; and further, to prove the execution of the said *, in order that the same may be duly registered according to the provisions of the Act of Assembly in such case made and provided; and this you or any of you shall in no wise omit, under the penalty upon each of you of one hundred pounds. Witness , esquire, at Fredericton, the day of in the year of our reign.

No. 2. Subpœna duces tecum.

[*The same as the above to the asterisk *, then thus*]—and also, that you bring with you, and produce at the time and place aforesaid, the said [*describe the deed or instrument*] hereinbefore mentioned and described, in order that the same may be duly registered, &c. [*conclude as in the preceding form*].

(*b*) This Act was repealed, and re-enacted by 1 R. S., c. 112, s. 18, of which the Act now in force, C. S., c. 74, s. 22, is a copy.

HILARY TERM, 1850—13 VIC.

Trial by the Record.

1. IT IS ORDERED, That if the party who may have given the notice of trial by the record, pursuant to the rule of Trinity term, 9th Victoria (*a*), shall not enter the same for trial on the first day of term, as required by such rule, the other party may move to enter the same for trial on the second day of term, and proceed to trial (*b*) at such time as the Court may thereupon appoint, on delivering to the Chief Justice a paper book, in case such book should not already have been delivered.

2. It is further ordered, That either party may give notice of trial by the record, and enter the same pursuant to the rule of Trinity term, 9th Victoria (*c*); but that if notice be given by both parties, the notice of the party seeking to perfect the record shall have precedence, provided he duly enter the case, and deliver the paper book to the Chief Justice.

(*a*) *Ante*, p. 115.

(*b*) Judgment, as in case of nonsuit, cannot be had (*Kelly* v. *McLaughlin*, 3 Kerr, 104).

(*c*) *Ante*, p. 115.

EASTER TERM, 1850—13 VIC.

Service of Process at Dwelling.

1. WHEREAS, by the Act of Assembly 12th Victoria, c. 39, s. 44, the Act of Assembly 7th William IV., c. 14, allowing service of process to be made at the usual place of abode of the defendants, is repealed; and the said Act of 12th Victoria (*a*) limits and restricts service of process at the dwelling to cases where the defendant shall be within the jurisdiction of the Court at the time of such service; and the rule No. 2 of this Court of Trinity term, 3rd Victoria, is thereby virtually superseded:

It is ordered, That such rule be rescinded, and that the affidavit of such service shall be in the following form, or to that effect, in order to entitle the plaintiff to an order for perfecting such service:

"A. B. (*b*). sheriff of (*or* A. B., of , a deputy of the sheriff of), maketh oath and saith, that he, this deponent,

did, on the day of , deliver a true copy of the annexed writ or process at the house of C. D., the defendant named in such writ or process (*or* the house of any other person, *as the case may be*), situate in the parish of , in the county of , unto E. F. (*c*), the wife of such defendant (*or* to G. H., an adult person residing in the said house, and known to this deponent as a member or inmate of the family, of such defendant); and this deponent further saith, that the said house was, at the time of such delivery, the usual place of abode of such defendant [and that the said copy of the said process was accompanied with an English notice in writing to the defendant, of the intent and meaning of the service of such process, pursuant to the Statute in such case made and provided];* and this deponent further saith, that the said defendant was, at the time of such service, within the limits of this Province, as this deponent knows, for the following reasons (*here state the particular means of knowledge the deponent has of the defendant's being within the Province; if this fact is not known to the serving officer, it may be proved by the affidavit of another person* (*d*); *and the affidavit of the serving officer may omit the words after the *, and conclude as follows:*—) and this deponent further saith, that he verily believes that, at the time of such service, the defendant was within this Province."

(The clause between brackets (*e*) *may be omitted in the service of summary writs.)*

2. It is further ordered, That in order to entitle the plaintiff to an order for making a service at the dwelling good service, the writ shall be delivered to the sheriff of the county into which it is issued for service, and that such service be effected, and the affidavit thereof made by the sheriff, or his general or special deputy.

3. It is further ordered, That these rules shall apply *mutatis mutandis* to writs directed to the coroner (*f*).

4. It is further ordered, That these rules apply to every writ or process issued after the end of the present term.

(*a*) This Act was in turn repealed by 36 Vic. c. 31, s. 215, and re-enacted by s. 8 (now C. S., c. 37, s. 7), with an additional clause requiring the affidavit to show that the defendant "was, at the time of the service, within the jurisdiction of the Court, according to the belief of the person serving such summons, stating his reasons for such belief."

See R. Trin. 1857, r. 6, *post*, as to service at the place of business of a non-resident, and C. S., c. 37, s. 10, as to service at the place of residence of a defendant who has temporarily left the Province for the purpose of avoiding service, and ss. 15–18, as to service of process abroad.

12 Vic. c. 39, s. 16, relating to service on corporations aggregate, under which *Gillmor* v. *London & L. & G. Ins. Co.*, 2 Han. 253, was decided, was repealed by 36 Vic. c. 31, and by sec. 9 of the latter Act, of which C. S., c. 37, s. 8, is a copy,

service can be made on the agent, whether the corporation be foreign or not. If the service is on any other than a duly qualified officer of the company, proceedings may be stayed without costs (*Spurr* v. *Albert Mining Co.*, 2 Pugs. 260). See as to service on companies incorporated under Dominion laws, Stat. of Canada 32–33 Vic. c. 12, s. 41; 40 Vic. c. 43, s. 61.

That service on a lunatic need not be personal, see Day's C. L. P. Acts, 40; 4 *Fish. Dig.* 6916; but see *Sandall* v. *Godsoe*, 1 All. 441.

Service on an agent, who had a power of attorney authorizing him to appear to and defend suits against the defendant, was held to be irregular (*Harris* v. *Mitchell*, 1 Han. 2), but service on one who has a general authority to accept service of process for defendant is, it seems, sufficient (*Farley* v. *Phillips*, Bert. 347).

Where a writ was not served personally, and no judge's order was obtained, and the defendant denied any knowledge of the suit, the judgment and execution were set aside, though the defendant's affidavit was contradicted (*James* v. *Dupres*, 1 All. 506). *Chipman, C. J.*, is there reported to have said, "The law requires a judge's order to make the service perfect, and we cannot dispense with it." But it is clear that a judge's order may be dispensed with, and in that case both *Carter* and *Street, JJ.*, admit that it might be waived by the conduct of the defendant, and state as their reasons for setting aside the judgment, that the affidavits did not clearly make out the waiver. In *O'Regan* v. *Berrymount*, 1 Kerr, 167, which was very fully argued, and where the English authorities were reviewed, the Court refused to set aside the judgment, though the service was not perfected, it appearing that the defendant knew that the suit was going on, and, after final judgment, gave a new security for the amount. In *O'Leary* v. *Graham*, 5 All. 105 (distinguished in *Parrot* v. *Roberts*, 2 P. & B. 388), the judgment was sustained, though there was no judge's order, and the defendant denied any knowledge of the suit until he was arrested on execution, the Court being satisfied that he had received the copy of the process left at his house, and knew that the suit was proceeding, his explanation of the matter not being satisfactory. It is, perhaps, difficult to define exactly what will amount to a waiver of an irregularity; each case must depend upon its own particular circumstances, and though judgment obtained without personal service, or an order to perfect the service, is clearly irregular, the inclination of the Court appears to be to sustain the judgment wherever it appears that the writ came to the knowledge of the defendant in time to enable him to appear, if he wished to defend the suit—*Botsford's Rules*, 137. Where the summons was served in April, an application in December, after execution levied, to set aside the service and judge's order was held to be too late (*Burchell* v. *Poor*, 1 P. & B. 151; and see *Farley* v. *Phillips*, *supra*, *per Chipman, C. J.*), *Quære*, whether a wife can make the application for the husband, without shewing that it is made by his authority (*Burchell* v. *Poor*). Where the necessity for a judge's order appears by the affidavit of service, the defendant need not shew, on his application to set aside proceedings for want of such order, that the writ did not come to his knowledge (*Wetmore* v. *Levy*, 5 All. 55). "From several cases, particularly *Phillipps* v. *Ensell*, 2 Dowl. 684; *Herbert* v. *Darley*, 4 *id.* 726, it appears to be the practice of the Court to support the service, if the facts, when all examined into, will authorize it, although they may not be such as would have sanctioned the original affidavit"—*Per Parker, J.*, in *Farley* v. *Phillips*, *supra*; and see *Burchell* v. *Poor*, *supra*, as to sustaining the service on grounds other than those mentioned in the affidavit. See *Watt* v. *Barnett*, L. R. 3 Q. B. D. 363, as to setting

aside the judgment on terms, where the defendant has had no notice of the proceedings. Substituted service, duly effected according to the order of the Court, is equivalent for all purposes to personal service (*id.*).

The writ, affidavit and judge's order must be filed before signing interlocutory judgment (*ante*, p. 95).

(*b*) The affidavit must be drawn in the first person, and divided into paragraphs—R. Hil. 1875, r. 1, pl. 5, *post*.

(*c*) Where the name of the person to whom the writ was delivered was omitted, the interlocutory judgment was set aside (*Sandall* v. *Godsoe*, 1 All. 441).

(*d*) See C. S., c. 37, s. 7, cited *ante*, *n.*, p. 131.

(*e*) The notice referred to in this clause (see Stat. 12 Geo. I. c. 29) is not necessary under the C. L. P. Act. The summary practice is abolished, *ante*, p. 47.

(*f*) *Quære*, whether the relationship of the sheriff to the defendant renders it necessary to direct any other than the jury process to the coroner (*Stevenson* v. *Douglas*, Bert. p. 282). See as to writs of replevin, R. East. 1810, r. 2, *ante*, p. 19.

TRINITY TERM, 1850—13 VIC.

Notice of Matter of Defence, 13 Vic. c. 32.

IT IS ORDERED, That a copy of the notice of any matter of defence delivered with the plea, pursuant to Act 13th Vic. c. 32 (*a*), and a copy of any order of the Court or a judge, which shall have been made touching such notice, shall be filed with the *nisi prius* record at the Court of *nisi prius*, and be annexed to such record.

(*a*) See the observations by the Court in *Marks* v. *Gilmour*, 3 All. 172, and *Anderson* v. *Smith*, 4 All. 311, upon this Act. It was repealed in 1873, when the system of pleading, as established by the English Common Law Procedure Acts and the rules thereunder, was adopted in this Province, by an Act (36 Vic. c. 31—C. S., c. 37,) founded upon a bill prepared some years previously by his honor the present Chief Justice. The provisions of the 2nd, 3rd and 4th sections were, in substance, again introduced by 43 Vic. c. 8, ss. 1, 2, 3, but section 9 of the latter Act, corresponding to sec. 1 of the former, by which the statute allowing several pleas was expressly repealed, merely repeals inconsistent and repugnant Acts. Secs. 77, 79 of C. S., c. 37, authorizing several pleas to be pleaded, are not inconsistent with 43 Vic. c. 8, and are not repealed by it; and, therefore, a defendant, instead of pleading one plea and giving notices, may still plead several pleas (*Cruikshank* v. *McAvity*, before *Duff*, *J.*, at chambers—*Daily Telegraph*, July 30, 1880).

Though, in strictness, the above rule may not be in force with respect to the late Act, yet, as the practice thereby enjoined is very convenient, it ought to be followed.

43 Vic. c. 8, s. 1, enacts: "The defendant in any action in any court of record in this Province (except actions of replevin or where he is sued as executor or administrator) may plead the general issue or any other plea in bar to said action, and on the trial

thereof before a jury, may give in evidence* any other matter of defence whatsoever, provided that notice of such other matter be given in writing to the plaintiff or his attorney at the time of the delivery of the plea, which notice may be proved on the trial to have been delivered either *ore tenus* or by affidavit of the person delivering the same, and provided also, that any such matter of defence may, without any previous notice thereof, be met on the trial by evidence of any matter which might have been pleaded thereto before the passing of the Common Law Procedure Act, 1873, by way of replication, and so *toties quoties* by either party, each notice of defence shall be numbered consecutively and signed by counsel.

Sec. 2. The court or a judge shall have power to amend, strike out, or add to such notice.

Sec. 3. Any such notice may be in a general or brief form, and shall be deemed sufficient unless the plaintiff shall make it appear to the Court, or judge before whom the trial is had, that he has been misled by the defect or generality of such notice.

Sec. 4. Any defence arising after the commencement of any action may be given in evidence on the trial thereof, provided notice thereof be given to the plaintiff or his attorney at any time within thirty days before the said trial, notwithstanding that the defendant has before pleaded in the said action.

Sec. 5. In cases in which a plea *puis darrein continuance* was heretofore pleadable in *banc* or at *nisi prius*, the same defence may be given notice of, with an allegation that the matter arose after the last pleading or notice of defence was given; but unless the Court or a judge otherwise order, such notice shall not be allowed if not accompanied with an affidavit that the matter thereof arose within thirty days before the giving of such notice.

Sec. 6. Matters of defence arising after the commencement of an action, may be given notice of, together with matters of defence arising before the commencement of the action, provided that the plaintiff may, by notice in writing, confess such notice, and shall be entitled to the costs of the cause up to the time of the giving notice of the said matter of defence arising after the commencement of such action, unless given notice of by one or more only out of several defendants.

Sec. 7. When a notice of defence is given, with an allegation that the matter of defence arose after the last plea pleaded or notice of defence given, the plaintiff shall be at liberty to confess such notice, and shall be entitled to the costs of the cause up to the time of the giving of the said notice, unless given notice of by one or more only out of several defendants.

Sec. 9. So much and such parts of chapter 37 of the Consolidated Statutes of "Proceedings and Practice in the Supreme Court" as are inconsistent with and repugnant to the provisions of this Act are hereby repealed.

The notice under the Act, it would seem from analogy to the notice under the Stat. 8 Geo. II. c. 24, s. 5, relating to set off, is a practical proceeding not appearing on the record (3 *Chit. Pl.* 933, n. (*r*), and the above rule had not the effect of incorporating it therein, see *Lawton* v *Adams*, 5 All. 274; *ante*, p. 71.

A notice of defence of leave and license has the same effect as a special plea in en-

* *Quære*, whether it was intended that the notice should operate by way of traverse, and so entitle a defendant to a verdict without his giving any evidence—see *Commercial Bank* v. *European A. Sy.*, 2 Han. 219.

titling a plaintiff to full costs under Stat. 22–23 Car. II. c. 9 (*Marks* v *Gilmour*, 3 All. 170). The statements in one notice cannot be used as an admission on the issue raised by another notice (*Knapp* v. *King*, 2 Pugs. 312). A notice of tender as to part of the declaration cannot be given with the general issue to the whole (*Coulan* v. *Campbell*, 3 All. 348). Estopple by matter of record is not conclusive, unless pleaded so that the opposite party can take upon it that issue by which records are to be tried; and where notice of such matter is given, the jury are not precluded from finding the real truth (*Sulis* v. *Ferguson*, 5 All. 110). A defendant has no right to prove a notice of justification on cross-examination of plaintiff's witnesses (*Atkinson* v. *Smith*, 4 All. 309). Matter in abatement cannot be alleged in the notice, as the plea in bar with which the notice would have to be given is a waiver of grounds of abatement (1 *Ch. Pl.*, 6 *ed.*, 440; and see *Thompson* v. *Keith*, 6 All. 133; *Mercer* v. *Cosman*, 2 Han. 240). It is too late after verdict to object that notices and evidence thereunder had been given in an action of replevin (*Wilbur* v. *Trites*, 5 All. 633; see, as to the effect of evidence admitted without objection, where there are no pleas under which it is admissable, *Wallace* v. *Vernon*, 1 Kerr, 5; *Goddard* v. *Fredericton Boom Co.* 6 All. 452; and see *Robinson* v. *Palmer*, 2 All. 223, where several pleas being improperly pleaded, the defendant's evidence was confined to one). Proof of the facts stated in the notice will not entitle a defendant to a verdict, unless it constitutes a legal defence (*Whelpley* v. *Riley*, 2 All. 275; *Commercial Bank* v. *European As. Sy.*, 2 Han. 219; see *Clark* v. *Scottish Imperial Ins. Co.*, 2 P. & B. 249, and cases cited in Stockton's Bert. 84).

If there be a doubt whether or not the matter can be given in evidence under the plea pleaded, a notice will be allowed (*Ladds* v. *Vernon*, 1 Pugs. 350).

The notice should state the grounds of defence with reasonable certainty, and shew, in substance, that the matter alleged would have been pleadable in bar (*LeGat* v. *Duffy*, 3 All. 57; *Lang* v. *Gilbert*, 4 All. 359, distinguished in *Commercial Bank* v. *European Ass. Sy.*, 2 Han. p. 223). It was not the intention of the Act (13 Vic. c. 32,) to make anything a matter of defence under a notice which would not, before the passing of the Act, have been a defence under a plea; the object of the Legislature was to get rid of the formal parts of pleading, but to retain the substance, therefore a plea of general non performance of conditions being insufficient, a notice of the same kind will stand in no better position (*Commercial Bank* v. *European Ass. Sy.*, 2 Han. 219). If the matter stated would, if proved, be no defence to the action, and, if pleaded, be bad on general demurrer (see R. East. 1859, *post*, as to special demurrer), the notice will be set aside (*Wilson* v. *Street*, 2 All. 629; *Ladds* v. *Vernon*, *supra*; *McLeod* v. *Carman*, 1 Han. 592). In *Dowling* v. *Trites*, 2 All. 520, the notice was set aside with costs, and an application to amend, made on shewing cause, was held to be too late.

The notice may be as follows:

(Title of the court and cause.)

Take notice, that the above named defendant, on the trial of this cause, will give in evidence and insist—

1. That (*state the subject matter of the defence as in a plea*).

2. That (&c.)

L. M., *counsel for defendant.*

Dated this day of , A. D. 18 .

L. M., *counsel for defendant.*

Mr. P. A., *plaintiff's attorney.* Yours, &c., D. A., *defendant's attorney.*

The notice delivered should, it seems, be signed by the counsel.

Quære, whether the Act is applicable to *scire facias* at the suit of the Crown? It does not take away the right of pleading in such case (*LeGal* v. *Duffy*, 3 All. 57).

HILARY TERM, 1852—15 VIC.

Attachment—when to be taken out.

IT IS ORDERED, That in future no attachment do issue unless taken out in the term during which the same may have been granted, or in the vacation next succeeding the same, without the order of the Court or a judge (*a*).

(*a*) For the practice prior to this rule, see *R.* v. *Sheriff of Gloucester*, Bert. 187, and *R.* v. *Harper*, 2 All. 433. An attachment, it seems, could not have been issued after one year from the date of the rule without an order to revive the attachment, obtainable upon an affidavit that the contempt for which the attachment was granted was not satisfied and accounting for the delay (2 *Chit. Arch.*, 12 *ed.*, 1719; *Corner's Cr. Pr. Appendix*, 18; 1 *Gude's Cr. Pr.* 251). Where a *certiorari* was granted in Trinity term, but the writ was not taken out, the Court refused in Michaelmas term to enlarge the rule, on an affidavit of the attorney that he was not aware that, by the practice, he ought to have taken out the writ before Michaelmas term (*R.* v. *Harshman*, M. T. 1872, Stev. Dig. 166). A writ of attachment was returnable on the first Tuesday in Michaelmas term, an *alias* was applied for in the following Hilary term; held there was no such delay as to justify the Court in setting aside the *alias*, the defendant not shewing that he was prejudiced by the delay (*R.* v. *Knapp*, 1 P. & B. 238). An application for an attachment should be promptly made, or the delay explained by affidavit (*Cotton* v. *Stack*, 1 P. & B. 515).

An attachment can only go with the consent of all the judges (*per Ritchie, C. J.*, in *Jones* v. *Smith*, 2 Pugs. 45).

See R. Trin. 1860, r. 5, *post*, as to the necessary indorsements on the attachment, and R. Mich. 1874, form No. 7, as to issuing an execution in lieu of an attachment.

The cases on the recovery of costs by attachment are collected in the note to *Marsh* v. *Rose*, A. C. MS. 105; the subsequent cases are *Doe* d. *Scott* v. *King*, 3 Kerr, 492; *Campbell* v. *Todd*, 1 All. 199; *Tobin* v. *Layton*, 2 All. 622; *R.* v. *Harper*, *id.*, 433; *Doe* d. *St. John's Church* v. *Crawford*, 3 All. 266; *Doe* d. *Sargeant* v. *Sargeant*, 6 All. 67; *R.* v. *DeLaney*, *id.* 186; *Atkinson* v. *Mitchell*, *id.* 345; *Gilbert* v. *Cyr*, M. T. 1870, Stev. Dig. 51; *Robicheau* v. *Turner*, T. T. 1871, *id.*; *Cotton* v. *Stack*, 1 P. & B. 514. Attachment for costs was abolished by 37 Vic. c. 7 (*Doe* d. *DeVeber* v. *DeVeber*, 2 Pugs. 417), and restored by 38 Vic. c. 4, s. 20, now C. S., c. 38, s. 26 (*Bishop* v. *Meehan*, 2 P. & B. 328).

EASTER TERM, 1855—18 VIC.

New Trials from York Sittings.

1. IT IS ORDERED, That when a rule *nisi* for a new trial—or

of the like kind—has been granted in a cause tried at the sittings for the county of York, the case shall be entered by the clerk on the special paper for the term at which the rule is granted, without its being necessary to serve the rule *nisi*, as in other cases, unless the Court shall order the same to be served, and the cause shall be called on for argument in the order in which it is entered (*a*).

(*a*) See R. Hil. 1867, *post*, and *ante*, p. 50, as to motions for new trials.

Rules under the Act relating to Jurors.

2. In reference to the Act of Assembly, 18th Vic. c. 24 (*b*), intituled "An Act relating to Jurors," it is ordered as follows:

Verdict and Postea, where Jury are not unanimous.

1. The clerk at any Circuit Court or sittings shall enter on the minutes the time when the jury retire to consider of their verdict, and also the time when the jury return into Court to deliver their verdict.

2. If they return within two hours, the verdict shall be taken and entered in manner heretofore accustomed.

3. If they return after the lapse of two hours, after they are called over by their names and answer thereto, they shall be asked thus—"Gentlemen of the jury, are you all agreed on your verdict, or how many, and which of you, are agreed thereupon?"

If they shall answer that they are all agreed, the verdict shall be taken and entered in the usual manner. If they shall answer that they are not all agreed, but that five (*or* six) are agreed, the names of the jurors by whom the verdict is so returned shall be taken and entered in the minutes, and the verdict shall be recorded (*c*) as follows:

The jury having considered of their verdict, and not being able all to agree within two hours, five (*or* six) of their number, namely, A. B. [*the names to be here specified*], do say that they do find [*the finding to be here stated*].

This entry shall then be read over to the jury distinctly, and shall be returned on the *postea* as follows:

[*Commencing in the ordinary form* (*d*).]

And the jurors of that jury being summoned, also come, who to speak the truth of the matters within contained, are chosen, tried, and sworn,

and having retired to consider of their verdict, and not being able to agree within two hours, five (*or* six) of their number, namely [*here set forth the names*], pursuant to the Act of Assembly relating to jurors, say upon their oath [*here state the verdict*].

Oath of Constable in charge of Jury.

4. The oath of the constable who shall have charge of the jury, shall be as follows:

You shall keep this jury together in one of the jury rooms of this court house [*or as the place may be*] until their verdict is agreed on, or the Court shall otherwise order; you shall not suffer any person to speak to them, or any of them, neither shall you yourself speak to them, unless it be to ask if they are agreed on their verdict, except by direction of the Court.—So help you God (*e*).

(*b*) Now Con. Stat., c. 45—by this Act the number of the jury was reduced to seven, of whom five can render a verdict.

(*c*) The plaintiff has the right of electing to be nonsuited at any time before the jury pronounce their verdict (*Robinson* v. *Lawrence*, 7 Ex. 123; *Outhwaite* v. *Hudson*, *id.* 380; *Anderson* v. *Shuter*, 3 Bing. 291–2); but *quære*, whether he can so elect after it is pronounced, but before it is recorded? (*Lawton* v. *Chance*, 4 All. 411).

(*d*) See the form *post*, R. Hil. 1875, Form No. 4.

(*e*) This oath omits the clause depriving the jury of food, &c., in order that it may conform to the practice introduced by 18 Vic. c. 24, s. 16 (C. S., c. 45, s. 20).

It has been held in several of the Courts of the United States that a communication from the judge to the jury, made after they have retired to deliberate, and in the absence of the parties, is ground for a new trial (*Read* v. *Cambridge*, 26 Am. Rep 690). The jury separating after the judge's charge, and before verdict, will not invalidate the verdict, if there has been no tampering with them (*Lymburn* v. *DeVeber*, H. T. 1828, Stev. Dig. 296; *Armleder* v. *Lieberman*, 31 Am. Rep. 530). Where, after the jury retired from the bar, the defendant conversed with them respecting the cause and supplied them with victuals, the verdict was set aside (*Trefethen* v. *Carman*, 1831, Stev. Dig. 290). Affidavits of jurymen, stating that they had received evidence after retiring, cannot be received to impeach their verdict (*Att'y General* v. *Boyer*, A. C. MS. 78). Affidavits of jurors are, in general, inadmissable on motions to set aside verdicts (*Hodgson* v. *Carr*, 3 Kerr, 499; *Babbit* v. *Cowperthwait*, 3 All. 373; *Oulton* v. *Bowser*, E. T. 1873, Stev. Dig. 292; *Bennett* v. *Smith*, 1 P. & B. 28; *Olive* v. *Belvea*, 1 All. 462).

MICHAELMAS TERM, 1855—19 VIC.

Equity Appeal Paper.

IT IS ORDERED, That a paper be prepared by the clerk of the Court on the Equity side, and delivered to the Court on the first day of each term, containing a list of the causes in Equity in which appeals are to be heard, which shall be called the "Equity

Appeal Paper," and the causes therein shall come on to be heard in order next after the Special Paper (*a*) of the same term (*b*).

(*a*) *Ante*, p. 31.

(*b*) See R. Hil. 1869, *post*, establishing the "appeal paper," and R. Trin. 1868, *post*, as to Equity appeals.

EASTER TERM, 1856—19 VIC.

Barristers from other Colonies.—Admission of

IT IS ORDERED, That any barrister of the Supreme or Superior Court, or Courts of any of Her Majesty's Colonies or possessions in North America, Bermuda, or the West Indies, and entitled to practice as such in all the Supreme Courts of that Colony or possession in which he may have been originally admitted a barrister, may, upon the recommendation of the Barrister's Society, be called, sworn, and enrolled a barrister of this Court, and entitled to the rights and privileges as such, so long as he shall be a member of the said Barrister's Society; provided always, that no such barrister of any other British Colony or possession shall be entitled to be admitted a barrister of this Court, unless it be proved to the satisfaction of this Court, that a barrister of this Court would be entitled to like rights and privileges in all the Superior Courts of that Colony or possession in which the applicant may have been originally admitted a barrister (*a*).

(*a*) Any attorney who, before his admission, was an attorney of some British Court, may be called to the Bar one year after his admission, *ante*, p. 104. He cannot be admitted an attorney until he has studied one year in this Province, R. Mich. 1837, r. 9 (*ante*, p. 84), and passed an examination (*id.* r. 5, and see *ante*, p. 25).

MICHAELMAS TERM, 1856—20 VIC.

Judgment Roll—Interest—Final judgment delayed.

IT IS ORDERED, That where interest is awarded under the Act of Assembly 12th Vic. c. 39, s. 29 (*a*), the entry on the judgment roll shall be in the form following, or to the like effect:

"Therefore, it is considered that the said plaintiff do recover against the said defendant, &c. &c. &c., together with now adjudged by the Court here to the said plaintiff for interest upon the said damages

(*or* debt) pursuant to the Act of Assembly in such case made and provided, because the final judgment has been delayed by the act of the defendant; and also for his costs and charges, &c. &c. &c., which said damages, interest, costs, and charges, amount in the whole to ."

(*a*) Repealed by 36 Vic. c. 31, and re-enacted by s. 123 (now C. S., c. 37, s. 120; see Stat. 3–4 Wm. IV. c. 42, s. 30; Pleading Rules of 1853, r. 26.

Where the judgment of the Court, setting aside a verdict for the plaintiff, was reversed on appeal, the Court considered that the greater part of the delay was caused by the Court in ordering a new trial, and refused to exercise the discretion given by the Act in favor of the plaintiff (*McKay* v. *Commercial Bank*, 2 Pugs. 324). It was doubted in that case, which was an action on the case for false representation, whether the Court could allow interest in other actions than those brought for a liquidated sum of money where interest was recoverable; and in an action of trover (*New Brunswick R. Co.* v. *Murray*, 2 P. & B. 412), and an action on the case for unliquidated damages, where interest had been allowed by the jury (*Burpee* v. *Carvill*, 3 Pugs. 235), interest has been refused. But interest was awarded in *McGivern* v. *Stymest*, 5 All. 324, an action on a policy of insurance for average contribution—in the *Commercial Bank* v. *European Ass. Sy*, 2 Han. 245, an action on a policy of guarantee—and in *Gilbert* v. *Campbell*, *id.* 55–60, an action for the breach of a special agreement. Where the verdict is for both principal and interest moneys, interest will only be allowed on the former (*Commercial Bank* v. *European Ass. Sy.*, *supra*). Leave may, it seems, be obtained to enter the judgment *nunc pro tunc* (*id*).

Interest may be levied under execution upon judgments signed since the 23rd of April, 1862, if a direction to that effect be endorsed thereon (C. S., c. 37, s. 121—25 Vic. c. 25; see Stat. 1–2 Vic. c. 110, s. 17; Pr. Rules, 1853, r. 76).

Trinity Term, 1857—20 Vic.

Interlocutory Judgment.—Memorandum of

1. It is ordered, That from and after the present term, in every memorandum of interlocutory judgment, the term at which the writ has been made returnable be specified on the margin or at the foot of the memorandum, and that it be also stated whether the action is summary or not summary (*a*).

(*a*) 30 Vic. c. 10, abolished the summary practice, *ante*, p. 47. Writs of *mesne* process are not now returnable at term.

The date of the entry of the cause must be stated on the memorandum—R. Hil. 1875, r. 1, pl. 4, *post*.

Warrants of Attorney executed by Agents.

2. It is ordered, That in no case where the warrant of attorney to confess judgment appears to have been executed, not personally, but by an attorney or agent in the name of the principal, shall any contession be signed thereon by an attorney of this

Court, unless the deed or other power conveying the authority to execute the warrant, together with an affidavit of the due execution thereof by the principal, be produced to, and read and examined by, the attorney who is applied to to sign the confession, before signing the same; nor shall judgment be entered upon any such confession, unless such deed or other power, and affidavit of execution, be produced to the clerk and filed with the warrant of attorney and confession (*b*).

(*b*) In *Hutchinson* v. *Johnson*, 4 All. 40, decided before this rule, it was held that a defendant might bind himself by a subsequent recognition of a bond and warrant executed without authority, and the above rule was framed in consequence of this case (*Bots. Rules*, 142). The warrant of attorney must also be filed (R. Hil. 1837, r. 4, *ante*, p 80.

3. It is further ordered, That if such deed or other power bear date, or appear to have been given more than a year and a day before the application to sign judgment, no judgment be entered thereupon without the order of a judge, nor after ten years without a rule of Court founded on a previous rule *nisi*, as is now the practice (*c*) in regard to warrants of attorney of those respective dates.

(*c*) See R. East. 1848, r. 1, pl. 2, *ante*, p. 122.

Warrants and Powers of Attorney.—Date.

4. It is further ordered, That every warrant of attorney to confess judgment, and every deed or other power by which authority is granted to execute the warrant, bear date of the day upon which the same are respectively executed; and, if it should happen that such warrant of attorney, deed, or other power, is to be given by two or more persons who cannot conveniently execute the same on the same day, then the warrant, deed, or power shall bear date of the day on which it shall be first executed; and the day on which any subsequent execution shall take place shall be specified in the attestation of the subscribing witness or witnesses to such execution.

Warrants of Attorney.—Signing Judgment on

5. It is further ordered, That every attorney signing a confession of judgment upon a warrant of attorney, do annex to his signature the date of signing, and do mark with his name, or initial letters of his name, the said warrant of attorney, and also any

deed or power under which the warrant is executed, where the execution is not personal (*d*).

(*d*) The non-compliance by the attorney with these directions does not render void the judgment; the clerk ought not to sign judgment if he is aware of the omission (*Levi* v. *Muzeroll*, 3 All. 598).

Service of Process at place of business.

6. It is ordered, That where service of process is made on persons resident out of the Province, under the Act of Assembly 14 Vic. c. 2 (*c*), the nature and place of the business carried on by the defendant in the Province, and the particular nature of the agency or employment of the person with whom the copy of process may have been left for the defendant, be stated in the affidavit of the sheriff or deputy sheriff making such service, or otherwise proved by affidavit to the satisfaction of the judge, before any order is made for perfecting such service.

(*c*) The provisions of this Act are continued in 36 Vic. c. 31, ss. 10–11; C. S., c. 37, ss. 9–10. The agent, upon whom the Act authorizes the summons to be served, must be a third person, whose interest is not, at all events, necessarily adverse to that of the defendant in the suit. Service on an agent, who was himself the plaintiff, was held to be wholly defective and not merely irregular (*Parrott* v. *Roberts*, 2 P. & B. 388). See *ante*, p. 132.

See R. East. 1850, *ante*, p. 130, as to service at defendant's residence.

HILARY TERM, 1858—21 VIC.

Barristers and Attorneys.—Graduates.

IT IS ORDERED That the privilege granted by the rules of Court to students applying for admission as attorneys, and to attorneys applying for admission as barristers, when such students and attorneys are graduates of some college or university, be confined to graduates of some university situate within the British dominions; but that such order shall not apply to any student already entered (*a*).

(*a*) R. Hil. 1823, r. 1, *ante*, p. 25; Mich. 1835, r. 13, *ante*, p. 62, Trin. 1842, r. 2, *ante*, p. 105. See C. S., c. 33.

MICHAELMAS TERM, 1858—22 VIC.

Replevin—Postea and Judgment under 1 R. S., c. 126.

IT IS ORDERED (*a*), That when, upon the trial of any action of

replevin, the defence arises under the 15th and 16th sections of chapter 126 of the Revised Statutes, and upon the plea of *non cepit* a verdict is found for the defendant, the *postea* be in the form following, with such variations as the case may require:

"Afterwards, &c. [*in the usual form*], say upon their oaths, that the said defendant did take and detain the said goods and chattels mentioned in the said declaration, as a distress for rent upon certain premises enjoyed by the said plaintiff under a grant or demise at a certain rent, and that there was due to the defendant for such rent at the time of making the distress, and still is due, the sum of , and they assess the damages of the said defendant by reason of the premises for the said rent, and the costs and charges of making the said distress, at the sum of , pursuant to chapter 126 of the Revised Statutes, besides his costs and charges, &c."

If the bailiff of the landlord, or any one acting in aid of the landlord, be made a defendant, the *postea* may be varied, as follows:

"And that there was due to the defendant, C. D., &c. [*as before*], and that the said defendant, E. F., was, at the time of making the said distress, the bailiff of the said C. D.," *or* "that the said E. F. was then and there present, aiding and assisting the said C. D. in making the said distress, &c."

And that the entry of judgment on the said *postea* be in the form following, with the requisite variations as before, according to the circumstances of the case:

"Therefore, it is considered that the said plaintiff take nothing by his suit, but that the said defendant do go thereof without day, &c.; and it is further considered, that the said defendant [*or* that the said defendant C. D.] do recover against the said plaintiff the said sum of , for his damages so assessed as aforesaid, and also for his costs and charges, by the Court of our said Lady the Queen now here adjudged to the said defendant, according to the said Revised Statutes; which said damages, costs and charges in the whole amount to , and that the said defendant have execution thereof."

(*a*) See the substituted forms given by R. Hil. 1875, Forms Nos. 9 and 10, *post*.

EASTER TERM, 1859—22 VIC.

Notice of Defence.—Several distinct grounds.—Duplicity.

IT IS ORDERED, That when a notice delivered under the Act of Assembly, 13th Vic. c. 32 (*a*), includes several distinct grounds of defence, which would, before such Act, have required separate

pleas, such separate grounds of defence be numbered consecutively and placed in separate clauses; but any objection to the form of the notice, on the ground of duplicity (*b*), must be made to a judge within fourteen days after the same is delivered, who will, upon summons, make such order for allowance or disallowance of the notice, or amendment of the same, and on such terms as the case may require; and no objection to the notice on the ground of duplicity will be allowed at the trial of the cause.

(*a*) See 43 Vic. c. 8, cited *ante*, p. 133.

(*b*) See the cases cited *ante*, p 97, for instances of duplicity in pleas; and see, as to how far other grounds of special demurrer are available in the case of a notice, *Wilson* v. *Street*, 2 All. 63; *Ladds* v. *Vernon*, 1 Pugs. 350. See *ante*, p. 135, as to setting aside notices defective in substance.

It is a proper course to bring the question of the legality of the notice before the Court, and much more desirable than leaving it to be decided at the trial (*Wilson* v. *Street*, *supra*; see *McLeod* v. *Carman*, 1 Han. 593), but if the notice is substantially defective, the point may be taken at the trial (*ante*, p. 135).

TRINITY TERM, 1859—22 VIC.

Judgment Roll.—Offer to suffer judgment by default.

1. IT IS ORDERED, That in any case (not summary) where, under the provisions of the Act of Assembly, 18th Vic. c. 9 (*a*), an offer and consent in writing has been filed by the defendant, to suffer judgment by default, for a certain specified sum as debt or damages (as the case may be), and the plaintiff has not, after due notice thereof, filed his acceptance of such offer, but has taken the case down to trial, and has recovered a verdict, but not for a greater sum than the sum so offered, the entry or suggestion on the judgment roll shall be as follows:

"And now, pursuant to (*b*) the Act of Assembly passed in the eighteenth year of the reign of Queen Victoria, entitled "An Act concerning Tender in actions at Law and Suits in Equity," on the day of , in the year of our Lord , the said defendant C. D., files in the office of the Clerk of the Pleas of this Court, an offer and consent in writing in the words following:—[*insert the offer*]—which offer and consent the said plaintiff, A. B., has not accepted; therefore, the issue joined between the parties remains to be tried: Therefore, let a jury thereupon come, &c." [*as in ordinary cases, to the conclusion of the pos*], *and then proceed as follows:*

"And inasmuch as it appears by the said return, that the debt [*or damages*] was not greater in amount than the sum for which the said C.

D. offered to suffer judgment by default, it is considered that the said A. B. do recover his said debt [*or damages*] so assessed at the sum of , together with his costs and charges by him about his suit in this behalf expended, up to the said day of , and for these costs and charges to , which said debt [*or damages*], costs and charges in the whole amount to , and that the said A. B. have execution thereof. And it is further considered, that the said C. D. do recover against the said A. B. for his costs and charges by him incurred after the said day of , and that he have execution thereof." (*c*)

(*a*) This Act was repealed by 36 Vic. c. 31, and its provisions, with some alterations, were enacted in ss. 129–133, of which C. S., c. 37, ss 127–131 is a copy. The latter Acts expressly empower the defendant's attorney to sign the offer, it having been held (*Wetmore* v. *Desbrisay*, 4 All. 356; *Wilson* v. *Maxwell*, 6 All. 219) under the original Act that the defendant should personally sign it; and they do not contain the expression, "pending in any court," used in the original Act. It was decided, in *Gibson* v. *Bateman* (4 All. 598, under 18 Vic. c. 9), that the offer could have been filed before declaration.

The offer may be in the following form:

(*Title of the court and cause.*)

The above named defendant hereby offers and consents to suffer judgment by default in this cause, and that judgment shall be rendered against him as debt [*or* damages] for the sum of [*if in respect of one or more of several causes of action under s. 126 add*, in respect to the cause (s) of action set out in the first (and second, &c.) count (s) of the declaration in this cause], pursuant to chapter thirty-seven of the Consolidated Statutes. Dated, &c.

P. A., *plaintiff's attorney.*

To A. B., *the above named plaintiff.*

Notice to plaintiff's attorney.

(*Title of the court and cause.*)

Take notice, that an offer and consent in writing by the defendant to suffer judgment by default in this cause, a true copy whereof is hereunto annexed, has been filed in the office of the Clerk of the Pleas.

Dated, &c.

Yours, &c.,

P. A., *plaintiff's attorney.*

Mr. D. A., *defendant's attorney.*

Acceptance of offer.

(*Title of the court and cause.*)

The plaintiff hereby accepts the judgment for the sum of , as debt [*or* damages] offered, by the offer and consent in writing, filed by the defendant in this cause.

Dated, &c.

P. A., *plaintiff's attorney.*

Judgment roll on acceptance of offer.

(*As in ordinary cases to the end of the pleadings, and then proceed as follows*)—"And now, pursuant to chapter thirty-seven of the Consolidated Statutes, on the day of , the said defendant, C. D., files in the office of the Clerk of the Pleas, of this Court, an offer and consent in writing, in the words following (*insert the offer*), which offer and consent the said plaintiff, A. B., has accepted. Therefore, it is considered that the said A. B. do recover against the said C. D. the said sum of , for which the said C. D. offered to suffer judgment by default, and also , for his costs of suit, by the Court here adjudged to the said A. B., which in the whole amount to ."

(*b*) "Chapter thirty-seven of the Consolidated Statutes."

(*c*) The offer must, it has been held, be taken with reference to the state of the pleadings at the time; therefore, where it was made before plea, and refused, and the de-

fendant afterwards gave notice of set-off, which he proved at the trial, and thereby reduced the plaintiff's demand below the amount tendered, the Court, on motion to review the taxation, considered that the defendant should have renewed his offer under the altered position of the parties, and allowed the plaintiff costs (*Miller* v. *Lakeman*, 6 All. 510; *McLeod* v. *Desbrisay*, *id.* 517). It is difficult to discover in the Act any distinction between the reduction of the plaintiff's claim by set-off and that by part payment, Statute of limitations, &c., but it is doubtful whether the defendant would, in the latter instances, be bound to renew his offer to deprive the plaintiff of his costs. The Act expressly provides for the alteration of circumstances between the date of the offer and the time of trial by the accruing of interest, or, according to *Belyea* v. *Stephenson*, 6 All. 513, damages in the nature of interest. The hardship of the case in *Miller* v. *Lakeman*, seems to have had much weight, and were it not that the Court seems indisposed to put a strict construction on this Act, much injustice would be inflicted on plaintiffs.

The judge who tried the cause may make an order allowing the plaintiff full costs, and the clerk was directed in future to be guided by such order (*McLeod* v. *Desbrisay*, 6 All. 517). Where the plaintiff accepts and signs judgement on an offer for a sum insufficient to carry costs, he does not thereby conclusively admit that such sum is his real claim, for which the action should have been brought, thus he may shew that the sum accepted is the balance due, after giving the defendant credit for a set-off which he had pleaded (*Turner* v. *Hamilton*, 6 All. 156, under 12 Vic. c. 40, s. 18), or that his real claim was more than could be sued for in the County Court, and that he accepted the tender because of the plaintiff's insolvency (*Morrice* v. *Wilson*, 2 Pugs. 225). So he has been allowed to shew that the action could not be brought in the County Court, because he had reason to believe that the title to land would be disputed (*Peppers* v. *Johnson*, 1 P. & B. 502), and *semb.*, that in all cases where the offer is accepted, the plaintiff is entitled to full costs (see *id.*, and R. Trin. 1839, r. 3, *ante*, p. 94).

Where the offer is made and accepted, after a verdict for the plaintiff has been set aside, the plaintiff is not entitled to the costs of the trial (*Wood* v. *Stymest*, 5 All. 429; *Ryan* v *James*, 2 Pugs. 219).

Where the plaintiff's attorney was unable, in consequence of an unintentional non-payment of Court fees, to file an acceptance within the time allowed, and a judge's order was made granting him further time, the Court refused to set it aside (*Carrick* v. *McLeod*, 5 All. 527). A rejected offer does not prevent the defendant from obtaining judgment *qu.* nonsuit (*Thomas* v. *DeMill*, 3 All. 407). The plaintiff is not bound by his acceptance of an offer which is a nullity (*Wilson* v. *Maxwell*, 6 All. 219).

The offer is a confession of the action *pro tanto*, and when accepted, settles all issues and ends all controversy in the suit between the parties, and a plaintiff could not afterwards proceed under sec. 92 of the Insolvent Act of 1869 (*Jones* v. *Bijeau*, 1 Pugs. 334).

The form of plea given in the 5th *ed.* of Chit. Pl., vol. 3, 909, intended to elude the payment of money into Court, has been disapproved of (1 Jur, 121; see *Sayre* v. *Smith*, 4 All. 164).

Summary Practice. (*d*)

2. In summary causes, when one of the several plaintiffs or defendants shall happen to die after the commencement of the

action, the subsequent proceedings shall be in the name of or against the surviving plaintiff or plaintiffs, or defendant or defendants, as the case may be, describing him or them respectively, as survivor or survivors of A. B., who hath died since the commencement of this suit, and who was a joint plaintiff or defendant therein.

(*d*) 30 Vic. c. 10, s. 38, abolished the summary practice, *ante*, p. 47. See *Crone* v. *Goodine*, 4 All. 371, before this rule.

MICHAELMAS TERM, 1859—23 VIC.

Judgment qu. nonsuit.—Affidavit for

IT IS ORDERED, That in future the affidavit on which a motion is made for judgment, as in case of a nonsuit (*a*) for not proceeding to trial according to the practice of the Court (where notice of trial has not been given), do state the particular term in or before which issue has been joined, or do state some particular day in vacation on or before which issue has been joined (*b*).

(*a*) See R. Hil. 1836, rr. 3-4, *ante*, p. 64.

(*b*) *Laney* v. *Siddall*, 3 Kerr, 223, therefore no longer furnishes the correct rule.

By the practice of this Court the cause is at issue, though the plaintiff has not added the *similiter* (*Doe* d. *Gray* v. *Smith*, 1 All. 508). The affidavit must also state where the venue is laid (*Doe* d. *Crane* v. *Wry*, 2 All. 311).

There is a substantial difference between an application for judgment for not proceeding to trial *pursuant to notice*, and for not proceeding to trial *according to the practice of the Court*. In the former instance the defendant is entitled to costs of the day, but not in the latter. Where the notice of trial was insufficient, and the defendant, by objecting thereto, prevented the plaintiff, who was willing to go to trial, from so doing, it was held that a motion could only be sustained on the latter ground, and the default alleged in the affidavit (not proceeding pursuant to notice) being answered, a rule was refused, though the notice of motion was general (*McDonald* v. *Rider*, 2 Kerr, 218).

The following form of affidavit by the attorney is taken from *Chit. Forms*, 6 *ed.*, 108:

(Title of the court and cause.)

"I, D. A., of , gentleman, attorney for the above named defendant, make oath and say—

1. That the venue in this cause was, and is, laid in the county of .
2. That issue was joined in this cause on the day of last.
3. That the said plaintiff hath not, as yet, proceeded to the trial of the said cause, or given any notice of the trial of the same."

If the application is grounded on an omission to proceed to trial pursuant to notice, *substitute for the 3rd paragraph*—

"3. That notice of trial was given on the part of the above mentioned plaintiff for

the last [Circuit Court] holden at , in and for the county of , and that the said plaintiff did not proceed to the trial of this cause in pursuance of his said notice" (*if it be intended to apply for the costs of the day, in case of the rule being discharged on a peremptory undertaking*), or if the motion is simply for costs of the day, (*ante*, p. 37), *add* "nor countermand such notice in due time, according to the rules of this honorable Court.")

HILARY TERM, 1860—23 VIC.

New trials.—York Sittings.

1. IT IS ORDERED, That the Rule of Court of Michaelmas Term 1st Victoria, No. 10 (*a*), relating to motions for new trials in causes tried at the sittings for the county of York, shall not apply to causes tried at the sittings holden in January in each year, but that motions for new trials in causes tried at the said last mentioned sittings, shall be made as in causes tried at any of the Circuit Courts.

(*a*) *Ante*, p. 85. See *ante*, p. 50, for the present practice.

2. (Affidavits in Equity—see Equity rules, *post*).

TRINITY TERM, 1860—23 VIC.

Crown Office.

IT IS ORDERED, That the following regulations be observed in the office of the Clerk of the Crown in this Court:

Blank Writs.

1. Blank writs of *habeas corpus*, and any others which require the fiat of a judge to be endorsed thereon before they can be issued for the purpose of being executed, and blank writs of subpœna, may be delivered to the respective attorneys of this Court signed and sealed, to be by them filled up as occasion may require; they accounting to the clerk therefor, and forwarding to his office proper *præcipes* for such of the said writs as they may from time to time fill up and issue, stating in the *præcipes* the name of the judge whose fiat has been indorsed, where a fiat is necessary.

2. No other blank writs than those above specified to be signed and sealed, nor shall any mere blank pieces of parchment be signed and sealed by the clerk of the Crown.

Indorsment on Writs from Crown Office.

3. Where writs of attachment, or other writs, are issued out of the Crown office upon a rule of Court therefor, or by order of a judge, the clerk shall, at the time of signing and sealing the writ, put at the foot thereof, or indorse thereon, a memorandum in the form following, or to that effect, as the case may be:

"By Rule of Court of term, A. D. 18 ," *or* "By order of the Chief Justice or Mr. Justice , dated , filed in the Crown office" (*a*).

(*a*) It is not necessary to file a *rule* for an attachment—the words "filed in the Crown office" relate only to a judge's order (*R.* v. *Knapp*, 1 P. & B. 239; *Co'well* v. *Robertson*, *id.* p. 487). An indorsement is also made on writs of attachment, describing the nature of the contempt in the words of the rule. An indorsement as follows, "In *John Doe*, on the demise of *Edward Cogswell* and others v. *Valentine Smith*, for not attending Court when subpœnaed on the part of the plaintiff, issued 14th February, 1877, P. A,, attorney for lessor of plaintiff," was held sufficient, the defendant having full knowledge of the alleged contempt and of the suit in which it was committed (*R.* v. *Knapp*).

HILARY TERM, 1862—25 VIC.

Patent Parchment.

IT IS ORDERED, That from and after the first day of Easter term next, the article called and known as *patent parchment* be not used for the writs and records of this Court (*a*).

(*a*) In *Burns* v. *Burns*, 4 All. 229, it was held that a material called "Brown's patent parchment" was sufficient within R. East. 1785, r. 1, *ante*, p. 1. The above rule was thereupon made.

HILARY TERM, 1863—26 VIC.

Arrest.—Foreign Judgment.—Judge's order.

1. IT IS ORDERED, That no person shall be held to bail upon the judgment of the Court of any foreign country, or of any British Colony, without a judge's order (*a*).

(*a*) By a rule of the Court of King's Bench, H. T. 48 Geo. III., it is ordered, "that no person be held to special bail in an action of trover or detinue without an order made for that purpose by the Lord Chief Justice or one of the judges of this Court," and this rule, though made after the establishment of the Supreme Court, is universally acted on in this Province. The principle which dictated the introduction of it would equally apply to actions of trespass, *de bonis asportatis* (*Petersd.* 39).

For the present practice with reference to holding to bail, see C. S., c. 38, ss. 1–2.

The right to arrest in [illegible] not taken away (*Mullin* v. *Frost*, 2 P. & B. 463), nor is it necessary in such case to state in the affidavit, that the arrest is not made for the purpose of vexing or harassing the defendant (*Weldon* v. *O'Sullivan*, 3 P. & B. 441). The amount for which a judge should order bail in an action of tort, must be, to a great extent, a matter of discretion to be exercised by him with reference to the facts disclosed by the affidavits. Sec. 7 of cap. 38 does not apply to arrests in such actions (*Beste* v. *Bernstain*, 4 P. & B. 106).

Where a judge's order is necessary under sec. 1, [illegible] affidavit need not allege the plaintiff's belief that the defendant is about to quit the Province (*O'Sullivan* v. *O'Sullivan*, 3 P. & B. 396, *Weldon* v. *O'Sullivan*, *id.* 441.) The order may be made for the arrest of one of several defendants (*id.*)

See the following cases as to the statement in the affidavit of causes of action *ex contractu*—common counts, *Cotter* v. *Brownell*, 1 Pugs. 356; *Davidson* v. *O'Connell*, 3 Pugs. 684—interest, *Simonds* v. *Simonds*, 2 All. 468; *Gray* v. *Alcorn*, 1 P. & B. 555—Bills and notes, *Cushing* v. *Gordon*, 6 All. 524; *Nicholson* v. *Nowlin*, 3 Pugs. 210; *Maclellan* v. *Barnes*, 3 P. & B. 374—Special agreements, *Nevins* v. *Cole*, 2 Han. 398; *Holderness* v. *MacFarlane*, 3 All. 152; *Ford* v. *Ladd*, 3 Kerr, 287; *Mitchel* v. *McMichael*, 1 P. & B. 58; *Whittimore* v. *Herbert*, 2 P. & B. 361—Describing defendant by initials, *McLellan* v. *Milmore*, *ante*, p. 56—Dates in figures instead of words at length, *Gray* v. *Alcorn*—Foreign currency, *National Park Bank* v. *Ellis*, 2 P. & B. 547—Several sums, total amount, *Cahill* v. *Cahill*, 2 P. & B. 438—By agent, *Robin* v. *Taylor*, 1 P. & B. 212—Foreign corporation, *Avon Stone Co.* v. *Dunham*, 2 P. & B. 460.

Divorce and Matrimonial Appeals.

2. It is ordered, That the clerk of the pleas do keep a paper, to be called the "Divorce and Matrimonial Appeal Paper," (*b*) in which shall be entered all appeals from decisions of the Court of Divorce and Matrimonial Causes; such entries to be made on or before (*c*) the first day of the term next after the decisions in the said Court; such appeals to be heard next after the Equity appeal paper (*d*).

3. It is ordered, That upon hearing of an appeal from the Court of Divorce and Matrimonial Causes, pursuant to the Act of Assembly, 23rd Vic. c. 37 (*e*), it shall be the duty of the appellant to procure and file with the clerk of the pleas in this Court, certified copies (*f*) of the libel and answer and decree; and that on hearing the appeal, the evidence [illegible] received from the report of the judge of the Court of Divorce and Matrimonial Causes.

(*b*) See R. Hil. 1869, *post*, by which one appeal paper for all appeals is to be kept.

(*c*) No entries are to be made after the opening of the Court (R. Mich. 1866, *post*).

(*d*) See R. Mich. 1855, *ante*, p. 138.

(*e*) Now C. S., c. 50. Section 17 gives the appeal: "Either party dissatisfied with

any decision of the Court in any suit or proceeding may, under such rules and regulations as the Supreme Court may have already made or may hereafter make, appeal therefrom to the Supreme Court, from whose decision an appeal may be made to Her Majesty in Her Majesty's Privy Council, under such rules and regulations as Her Majesty may prescribe, or to any other Court of appeal having jurisdiction."

The Supreme Court, on hearing an appeal, has no jurisdiction to grant costs to the wife pending the suit, to enable her to prosecute the appeal, no such application having been made to the Court below (*Hunter* v. *Hunter*, 5 All. 593). In a decree of divorce *a vinculo matrimonii*, on the ground of the wife's adultry, where the conduct of the husband has been free from blame, the wife should be barred of her dower, and where, in such case, the decree did not bar the dower, the Supreme Court, on appeal by the husband, ordered the decree to be altered in that respect, though no notice of the appeal had been given to the wife—she not having appeared to the suit (*Leeman* v. *Leeman*, E. T. 1872, Stev. Dig. 157

(*f*) The Court may order the proceedings to he printed—R. Trin. 1868, *post*.

4. (Clerk's fees in Equity. See Equity rules, *post*.)

HILARY TERM, 1865—28 VIC.

Service at Attorney's residence.

ORDERED, That no service of any paper on an attorney in any cause, shall be deemed good service by leaving such paper at his dwelling house or last place of abode, unless it shall appear by the affidavit of service that the attorney has no office, or, if having an office, that the same was closed, or if open, that there was no person in such office upon whom service could be made; in any of which cases, leaving the same at the dwelling house or last place of residence of the attorney, shall be deemed sufficient service thereof (*a*).

(*a*) See R. East. 1785, r. 11, *ante*, p. 6.

Service by placing the paper under the door of the attorney's office, is not sufficient, without some evidence of its having come to hand (*Burdett* v. *Lewis*, 7 C. B. N. S. 791; see *Atkinson* v. *Thompson*, 2 Chit. Rep. 81). Where the attorney had left the Province, and had no known place of residence therein, service of a notice, by putting a copy under the door of his office and leaving a copy at the house where he last lodged, and with the counsel by whom notice of trial had been given, was held sufficient (*Wheelock* v. *Alden*, 2 Kerr, 172; and see *Styrling* v. *Lloyd*, *ante*, p. 6, as to service on a defendant).

MICHAELMAS TERM, 1865—29 VIC.

Common Motion Day.

IT IS ORDERED, That Tuesday in the second week of each

term shall be the regular day for motions, instead of Saturday of that week (*a*); on which day motions shall have the precedence of the ordinary business, which, however, shall be proceeded with after the motions are concluded. Provided, however, that one or more of the judges will sit in Court on the second Saturday, whenever occasion may require.

(*a*) This rule is rescinded by R. Hil. 1877, *post*, which orders, that "the second Saturday in each term shall be a day for such motions."

MICHAELMAS TERM, 1866—30 VIC.

Entering Causes at Term.

1. IT IS ORDERED, That hereafter causes may be entered on the respective papers on the Monday preceding each term, and shall not be entered after the opening of the Court, without leave therefor (*a*)

(*a*) A cause struck out of the special paper may be entered at a subsequent term, without any special permission of the Court, if the entry is made within the proper time. Any objection to the entry of a cause should be made as soon as the erroneous entry is discovered, and should not be put off until the cause is called on for argument (*Milner* v. *Bridges*, 2 P. & B. 93, *per Wetmore, J.*).

Motion Paper.

2. The (*b*) causes entered on the motion paper shall come on to be heard immediately after the conclusion of the common motions at the beginning of each term, and the causes upon the other papers respectively shall be taken up in their order as now provided, immediately after the motion paper is concluded.

(*b*) This rule, so far as it alters the practice established by R. Hil. 1836, r. 1 (*ante*, p. 62), is rescinded by R. Hil. 1876, *post*.

HILARY TERM, 1867—30 VIC.

New Trials.—Notices of Motion for.

ORDERED, That in future the notices of motions for new trials, or to set aside verdicts, required to be given by the rules of Michaelmas term, 5 Wm. IV. (*a*), and Michaelmas term, 1 Victoria (*b*), shall state particularly the grounds of the intended motion.

For example:—If the motion is to be made on the grounds of mis-direction, or the improper admission or rejection of evidence,

the notice shall set forth the particular part or parts of the judge's direction objected to, and the particular portion or portions of evidence alleged to have been improperly admitted or rejected; and in like manner on all other grounds, specifying the same separately and distinctly, and as particularly as the circumstances of the case will admit of, and the party shall, on the motion, be confined to the grounds so specified (*c*).

(*a*) See this rule, *ante*, p. 50.

(*b*) *Ante*, p. 85, relating to new trials from the York Sittings.

(c) See 42 Victoria, c. 8, *ante*, p. 50, and see *Powell* v. *Wark*, 4 P. & B., p. 21, as to the particularity necessary in setting out objections to evidence.

The Court will only hear one counsel on stating points and moving for a new trial under the Act 42 Vic., c. 8 (*Gilchrist* v. *Dominion Telegraph Co.*, 4 P. & B. 241.)

A new trial will not be granted on an objection which might have been but was not taken at the trial, or on a point not raised there, because if it had been taken the opposite party might have satisfied or explained it. See *Greene* v. *Balemon*, L. R. 5 H. L. 591; *Doe* d. *Gards* v. *Needs*, 2 M. & W., 129; *Doe* d. *Cole* v. *Harper*, Bert., p. 303; *Rogers* v. *Peck*, *id*, 318; *Cormier* v. *Thibideau*, 1 Kerr, 297; *Connors* v. *Mc. Laggan*, 2 Kerr, 446; *Rose* v. *Lindsay*, 3 Kerr, 645; *Doe* d. *St. George's Church* v. *Sweeny*, 1 All., 416; *Doe* d. *Baxter* v. *Baxter*, 3 All., 306; *Szery* v. *Brayley*, *id.*, 315; *Brown* v. *Cunard*, *id.*, 319; *Doe* d. *Peters* v. *McGloyn*, 4 All., 189; *Kelly* v. *Dow*, *id.*, 435; *Wilbur* v. *Trites*, 5 All., 633; *Goddard* v. *Fredericton Boom Co.*, 6 All., 448; *Marvin* v. *Butterwell*, T. T. 1867, Stev. Dig., 285; *Doe* d. *Robinson* v. *Chassey*, 1 Han., 51; *Alexander* v. *Hartt*, *id.*, 161; *Campbell* v. *Wheeler*, *id.*, 269; *R.* v. *Steadman*, *id.*, 371; *McNiel* v. *Moore*, 1 Pugs. 234; *Doe* d. *McVey* v. *Daniel*, 2 Pugs. 372; *Kennedy* v. *Turnbull*, *id.*, 378; *Lynch* v. *Keegan*, 3 Pugs. 645; *Ward* v. *Parkhill*, 2 P. & B. 221; *R.* v. *Archibald*, *id.*, 250; *Smith* v. *Isolated R. and F. F. I. Co.*, *id.*, 31; *Doe* d. *Heathcote* v. *Hughes*, *id.*, 296; *Copp* v. *Reed*, 3 P. & B. 458; *Flood* v. *Morrisey*, 4 P. & B. 5; *Scribner* v. *McLaughlin*, 1 All. 379.

Counsel should take care that the points are properly entered on the judge's notes (*Brown* v. *Taylor*, Bert. 343), as the Court will take their information only from this source, (*Tilley* v. *Johnson*, 5 Dowl., 606; *Major* v. *Oxenham*, 5 Taunt. 340; *Copp* v. *Reed*, 3 P. &. B., 458.)

By-Laws and Regulations of the Barristers' Society of New Brunswick, made under the authority of the Acts 9th Victoria, Chapter 48, entitled "An Act to incorporate the Barristers' Society of New Brunswick," and 22nd Victoria, Chapter 28, in relation thereto.

2. The accompanying By-Laws and Regulations of the Barristers' Society of New Brunswick (*a*), made and passed on the eighth day of February, 1867, under the authority of the Act of Assembly 9th Victoria, cap. 48, entitled "An Act to incorporate the Barristers' Society of New Brunswick," and the Act 22

Victoria, cap. 28, in relation thereto, having been submitted to the judges of the Supreme Court for approval and sanction,

Ordered, that the same are hereby approved of and sanctioned, with the exception of the proviso contained in the 22nd Rule.

(*a*) Of these by-laws, those relating to barristers, attorneys and students are as follows:—

Repeal of former By-Laws.

1. By the Barristers' Society of New Brunswick, sanctioned by the Judges of the Supreme Court of this Province, *It is Ordained*, that the By-Laws and Regulations of this Society, hitherto in force or use, excepting so far as may affect anything heretofore done under the same, or any right acquired thereby, are hereby repealed.*

Members.

2. All members of the Bar of New Brunswick who have heretofore signified their assent, in writing, to the Secretary of the said Society, by respectively signing their names on a Roll, hitherto used for that purpose, and all other members of the said Bar who may hereafter signify their assent as aforesaid by signing the said Roll, or by writing to the Secretary of the said Society, authorizing him to sign the name of such member to such Roll, and which writing the said Secretary shall keep, and file, and sign the Roll accordingly, shall be deemed members of the Barristers' Society, and be subject to the By-Laws and Regulations thereof.

Officers.

4. The Officers of the Society shall be a President, Vice President, Treasurer, Librarian, and Secretary, to be elected annually by ballot, at a General Meeting, to be holden on the first Friday in Hilary Term, in each year, in the Law Library Room, at such hour as may be appointed. A General Meeting of the Society shall also be holden on the first Friday of each Term respectively, at such hour as may be appointed by the Council.

Council.

6. There shall be a Council, to be composed of the President, Vice President, and seven Barristers, to be elected annually at the General Meeting as aforesaid. The Judges of the Supreme Court and Court of Admiralty, being members of this Society, shall be honorary members of the Council. Three members shall be a quorum.

Authority of Council.

9. The Council shall have the general management of the affairs of the Society, and may, on due notice, with time and place of meeting, settle all questions between members relative to their *practice;* and regulate all other matters which can come under the cognizance of this Society,† or may refer the same to the Court; but an appeal shall in all cases be allowed from the Council to the next General Meeting, a notice of such appeal to be given to the Secretary within twenty days after notice of the decision.

* See these by-laws, *ante*, p. 116, and R. Mich. 1878, r. 1, *post*.

† See 2 All. 533.

Complaints against Members—How made.

10. A member complaining of any infringement of the Rules or By-Laws of the Society, or of any conduct of another member, shall inform the Council in writing of the nature of his complaint, and the Council shall thereupon, after having given at least twenty days previous notice to the person complained of, of the time and place of meeting, together with a copy of such complaint, make such decision thereon as they may deem right, and may also report their proceedings to the Court if they deem it necessary so to do.

Objections to Admission of Attorneys.

11. It shall be the duty of the President, and, in his absence, of the Vice President, to enquire into the regularity of every admission to the office of Barrister or Attorney, and to guard against and oppose, in the name of the Society, every irregular or improper admission, and to advance such objections, in every case, as may be thought expedient or necessary for the honor or credit of the Profession, and to act as Counsel for the Society on all occasions before the Court.

Examiners.

18. In addition to the office-bearers enumerated in the fourth rule, and at the time of their election, one or more members of this Society, of the degree of Barrister-at-Law, and being members of the Council, shall be annually appointed Examiners of candidates for admission, as Students or Attorneys, and in case of the sickness, death, or temporary absence of such Examiners, or either of them, or their neglect or refusal to act, the Council, or, if necessary, the Secretary, may appoint others, *pro tem.*, to fill the vacancy, which Examiners, or one of them, previous to each term, shall prepare reasonable and appropriate questions in writing, for the examination of such candidates as may offer at the approaching term, and shall attend their examination as hereafter provided, and shall respectively receive for services actually performed such fees as the Council may determine.

Admission of Students.

19. Before any person is presented to the Barristers' Society, for the purpose of being examined, in order to his being entered as a Student in the office of any Barrister, he shall give a Term's previous notice in writing put up in the Library Room, on or before the first Friday of the Term, and shall present a petition to the Council of the said Society, setting forth his age, place of birth, residence, place of education, the branches in which he is prepared to undergo an examination, and the name of the Barrister with whom he proposes to study, which petition shall be subscribed by the applicant, and certified by such Barrister, after a careful enquiry and personal examination, as to the character, habits and education of the applicant, and that upon such enquiry and examination, the Barrister verily believes the applicant to be a proper person and properly qualified to be admitted as a student-at-law, and upon his being approved by the Council, he shall be fully examined at Fredericton, at such time as may be appointed, by questions in writing, in such branches as two members of the Council (one being an Examiner) may determine, subject to the approval of a Judge, and who shall certify accordingly.*

* See former rules R. Trin. 1843, r. 1, *ante*, 100; Mich. 1847, by-law 1, *ante*, 116.

20. Upon the applicant passing such examination, and the Council being satisfied as to his moral character, good habits, and fitness to enter on the study of the Law, he shall receive a certificate to that effect.*

Admission of Attorneys.

21. Every Student making application† for admission, as an Attorney, shall give a Term's notice, by a writing for that purpose put up in the Law Library on or before the first Friday of the Term, and shall undergo an examination at such time and place as the Council or any two members thereof (an examiner being one) may appoint, by written questions previously prepared, under the authority of the Council, who may alter, add to, or amend the same, for such Student or Students to answer, who shall put the answers to such questions in writing, and during such examination shall not be permitted to refer to any book, or person, or other source of information, to assist him in such answers, and shall write the same in a legible hand, in the presence of one of the said Council, or the Secretary of the said Society, which written answers shall be submitted to the aforesaid two members of Council for their opinion upon the same, who, after examination, shall submit them for the approval of one of the Judges, such answers to be so submitted and decided on without the said members or Judge knowing the name of the respective parties who gave in the same, such answers being designated by letters or numbers only; and if such Student shall be deemed qualified, he shall receive a first, second or third class certificate, according to the merits of his written answers.

22. That upon a Student passing such examination, and the Council being fully satisfied as to his moral character, habits and conduct during the term of his study, he shall be recommended‡ for admission as an Attorney, [provided§ always, that in case any Student shall not pass his examination before the said two members of Council and Judge aforesaid, they shall report the same to the Society, and he may be heard before such Society against the refusal of his certificate.]

Fees on Admission.

23. Every candidate for admission as Student shall, on his application, pay to the Treasurer of the said Society the sum of £4, and every Student, on his application for admission as an Attorney, shall pay to the said Treasurer the sum of £6 towards the funds of the said Society.‖

Students not to receive Remuneration.

24. And whereas it is highly necessary, as well for the interest of every person entering upon the study of the Law, as for "securing to the Province and the Profession a learned and honorable body," especially in the late curtailed period of study,

* See former rule, R. Mich. 1847, by-law 2, *ante*, 116. His name must be entered with the Clerk of the Pleas, R. Hil. 1823, r. 7, *ante*, p. 26, and Trin. 1843, r. 2, *ante*, p. 107. See as to appeal, R. Trin. 1843, r. 3, *ante*, p. 107.

† By petition accompanied by the requisite certificates of character (R. Mich. 1837, r. 4, *ante*, pp. 82-84), and in the case of a graduate, of the time of his collegiate study (R. Trin. 1842, *ante*, p. 105). See as to filing the certificates, R. Mich. 1878, r. 1, *post*.

‡ See as to filing the recommendation, R. Mich 1878, *post*,

§ Not sanctioned by the rule. See R. Mich. 1837, r. 3, *ante*, p. 82; Mich. 1847, by-law 4, *ante*, p. 116.

‖ No greater fee than five dollars in the whole shall be required (C. S., c. 33, s. 6; 30 Vic., c. 7, s. 6).

that Students of the law, during their Studentship, should confine themselves exclusively to the study of their profession, and not receive any emolument or reward for their services, or engage in any other profession, business or employment: No Student, therefore, shall receive any salary or remuneration whatever for his services from the Barrister with whom he studies, nor from any other person, nor shall he be allowed to practice or try causes in any Court, on pain of being refused admission.*

Admission of Barristers,

25. Every †Attorney applying ‡ to be called to the Bar shall give to this Society a Term's notice of such his intention, and if, during the period since his admission as an Attorney, his practice and conduct have been professional and honorable, and no objections are made to his moral character and habits, he shall be recommended § accordingly, but, if objections be made, an enquiry therein shall be instituted by the Council, and upon such enquiry the said Council shall either grant or withhold a certificate of recommendation for such Attorney's admission as Barrister, as to them may appear just and right in the premises, subject to appeal as aforesaid.

HILARY TERM, 1868—31 VIC.

Removing Papers from the Files of the Court.

1. ORDERED, That all papers which may have been taken off the files of this Court, either on the Equity or Common Law side, under the order of the Court or any Judge thereof, by any attorney or other person, be forthwith returned to the Clerk of this Court and restored to their respective files.

2. No record paper or document on file in the office of the Clerk of this Court shall hereafter be removed therefrom except under the special order of the Court or one of the Judges thereof to be obtained only on it being made clearly to appear by affidavit to the Court or Judge that the original record paper or document is indispensably necessary to be used in some Court of this Province, or before a Judge thereof, and that a copy of such record, paper or document cannot be used in lieu thereof (*a*).

3. The Clerk of the Pleas or the Clerk in Equity, as the case may be, shall enter in a book the title of the cause, the descrip-

* See R, Hil. 1823, r. 8, *ante*, p. 26. This provision was annulled by 33 Vic., c. 26, s. 1 (C. S., c. 33, s. 4).

† See the former rule, R. Mich. 1847, by-law 5, *ante*, p. 116.

‡ By petition, R. Hil 1825, *ante*, p. 27. See R. East. 1856, *ante*, p. 139, as to admission of barristers of other courts.

§ See as to filing the recommendation, R. Mich. 1878, *post*.

tion of the record or papers, the date of removal, and the name of the attorney on whose application any such order shall have been granted, and shall enclose the record or papers permitted to be removed in a sealed envelope, indorsing thereon a description of the record or papers enclosed, and direct the same to the Clerk of the Circuits or the Clerk of the Court in which the same are to be used, to be delivered to the presiding Judge at the Circuit or Court where it is intended to use them, and shall himself place the same in the possession of the said Clerk or remit the same to him by mail if necessary, and if such records or papers are required to be used on the trial the presiding Judge shall break the seal of the envelope and deliver the said records or papers to the custody of the Clerk of the Court during the progress of the trial, and such Clerk shall, at the conclusion of the trial, again enclose and seal up the said records or papers, and after being identified by the signature or initials of the presiding Judge, shall forthwith return the same to the proper custodian.

(*a*) See the English practice, *Crook* v. *Dowling*, 3 Doug., 77; *Bastard* v. *Smith*, 10 A. & E., 214; *Bentall* v. *Sidney*, *id.*, 164; 2 *Tayl. Ev.*, 7 *ed.* 1286–7; Practice Rules of 1853, r. 32; H. T. 11 Vic.

TRINITY TERM, 1868—31 VIC.

Equity Appeals.—Decrees (*a*).

1. When the minutes of any decree shall not be settled under the Act 17th Victoria, cap. 18, s. 32, (*b*), more than fourteen days before the first of any term, a party intending to appeal therefrom shall enter the cause on the Equity Appeal Paper (*c*) of the term next after the settling of such minutes, but may obtain the order of a Judge to postpone the hearing of such appeal until the second term thereafter, which order shall be made unless good cause be shown to the contrary, and such order shall direct the time of serving the grounds of appeal on the opposite party.

Equity Appeals.—Orders.

2. When an appeal is intended to be made from any order of a Judge in Equity in a cause where no decree is made, and such order shall have been made within fourteen days before the first

day of any term, a like order may be made as is provided for in the preceding rule.

(*a*) By C. S., c. 49, s. 61, "Every appeal from any decree or order shall be made within twenty days after the settling of the minutes of such decree or order and shall be by notice, as in case of new trial,* to be served on the opposite party as well as on the judge who made the decree or order, and such appeal shall be heard at the term next after the settling of such minutes, provided fourteen days have elapsed between the settling of such minutes and the first day of term. If such minutes are not settled more than fourteen days before the first day of term, the party intending to appeal" (&c., substantially following the above rule). In this Act the interpretation given to 17 Vic., c. 18, sub-c. 2, s. 32, in *Atty. Gen.* v. *Nichols*, 3 All., 297, and *Brookfield* v. *St. And. & Q. R. R.*, 4 All., 496, as to the period from which the twenty days allowed for appeal run is adopted.† An appeal from an order does not operate as a stay of proceedings (s. 62). An appeal does not lie from an opinion of a judge, the decree not being regularly entered up (*Hodge* v. *Reid*, 2 Pugs., 26). The court has the same jurisdiction in appeals as the chancellor had prior to 17 Vic., c. 18 (s. 4.) It can hear the appeal though notice of the grounds of appeal has not been served on the judge as directed by the Act (*McDade* v. *Peters*, M. T. 1871, Stev. Dig. 26). The pleadings, evidence and papers used in any stage of the cause, and the judge's notes, are to be produced on the hearing of the appeal (s. 64—17 Vic., c. 18, sub-c. 2, s. 34), but the court is not bound to read or make use of evidence erroneously received (*DeVeber* v. *Andrews*, 4 All., 626). If the decree or order be reversed or varied on appeal the case may be remitted to the court below for the subsequent proceedings (*McLeod* v. *Thomas*, 2 Han., 385, citing *Sowdon* v. *Marriott*, 2 Phil., 623; *Fight* v. *Marriott*, 12 Jur., 487; *Salkeld* v. *Johnston*, 1 Mac. & G., 255; *Malcolm* v. *Scott*, 3 *id.*, 29). Where the court stopped the respondent's counsel when he was about to endeavor to sustain the decision of the judge below on grounds not considered by the latter, judgment ought not to be given allowing the appeal until the respondent's counsel has been heard on those grounds (*per* Wetmore *J.*, *Watt* v. *South West Boom Co.*, 3 P. & B., 646).

The Court of Appeal has power to order that the costs of proceedings in the Court below be allowed the appellant (*Wiggins* v. *Hendricks*, Hil 1873, Stev. Dig. 379.) An appeal on a question of costs does not lie where the judge below has exercised a *bona fide* discretion and has not proceeded on a mistake or misapprehension (*Livingstone* v. *Bank of N. B.*, 6 All., 252-263; *Attenborough* v. *Kim*, 14 Moo. P. C., 351; *Allen* v. *Trenholm*, 3 All., 421; *Jardine* v. *McWilliams*, 1 Han., 579; *Sayre* v. *Harris*, 2 P. & B., 677; and cases cited 1 Fish. Sup. Dig., 79-100). Where the judge reserved the question of costs on refusing to make an order for imprisonment for breach of an injunction, it was held that the Court could make no order concerning such costs (*Sayre* v. *Harris*, 2 P. & B., 677). In *Gilbert* v. *Campbell*, 5 All., 440, an order reviewing taxation of costs was appealed from.

* The grounds must be stated in the notice, see R. Mich. 1834, r. 3 (*ante*, p. 50); Hil. 1867 (*ante*, p. 152). The provisions of 42 Vic., c. 8, (*ante*, p. 50), do not apply to Equity appeals.

† For other purposes, as a general rule, an order operates from the time it is pronounced and not from the time it is drawn up, and it is not the practice for the clerk to submit to the solicitors the minutes of interlocutory orders before drawing them up (*Buchanan* v. *Peters*, Allen, J., June 1871, Stev. Dig. 348.

Where the cause was heard *viva voce* and depended altogether on the credibility of the respective witnesses, the Court refused to hear an appeal (*Smith* v. *Armstrong*, E. T. 1872, Stev. Dig. 27; *Jones* v. *Calkin*, 3 Pugs., 357; *Gray* v. *Turnbull*, L. R. 2 H. L. Sc. Ap. 53; see *Bigsby* v. *Dickinson*, L. R. 4 Ch. D. 24.

Where the judge, being satisfied that a breach of an injunction order by the defendant was not wilful, declined to make an order for his imprisonment, the Court refused to disturb the judgment (*Sayre* v. *Harris*, 2 P. & B., 677).

A misjoinder of plaintiffs is not a ground of appeal (*Jones* v. *Calkin*, *supra*).

"The costs of a successful appeal will not be given in the absence of misconduct on the part of the respondent. Any departure from this rule is exceptional." *Per Ritchie, C. J., Wiggins* v. *Hendricks*, 1 Pugs., 152; *Denny* v. *Hancock*, L. R. 6 Ch. 138; *Stannard* v. *Lee*, *id.*, 346; *Alexander* v. *Mills*, *id.*, 124). But see *Gilbert* v. *Smith*, 2 P. & B., 211; *DeVeber* v. *Oulton*, *id.*, 343; *Hazen* v. *Hazen*, 4 P. & B., 70. Costs on appeal refused to appellant though he was substantially successful, his case not having been fairly stated in his bill and his conduct not appearing to have been *bona fide* (*Hillock* v. *Frizzle*, 5 All., 655). Costs on appeal are to be taxed according to the scale of costs in Equity (*Haningt'n* v. *Harshman*, 1 Pugs., 332). Where the same counsel appears at the hearing and on appeal two copies of the abbreviation of pleadings will not be taxed (*Frye* v. *Prescott*, *Allen, J.*, March 1869, Stev. Dig. 349, s. 25; *Gilbert* v. *Campbell*, 5 All., 440; *Hendricks* v. *Hallett*, 1 Han., 170). The costs where the appeal is dismissed with costs are recoverable by attachment, not by execution, under C. S., c. 49, s. 68 (17 Vic., c. 18, sub-c. 2, s. 39), (*Smith* v. *Armstrong*, M, T. 1872, Stev. Dig. 113).

If notice of appeal is given and the cause is not entered on the appeal paper, the opposite party may move to have it dismissed with costs (*Duncan* v. *Reynolds*, 2 Han., 187.

(*b*) Repealed by C. S., and re-enacted in c. 49, ss. 60, 61, except as to the clause abolishing re-hearings, bills of review, etc.

(*c*) "Appeal Paper" in the Act.—See R. Hil. 1869, *post*, p 161.

Equity, Divorce, and Probate Appeals.—Printing.

3. Whenever an appeal is made from a decree or order of the Court or of a Judge in Equity (*d*), or from the Court of Divorce and Matrimonial Causes (*e*), or from a Probate Court (*f*), this Court may order the whole or any part of the pleadings, evidence, judgment or other proceedings to be printed and such number of printed copies thereof to be furnished for the use of the Appellate Court as may be deemed necessary, and may make order for the payment of the expenses thereof in the costs of the suit.

(*d*) Equity appeals must in all cases be printed in time for the appeal to be argued at the term at which it is set down. See C. S., c. 49, s. 63.

(*e*) See R. Hil. 1863, rr. 2, 3, *ante*, page 150, as to these appeals.

(*f*) See R. Hil. 1869, *post*, p. 161.

4. (Proceedings against Infants. See Equity rules, *post.*)

5. (Setting down Cause for hearing. See Equity rules, *post*).

Special Cases.

6. All special cases submitted for the opinion of the Supreme Court, whether on the Equity (*g*) or Pleas (*h*) side, shall be printed at the joint expense of both parties and copies thereof furnished for the use of the Judges and for the Clerk of the Court (*i*), and the cost thereof shall be taxed and allowed after the decision of the case according to the rights of the parties.

(*g*) See C. S., c. 49, ss. 81–86; (26 Vic., c. 15, ss. 13—18; Stat. 13 14 Vic., c. 35—Sir George Turner's Act.

The provisions of the English Act respecting cases where infants, married women and lunatics are interested seem to have purposely been omitted, see *Bots. Rules*, 126. For the practice under the English Act see 1 *Seton*, 4 *ed.*, 45; 2 *Daniel*, 4 *English ed.*, 1701; *Bots. Rules*, 88. In Mich. Term, 1865, the Supreme Court in Equity determined without argument that a special case would not be heard before the Court in term unless as an appeal from the decision of one of the judges (*Bots. Rules*, 89).

(*h*) See R. Hil. 1846, *ante*, p. 114, note (*c*).

(*i*) Copies of printed cases are to be handed to the reporter (3 P. & B., 646.)

HILARY TERM, 1869—32 VIC.

Appeal Paper.

IT IS ORDERED, That hereafter there shall be but one Appeal Paper, and that the Clerk of the Pleas shall enter causes thereon (*a*) in the following order :—

See rules H. T. 1881

1st. Appeals from the decision of a Judge in Equity (*b*).

2nd. Appeals from the Court of Divorce and Matrimonial Causes (*c*).

3rd. Appeals from Courts of Probate (*d*).

4th. Appeals under the Act 27 Victoria, c. 44, (*e*), for winding up the affairs of incorporated companies.

5th. Appeals from the County Courts (*f*).

And in case of any other appeals (*g*) not hereinbefore provided for they shall be entered after the County Court Appeals in the order of time in which they may be allowed by law.

All appeals shall be heard in their order and at the time prescribed by the rules of Court.

(*a*) Entries are to be made before the opening of the Court, R. Mich. 1866, *ante*, p. 152.

(*b*) See R. Trin. 1868, r. 1, *ante*, p. 158 These appeals are to be heard after the special paper, R. Mich. 1855, *ante*, 138.

(*c*) See R. Hil. 1863, *ante*, page 150. These appeals are by that rule to be heard after the Equity appeals.

(*d*) C. S., c. 52, ss. 47-49, by which Probate appeals are now regulated, is not a mere consolidation of the repealed Act, but contains material additions and alterations.

Where a party had given notice of appeal but the papers had not been sent up nor the cause set down on the appeal paper, an *ex parte* application from the other side to dismiss it was refused (*In re McLeod's Estate*, 2 Han., 409). An appeal was made by mistake to a judge in Equity instead of to the Supreme Court (see *ex parte Stockton*, 2 Han, 481), and on his refusal to hear it application was made to the Court within six months after the decision of the Probate Court and leave to appeal obtained, on which the appellant filed a bond for costs. On application to set aside the order for leave to appeal on the grounds that the affidavits on which it was obtained were improperly entitled and that the bond was not in the form required by 1 R. S., c. 136, s. 46, the appeal was ordered to be heard on the appellant filing a bond conditioned to pay such costs as the Supreme Court should adjudge, and on payment of the costs of the application, though more than six months had elapsed since the decision of the Judge of Probates (*Ex parte Stockton*, H. T. 1872, Stev. Dig. 27; *ex parte Roach*, *id*).

The Court may order the proceedings to be printed, R. Trin. 1868, r. 3, *ante* 160.

Before the C. S., c. 52, s. 47, by which questions of fact are now to be decided irrespective of the decision of the Court below, the Court would not reverse the judge's decision on such questions unless in a very clear case (*Ex parte Simpson*, 2 Pugs., 142; see *in re Gilbert's will*, 1 P. & B., 525).

In the absence of fraud or want of jurisdiction a decree of the Probate Court can only be questioned by an appeal (*Harrison* v. *Morehouse*, 2 Kerr, 584; *Doe* d. *Elston* v. *Thompson*, 4 All., 483; *Doe* d. *Bowen* v. *Robertson*, 5 All., 134; *Doe* d. *Shore* v. *Gearon*, 1 Han., 144; *Coy* v. *Coy*, April 1868, *Allen*, *J.*, Stev. Dig. 346; 1 Han., 177; *Doe* d. *Sullivan* v. *Curry*, 1 Pugs., 175; *in re Ford's Estate*, 1 P. & B., 551; see *Hendricks* v. *Hallett*, 1 Han., 206.)

Where a decision of the Court refusing probate on the ground of the want of testamentary capacity in the testator was reversed, the costs of the contestants of the will in the Court below and on appeal were ordered to be paid out of the estate (*In re Hazen's will*, 3 Pugs., 329.

(*e*) C. S., p. 1070.

(*f*) See R. Mich. 1876, *post*.

(*g*) See *Skinner* v. *McLeod*, 2 Pugs., 131, and *Bourgeois* v. *Gilbert*, 3 P. & B., p. 353, as to appeals under the repealed Insolvent Act. The appellant had to shew that all the necessary preliminary steps had been taken, otherwise the Court had, it seems, no jurisdiction over the appeal or power to make any order with reference to it (*Hamilton* v. *Bourgeois*, 3 Pugs., 232).

An appeal never lies unless expressly given by statute (*R.* v. *Cashiobury*, 3 D. & R., 35; *Ex parte Moore*, 1 Pug., 333).

An appellant is confined to the points taken in the Court below (*R.* v. *Steadman*, 1 Han., p. 371; *Copp* v. *Reed*, 3 P. & B., 455 see *Hussey* v. *Payne*, 8 Ch. D., 670).

As to how far an appeal takes away the writ of *certiorari*, see *Ex parte Ellis*, 3 All., 601; *Ex parte Jocelyn*, 2 *id.* 637; *Ex parte Cliff*, M. T. 1856, Stev. Dig. 91; *Ex parte O'Regan*, 3 All., 261; *Ex parte McNeil*, *id.* 493; *Ex parte Montgomery*, *id.* 149; *Ex parte Nowlin*, 6 All., 141; *Collins* v. *Hall*, 2 Han., 90; *Ex parte Thomas*, *id.*, 163, commented on in *Bourgeois* v. *Hamilton*, 3 P. & B., p. 356; *Ex parte Moore*, 1 Pugs., 333; *Ex parte Richards*, 2 Pugs., 6; *Ex parte Linton*, 2 Pugs., 412; *Ex parte Foye*, E. T. 1873, Stev. Dig. 89; *Ex parte Wilson*, 1 P. & B., 274; *Ex parte Ferguson*, 3 P. & B., 117; *Ex parte Estabrooks*, *id.*, 283; *Ex parte Lewin*, 3 P. & B., 425; *R.* v. *Blathwayt*, 3 D. & L., 542).

That the Supreme Court on declining to hear an appeal for want of jurisdiction has power to award costs, see *Great Northern & L. Committee* v. *Inett*, L. R. 2 Q. B. D. 284; *Carr* v. *Stringer*, E. B. & E. 123; see, however, *Bustin* v. *Howell*, 1 All., 596; *Ex parte Stockton*, 2 Han. 481, Stev. Dig. 111; and see *Fraser* v. *Fothergill*, 14 C. B., 298.

EASTER TERM, 1870—34 Vic.

Money Paid into Court.—Detailed returns of.

ORDERED, That the Clerk in Equity do on the first day of each term furnish for the information of the judges and any parties interested a detailed return of all moneys, in the Bank of New Brunswick or elsewhere, paid in in this Court or in the Court in Equity, or by direction of either, with the name of the cause, the amount paid in each cause, whether paid in in every case to the credit of the specific cause or how otherwise, the date of payment, and the amount of increase or interest (if any) in each case and the amount (if any) drawn out in each cause, with the date or respective dates thereof and by what authority drawn, a copy of which return shall be entered at length in the minutes of the Term.

MICHAELMAS TERM, 1871—35 VIC.

Paying Money into and out of Court.

1. IT IS ORDERED, That hereafter all moneys paid into the Supreme Court or the Supreme Court in Equity shall, unless otherwise specially ordered, be paid into the Bank of New Brunswick to the credit of the Supreme Court or the Supreme Court in Equity and to the credit of the particular cause or matter in which the same shall be paid in, and a deposit receipt thereof shall be forthwith delivered to the Clerk of the Pleas or

Clerk in Equity, as the case may be, and no money shall be considered as properly paid in till such deposit receipt is so filed (*a*).

2. No moneys paid into this Court shall be drawn out except by order of the Court or of a Judge thereof, to be signed by the Clerk and countersigned by the presiding Judge of the Court or the Judge who made the same, and no such order shall be made unless it be first certified to the Court or Judge by the Clerk that such money has been duly deposited and the deposit receipt filed and entered.

3. The Clerk of the Pleas and Clerk in Equity shall keep books in which such receipts shall be entered immediately on the same being filed with him, and such books shall be open to public inspection at all reasonable times.

(*a*) See as to the liability of the clerk for interest received by him on money deposited (*Wilkins* v. *Geddes*, 3 Duval, S. C. R. 203).

MICHAELMAS TERM, 1872—36 VIC.

Nisi Prius Records.

IT IS ORDERED, That the clerks of the circuits shall not hereafter enter any cause on the docket at Nisi Prius (*a*), unless the Nisi Prius record is regularly and properly made up (*b*), and duly filed with the clerk at the time of the entry, and that after being so filed, no such record shall be altered or taken off the files during the circuit without leave of the Court (*c*).

(*a*) See R. Hil. 1826, *ante*, p. 29.

(*b*) If the record is grossly imperfect the judge may refuse to try the cause, (see *R.* v. *Tremain*, 8 D. & R. 590; *Bent* v. *Benyon*, 6 C. & P. 217), or if it is materially defective or differs materially from the pleadings a new trial may be granted (*Lush*, 538; and see *Steadman* v. *Holstead*, 3 Kerr 355; *Portland Ferry Co.* v. *Pratt*, 2 All. 17; *Brocheau* v. *Deshrisay*, 4 All. 122). A mistake in the *jurata* in describing the Court for York County as a Circuit Court was held no ground for a new trial (*Palmer* v. *Gilbert*, 1 All. 505). In *McLaughlin* v. *Ratchford*, 3 Kerr 421, a new trial was granted because the *nisi prius* record in a case under 26 George III., c. 24, was irregularly made up. A variance or mistake may now in general be amended and this at any time (*Chit. Forms* (10 ed.) 213; C. S., c. 37, s. 161; see the former practice, *Doe* d. *Andrews* v. *Seelye*, 3 Kerr 134.) If the cause is entered before issue joined the defendant should, as soon as it comes to his knowledge, take steps to have it struck out (*McLelland* v. *Masson*, 2 Pugs. 59). Where there was no joinder of issue to a special

replication to a plea to one of the counts the record was amended at *nisi prius* by striking out that count (*Berresford* v. *Geddes*, L. R. 2 C. P. 285).

A form of record is given by R. Hil. 1875, Form No. 3, *post*.

(*c*) This does not interfere with the plaintiff's right to withdraw the record.

TRINITY TERM, 1873—36 VIC.

Venue—change of.

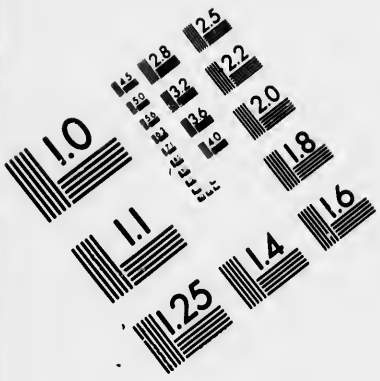
No (*a*) venue shall be changed (unless by consent of parties) without the special order of the Court or Judge founded upon a rule *nisi* or summons (*b*).

(*a*) Taken from the Practice Rules of 1853, r. 18.

(*b*) Unless under very particular circumstances the application must be made at chambers, not to the Court (*Chit. Arch.* 1354; *Prescott* v. *Allen*, 2 Pug. 349). Where the application was practically *ex parte*, though a summons had issued, a judge's order changing the venue was set aside by the Court (*Reed* v. *Leonard*, 2 Pugs. 85).

Practice before this rule—Common affidavit.] See *Tidd*, 9 *ed.*, 609; *Lush*, 345; *Chit. Arch.*, 8 *ed.*, 1164.

The venue can be changed on the common affidavit though the action is on a written agreement in the nature of a guarantee (*Read* v. *Emerson*, 2 All. 455; it does not appear from the report that the writing was specially declared on, see *Smith L. C.*, 7 *ed.*, 695). The venue was laid in N., but the judge at the circuit, being connected with the plaintiff, declined to try the cause; the plaintiff then applied to change the venue to K. and obtained an order to do so, with leave reserved to the defendant to apply to restore it,—held, that the defendant could bring the venue back to N. on the common affidavit, as it was the first opportunity he had of applying to change (*Rankine* v. *Latson*, 1 Han. 29; cannot usually do so after plea pleaded, *post*, 166). It cannot be changed where the cause of action accrued partly out of the Province (*Dempster* v. *Stewart*, 1 Kerr 103; *Ketchum* v. *N. B. Ry. Co.*, *infra*), or in more than one county (*id.*) In an old case (*Nevers* v. *Travis*, E. T. 1834, Stev. Dig. 329, see *Price* v. *Woodburn*, 6 East. 433; 6 Taunt. 545; where the venue was changed from A. to B. on the usual affidavit, when, in fact, part of the cause of action arose in another county, the Court refused to bring the venue back to A., the plaintiff not being able to give the usual undertaking to give material evidence in that county; but in *Ketchum* v. *N. B. Railway Co.*, H. T. 1873, Stev. Dig. 329, where the venue had been changed on a false affidavit (the cause of action having arisen abroad or in more than one county) from W. to Y., it was restored on the plaintiff's undertaking to give material evidence of some matter arising outside of the County of Y. Where the plaintiff was nonsuited for not complying with the usual undertaking the nonsuit was set aside on payment of the costs of the trial and of the motion to set aside the nonsuit (*Deshrisay* v. *European & N. A. Ry.* 1 Han. 48; see on the question what evidence satisfies this undertaking, *id.*; Tidd, 512; *Curtis* v. *Drinkwater*, 2 B. & Ad. 169; *Collins* v. *Jenkins*, 4 B. N. C. 225; *Greenway* v. *Fitchmarsh*, 7 M. & W. 221; *Brunt* v. *Thompson*, 2 Q. B. 789; *Clarke* v. *Dunsford*, 3 D. & L. 618; *Gilling* v.



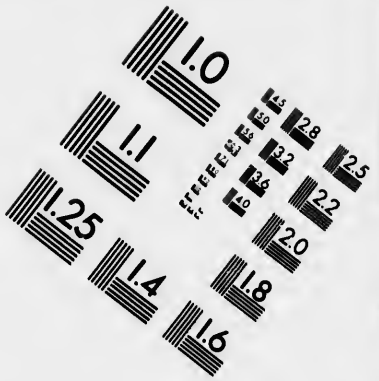
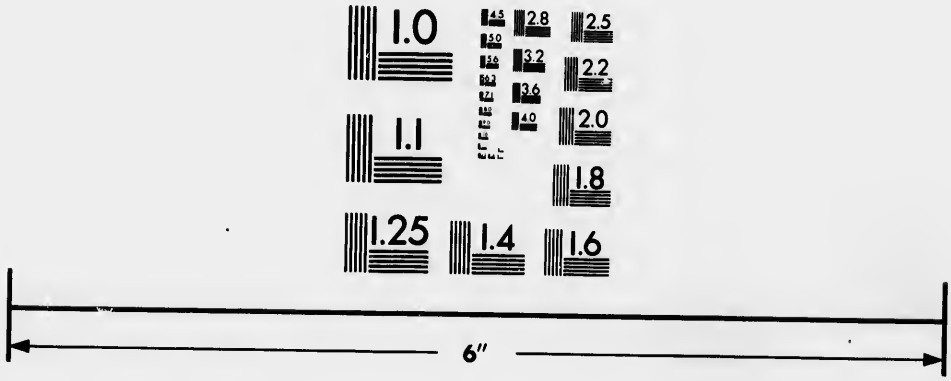
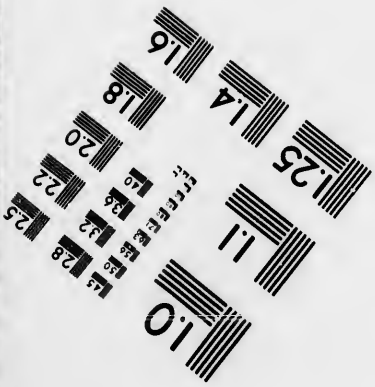
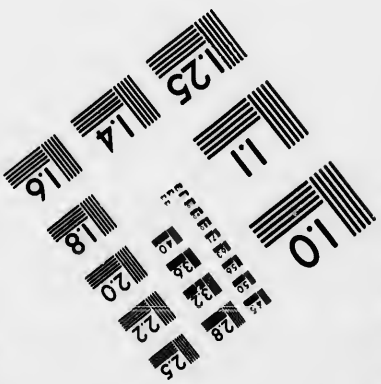


IMAGE EVALUATION
TEST TARGET (MT-3)







Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

2.8
2.5
3.2
2.2
3.6
2.0
1.8
1.6
1.1
1.0

Dugan, 1 C. B. 8; *Lee* v. *Simpson*, 3 C. B. 871). The venue may still be changed on the common affidavit, see *infra*.

Special affidavit.] Where it appeared that the change would be a convenience to the defendant, whose witnesses all resided in the county to which he desired to change the venue, but that it would be less expensive to the plaintiff to try the cause in the county where he had laid the venue, the Court refused to interfere (*Carvill* v. *St. John Fire Ins. Co.*, 3 All. 431). On an application to set aside a judge's order changing the venue from Charlotte to St. John it appeared that seven of the defendant's witnesses resided in Albert and at least three of the plaintiff's in Charlotte; and that the cause of action, a collision at sea, arose near St. John and Charlotte, the Court refused to interfere; a large and liberal allowance of $80 for expenses of witnesses was made the plaintiff by the order (*Jackson* v. *McClellan*, 2 Han. 323). A motion on behalf of a plaintiff, made after notice of trial given and countermanded, to change the venue from York to Northumberland on affidavit that one material witness to prove his case resided in Restigouche and two others in Northumberland, was dismissed with costs, no other special reason being stated (*Commercial Bank* v. *Williston*; 2 Kerr 507).

Practice since the rule.] It was thought that the effect of the above rule was to oblige a defendant applying to change the venue in all cases to produce an affidavit satisfying the judge that there were sufficient substantial grounds for changing the venue but the result of the authorities appears to be that in cases where the common affidavit would formerly have sufficed it may still be used as making a *prima facie* case but subject to be answered by the plaintiff showing grounds for retaining the venue (*Smith* v. *O'Brien*, 26 L. J. N. S., Exch. 30; *Friar* v. *McGowan*, 3 P. & B. 25), and that where the application is made at a stage at which the common affidavit would not formerly have sufficed the affidavit upon which the application is founded must be special as before the rule (*Smith L. C.*, *696*, citing *Ramsden* v. *Skiff*, 13 C. B. 601; *Clulee* v. *Bradley*, *id.*, 604; *Begg* v. *Forbes*, *id.*, 614; *De Rothschild* v. *Schilston*, 8 Ex. 503).

An application to change the venue on the common affidavit cannot be made after plea (*Begg* v. *Forbes*, 32 L. J. C. P. 222); and it seems that in general an application on special grounds should not be made until after issue joined, or it can be clearly seen what the issue will be (*id*; *Hodge* v. *Churchward*, 5 C. B. 495; *Dowler* v. *Collis*, 4 M. & W. 531; *Chit. Arch.*, 12 *ed.*, 1354).

Where the application is made on the common affidavit and the plaintiff in answer shews that the cause of action did not arise in the county to which the venue is sought to be changed, but in a third county, the judge has no right on that application to order it to be changed to such third county (*Craig* v. *Glasier*, 1 P. & B. 1). The venue has been changed on this affidavit, though the plaintiff showed that he could give material evidence where it was laid, but leave to restore it on giving the usual undertaking was reserved to him (*id.*, but see *Friar* v. *McGowan*, 3 P. & B., p. 25). When the common affidavit is answered by the plaintiff upon the special matter the Court will exercise its discretion on the whole case before it (*Ross* v. *Napier*, 39 L. J., *Ex.* 2).

In a note to *De Rothschild* v. *Schilston*, *supra*, Pollock, C. B., is stated to have given as the opinion of a committee of the judges that "the defendant may, if he pleases, rely only on the fact that the cause of action arose in the county to which he seeks to have the venue changed, which ground shall be sufficient unless the plaintiff

shews that the cause can be more conveniently tried in the county in which it was originally laid or other good reason why the venue should not be changed;" but in the recent case of *Church* v. *Barnett*, L. R. 6, C. P. 116, *Willes, J.*, emphatically denies that this supposed resolution of the judges either received their sanction or correctly represents the practice. That learned judge lays down as the true rule that a plaintiff has a right to lay his venue where he thinks proper. If he does so capriciously a judge will change the venue to the place where the cause of action arose. But where he has not exercised a capricious choice the defendant who seeks to deprive him of an undoubted right must shew that there will be a practical preponderance of convenience in trying the cause in the place where the cause of action arose (*Smith's L. C.* 696; but see *Friar* v *McGowan*, *supra*).

That the Court will not change the venue unless there is some great and obvious preponderance of convenience in trying the cause elsewhere, see *Day's C. L. P. Acts*, 94; *Durie* v. *Hopwood*, 7 C. B. N. S. 835; *Blackman* v. *Bainton*, 15 *id.* 432; *Church* v. *Barnett*, *supra*; and see *Halliwell* v. *Hobson*, 3 C. B. N. S. 761). The county where the cause can be most conveniently tried is in general held to be that in which the witnesses reside (*Smith* v. *O'Brien*, *supra*; see *Channon* v. *Parkhouse*, 13 C. B. N. S. 341; *Ross* v. *Napier*, *supra*); the place where the contract was made, where the breach took place and where the parties reside being also elements for consideration (*Levy* v. *Rice*, L. R. 5 C. P. 119).

Quære, whether a defendant can, after obtaining an order for leave to come in and defend upon the terms of pleading instanter and taking short notice of trial, apply for a change of venue (*Reed* v. *Leonard*, 2 Pugs. 85); that he cannot on the common affidavit, see *Cluley* v. *Bradley*, 13 C. B. 604, and *Jackson* v. *Kidd*, 8 C. B. N. S. 354).

See as to reviewing the order of the judge, *Schuster* v. *Wheelwright*, 8 C. B. N. S. 383; *Jackson* v. *Kidd*; *Church* v. *Barnett*; *Begg* v. *Forbes*, 13 C. B. 614; *Cartwright* v. *Frost*, 3 H. & N. 278; *Penhallow* v. *Mersey D. & H. Co.*, 38 L. J., Ex. 21; *Reed* v. *Leonard*; *Craig* v. *Glasier*; *Friar* v. *McGowan*, *supra*. "I am not prepared to adopt the opinion that the Court will in no case review the discretion of a judge in changing the venue; it seems to me that such a doctrine is not borne out by the weight of recent authorities" (per Ritchie, C. J., *Jackson* v. *McClellan*, 2 Han., p. 325).

"If the application [for change of venue on special grounds] be unopposed, defendant pays the costs, but otherwise they will be costs in the cause, if granted" (*Lush Pr.* 352, citing *Cotterill* v. *Dixon*, 2 Dowl. 112; *Lewin* v. *Morris*, *id.*, 60).

An attorney suing in person has the right to lay the venue in transitory actions in York, and the Court has no power to change it (*Grace* v. *Wilbur*, 35 L. J. Q. B. 1; and see *DesBrisay* v. *Baldwin*, 3 Kerr 379).

The statute 3-4 Wm. IV., c. 42, s. 22, by which the Court may order the issue in a *local* action to be tried in a county other than that in which the venue is laid, has not been extended to this Province, but independently of the enactment the Court has the power at common law of awarding the venire in such actions to the sheriff of the next adjoining county if a fair and impartial trial cannot be had in the proper county (Lush 345; Tidd 605). By C. S., c. 37, s. 40 (stat. 15-16 Vic., c. 76, s. 41), where two local causes of action are joined the venue may be laid in either county.

EASTER TERM, 1874—37 VIC.

Table of Fees

To be taken by the Attorney, Counsel, and Clerk, for all proceedings in relation to matters referred to in "The Common Law Procedure Act 1873," as framed by the Council of the Barristers' Society, and recommended for adoption by the Court, and which Table of Fees was filed in the Office of the Provincial Secretary on the twenty-first day of February, A. D. 1874, and was confirmed by the Act passed on the 8th April, A. D. 1874, intituled "An Act to amend the Common Law Procedure Act" (*a*).

TO THE ATTORNEY.

1.—Writs.

All writs and engrossing the same, excepting subpœnas under four folio,	$ 2 00
For every folio above four, twenty cents per folio.	
Every subpœna and engrossing same,	1 00
Special indorsement of demand on writ,	1 00

2.—Copy and service of Writs, &c.

For each copy, excepting subpœna, including copy of all notices required to be indorsed,	1 00
If more than four folio, for each additional folio,	0 10
Copy of supbœna,	0 50
Notice of a writ for service out of the jurisdiction,	1 00
When writ is served out of the Province, correspondent's charges and actual expenses of service, in discretion of the taxing officer.	
To the attorney, for service of subpœna on each necessary witness,	0 50
Agent's fee, in cases where there is no appearance,	1 00
In all other cases,	2 00
(No agent's fee to be allowed until after return of writ.)	

3.—Instructions, &c.

Instructions and warrant to sue or defend,	3 60
For instructing counsel on drafting and signing pleadings,	1 40
(No fees for instructions to counsel are to be allowed when such counsel, or his partner, is attorney in the suit.)	

(*a*) This table is copied almost literally by C. S., c. 119 (p. 953). The variations are pointed out in the notes. By c. 37, s. 216, "Subject to review, the clerk of the pleas shall tax costs according to the Table of Fees."

The costs of the trial of election petitions are to be taxed under this table and not under the ordinance (*Stevens* v. *Rogers*, 1 P. & B., 54).

Instructions for every suggestion, plea of suggestion, to defend for executors or administrators after suggestion of death of original defendant, to offer to suffer judgment by default, or to tender damages, or to accept same, to strike or reduce special jury, each, ...	1 40

4.—Drawing Pleadings, &c.

Declaration, including instructions and engrossing and attendance, to file or deliver, ...	4 00
If above ten folio, for each additional folio, ...	0 20
One or more pleas (not exceeding in all 3 folio), exclusive of instructions but inclusive of engrossing, ...	1 00
If above 3 folio, for each additional folio, ...	0 20
Joinder of issue, including engrossing, ...	0 50
Demurrer and joinder in demurrer, each, ...	0 50
Marginal statement of grounds for argument, exclusive of copies for judges, ...	1 40
Replication, new assignment, and all other pleadings, the same as the foregoing charges for pleas.	
Issue or demurrer book, not exceeding 6 folio, ...	1 40
If above 6 folio, for each additional folio, ...	0 20
Judgment, whether by default or final, ...	1 00
Suggestions not exceeding 3 folio, including engrossing, ..	0 80
If above 3 folio, for each additional folio, ...	0 20
Special case record and rolls per folio, ...	0 20
Particulars of premises in ejectment, ...	1 00
All other particulars of demand or set off, per folio, ..	0 20
Cognovit actionem, including engrossing, ...	1 50
Affidavits, interrogations, notices (except as herein specially provided for), costs and all other papers not otherwise herein provided for, per folio, ...	0 20
Judge's summons, including engrossing, ...	0 50
Judge's order and engrossing, ...	1 00

5.—Engrossing and Copying.

Engrossing or copying on paper all pleadings, orders, summonses, affidavits, interrogatories, notices, papers or proceedings not otherwise herein provided for, per folio, ..	0 10
Engrossing all papers, rolls, records, pleadings, or other proceedings not herein specially provided for, on parchment, per folio, ...	0 15
Copies of all pleadings or papers required by the Court or judge, per folio, ...	0 10
Expenses of all necessary printing ordered by the Court.	

6.—Drawing Notices and Service, &c.

To executor or administrator of sole defendant deceased to appear to writ of suggestion, ...	1 00

Notice of appearance, notice to plead, notice of declaration, when necessary, and notice of objection for misjoinder or non-joinder, notice of trial, and notice of writ of inquiry, each,	0 60
Each necessary copy,	0 30
Serving each paper on the opposite party's attorney,	0 20

8.—Ejectment (*b*).

Settling agreement for consent rule,	2 00

9.—Attendance.

Attending Court on motion for rule nisi or absolute,	1 50
Attending Court on argument of motion for rule,	5 00
Attending Court on hearing judgment, (when same is not delivered at the argument).	1 50
Attending judge on obtaining summons,	0 50
Attending judge on order without previous summons,	0 50
Attending judge on argument of summons,	1 00
Attending judge on hearing judgment, when judgment not given at time of argument,	0 50
Attending to enter record for trial at each circuit and attending Court,	3 00
Attending clerk of circuits for postea,	0 50
Attending clerk on taxation of costs on postea,	1 40
Attending clerk on taxation of all other costs,	0 70
Attending to receive money out of Court or pay money in,	2 00
Attending Court on trial of cause (not to be allowed if attorney is counsel in the cause),	5 00
Attending on trial of writ of inquiry, or de prop. probanda,	5 00
Attending clerk of peace (*c*) on striking special jury,	2 00
Every other necessary attendance on a judge,	0 50
Every other necessary attendance on the clerk, (Not more than four attendances on clerk allowed, unless under special circumstances).	0 20

10.—Briefs.

Brief on argument of summons before judge at chambers, including copy,	1 00
Brief on trial or argument before Court (*d*),	5 00

11.—Miscellaneous.

Postages in the discretion of the taxing officer.	
Term fees, not to exceed four each,	1 00
Defendant on appearance, when only one,	1 00
When more than one, for each additional,	0 40

(*b*) See *Doe* d. *Hartt* v. *Brayley*, *ante*. 35.

(*c*) "*County Secretary*," C. S., p. 955.

(*d*) When a rule nisi is moved for this charge is not allowed until a rule has been granted (*Wright* v. *Mcrithew*, 2 All. 520.

Costs of judgment on bond and warrant of attorney, to include all costs, ... 25 00
Letter before action, ... 1 00

FEES TO COUNSEL.

On motion of course, or on motion for rule nisi, or on motion to make rule absolute in matters not special, ... 2 50
On special motion for rule nisi, or on obtaining rule absolute after notice of motion, in the discretion of the Court (*e*).
Attending examination of witnesses de bene esse, in the discretion of a judge upon examiner's certificate.
On perusing and settling pleadings, or interrogatories, or special case, ... 5 00
Signing any pleadings or papers requiring the signature of counsel, ... 1 50
On executing a writ of inquiry, or de proprietate probanda, to be taxed by a judge on the certificate of the sheriff or officer presiding, not exceeding 25 00
On a trial by the record on arguments in supporting or opposing rules, demurrers, special cases, or on appeal or other special argument, ... 15 00
(This may be increased at the discretion of the presiding judge).
On brief for trial when cause not tried and cognovit given after notice of trial, ... 15 00
Trial fee in all causes tried, or after being entered for trial referred to arbitration by rule of Court or order of Nisi Prius, in the discretion of a judge.
Fee to counsel on argument at chambers, where in the opinion of the judge hearing the same the attendance of counsel was necessary, in the discretion of the judge.
All services not herein specially provided for shall be charged and allowed according to the ordinance of fees heretofore used in the Supreme Court (*f*).

CLERK'S FEES.

Signing and sealing writ, ... 0 30
Entering an appearance or notice, interlocutory judgment, admission by guardian, every default, discontinuance, non pros. relicta verificatione, retraxit, satisfaction on record, each, ... 0 20

(*e*) See *York C. M. I. Co.* v. *Hartley*, *ante*, 65.

(*f*) The fees to counsel allowed by the ordinance are :—
"Perusing and amending special pleadings and entries, or assisting on demurrer or other special proceeding (see *Wright* v. *Merrithew*, 2 All., 520), . £0 6 8
Trial fee, ... £0 15 0
In all causes tried, or after being entered for trial referred to arbitration by rule of Court, a counsel fee in the discretion of the judge, not exceeding five guineas (see *Kileen* v. *Burk*, 3 Kerr, 419)."

On entry of every cause,	0 50
Filing any affidavit, writ (*g*), declaration, or other paper, each,	0 10
For moneys paid into Court, two and one half per cent.	
Taking special bail in Court, each person,	0 20
Copy of all common rules, each,	0 20
Searching the records,	0 20
Entering the allowance of writ of error, certiorari or habeas corpus,	0 20
Copies of all papers other than common rules, per folio,	0 10
Certifying a judgment under seal,	0 70
If above two folio, the same as for copying and for seal,	0 10
Judgment and taxing costs,	0 70
Filing the roll,	0 60
Certified copy of judgment,	0 20
Certified copy of satisfaction of judgment,	0 20
Memorial of judgment,,	0 20
Drawing a recognizance of each person,	0 20
Entering bond of arbitration and award,	0 70

(Fifty cents to be paid to the crier on every cause entered by the clerk of the pleas out of his fees).

JNO. JAS. FRASER.

Provincial Secretary's Office, 22nd April, 1874.

The following examples of bills of costs under the above table were prepared by the clerk of the pleas :—

IN THE SUPREME COURT.

Cost on Judgment by default on Assessment.

187 .

Nov.	Instructions and warrant to sue,	$3 60
	Writing letter,	1 00
	Præcipe for writ and filing,	0 40
	Writ and copy,	3 30
	Entering cause and filing writ,	1 10
	Agent's fee,	1 00
	Declaration and filing,	4 10
	Notice to plead,	0 60
	Search,	0 20
Dec.	Signing and filing interlocutory judgment,	1 10
	Certificate of interlocutory judgment,	0 20
	Affidavit on which to obtain assessment,	0 50
	Attending before a judge,	2 50
	Assessment docket and filing,	0 40
	Entering warrant on roll,	0 10
	Suggestions and engrossing,	0 80
	Costs and copy (folio 2),	0 60
	Taxing costs and signing judgment,	0 70
	Attorney attending taxation,	0 70
	Filing roll and papers)	0 70

(*g*) Printed "written," in C. S., p. 956.

Judgment docket and filing,	0 40
Execution præcipe and filing,	2 70
Term fees,	2 00
Four attendances,	0 80
Postage,	0 45
	$30 00
Sheriff's fees,	
	$

For convenience, costs may be made out as follows :—

SUPREME COURT.

Costs on assessment.
Cause entered 4th Nov., 1874.

As per scale,	$30 00
Sheriff's fees,	
	$

IN THE SUPREME COURT.

Costs on default.
Special Indorsement.

187 .

Instructions and warrant to sue,	$3 60
Writing letter,	1 00
Præcipe for writ and filing,	0 40
Writ and copy,	3 30
Special indorsement,	1 00
Entering cause and filing writ,	1 10
Agent's fee,	1 00
Search,	0 20
Final judgment,	1 80
Docket and filing,	0 40
Costs and copy,	0 60
Taxing costs and signing judgment,	0 70
Attorney attending taxation,	0 70
Filing roll and papers,	0 70
Execution præcipe and filing,	2 70
Term fees,	2 00
Three attendances,	0 60
Postages,	0 40
	$22 20
Sheriff's fees,	

For convenience, costs may be made out as follows :—

SUPREME COURT.

Costs on special notice and default.

As per scale,	$22 20
Sheriff's fees,	
	$

MICHAELMAS TERM, 1874—38 VIC.

Table of Fees, and Forms,

Under the Act of Assembly 37th Victoria, chapter 7, "*To provide for Process of Attachment in certain Civil Suits, and to abolish Imprisonment for Debt*" (*a*).

TO THE ATTORNEY.

Drawing affidavit to obtain attachment, and particulars of plaintiff's demand, per folio,	$0 20
Copy thereof, per folio,	0 10
Writ of attachment,	0 60
Each copy thereof,	0 30
Attending judge (when necessary) to obtain order for attachment,	0 50
Drawing order for attachment,	0 20
Execution for costs,	0 60

TO THE CLERK.

Signing and sealing every writ,	0 30
Filing each writ or paper,	0 10

TO THE SHERIFF.

Executing writ of attachment, and return,	1 00
Copy of attachment, &c., to sheriff of another county, with directions indorsed, when property is attached thereunder,	0 60
Memorandum of attachment of real estate, and filing same, if not exceeding two folio,	0 50
If over two folio, for each additional folio,	0 20
[The like charge for a memorandum of the attachment of personal estate.]	
Bond from plaintiff, or defendant, or part owner,	1 00
Assignment of bond,	0 50
Appraisement of property attached, and notices of same to the parties,	1 50
Sale of property attached,	
[The like fees as on sales under executions.]	
Filing a claim to property, and schedule, &c., with clerk of the County Court,	1 00
Copy of attachment, &c., to file under section 21,	0 50
If exceeding three folio, for every additional folio,	0 10
Notifying registrar to enter discharge of attachment,	0 50
Levying money under execution,	
[The same fees as in executions in other cases.]	
Mileage to execute attachment, for each mile, going and returning,	0 10

(*a*) C. S., c. 42, which re-enacted Part I. of this Act, relating to attachment, and included these fees and forms, is repealed by 43 Vic., c. 1.

APPRAISERS' FEES.

To each appraiser, ... 1 00

No. 1.—Bond given by Plaintiff.

Know all men by these Presents. that we [*principal and two sureties*] of , in the county of , are held and firmly bound to , sheriff of the county of , in the penal sum of , to be paid to the said sheriff, or his successor in office for the time being; for which payment we bind ourselves, and each of us in the whole, our and each and every of our heirs, executors and administrators, firmly by these presents. Sealed with our seals. Dated the day of

The condition of the above obligation is, that if the above named [*plaintiff*] shall prosecute with effect and without delay a certain suit lately brought by him in the Supreme Court, (*or* County Court for the county of , *as the case may be*), against [*the defendant*], for [*state briefly the nature of the action*], and shall pay to the said [*defendant*] all such damages and costs as the said defendant may sustain by reason of the writ of attachment issued in the said suit, or the proceedings thereon; then this obligation to be void, otherwise to remain in force.

Signed, sealed, &c.

No. 2.—Bond from Defendant under Section 26 (b).

[*Obligatory part, same as Form No. 1.*

Whereas certain property in the possession of the above named [*defendant*] has been attached by the said sheriff under a writ of attachment issued out of the Supreme Court, (*or, as the case may be*), in a suit brought by [*the plaintiff*] against the said [*defendant*] which said property, mentioned and described in the schedule hereunto annexed, has been redelivered by the said sheriff to the said [*defendant*]: Now the condition of the above obligation is, that if the said [*defendant*] do and shall within thirty days after the recovery of any judgment that may be obtained against him by the said [*plaintiff*] in the said suit, redeliver the said property mentioned in the schedule, to the said sheriff, or his successor in office for the time being, or pay or satisfy to him the estimated or appraised value of the said property to the extent to which the same is bound by the said attachment; then the above obligation to be void, otherwise to remain in force.

Signed, sealed, &c.

SCHEDULE OF PROPERTY REFERRED TO.

[*Here describe the property.*]

No. 3.—Bond by part owner of property, Section 33.

[*The obligatory part, the same as Form No. 1.*]

Whereas certain property, described in the schedule hereunto

(*b*) See *Botsford* v. *Trites*, 3. P & B., 135.

annexed, has been seized by the said sheriff under a writ of attachment issued out of the Supreme Court, (*or, as the case may be*), in a suit brought by [*plaintiff*] against [*defendant*], which property is owned by the said [*defendant*] jointly with the above named [*the principal obligor*], and has been delivered by the said sheriff to the said [*the principal obligor*]: Now the condition of the above obligation is, that if the said [*principal obligor*] shall restore the said property to the said sheriff, or his successor in office for the time being, in like good order as the same now is, or pay to the said sheriff, or his successor in office for the time being, the appraised value of the said [*defendant's*] share or interest therein; or satisfy all judgments to the amount of the said appraised value, as shall be recovered in the suit or suits in which the said property is attached; provided the same be demanded within the time during which the said property would have been held by the respective attachments; then the above obligation to be void, otherwise to remain in full force and effect.

Signed, sealed, &c.

[*Schedule of property referred to.*]

No. 4.—Assignment of Bonds, Nos. 1, 2 and 3.

In obedience to the order of the Supreme Court, (*or*, of Mr. Justice , *or*, of the County Court of , *as the case may be*), I, A. B., sheriff of the county of , do hereby assign the within bond to the within named .—Sealed with my seal, and dated the day of , A. D. 18 .

A. B.

No. 5.—Bond given by Claimant under Section 42.

[*Obligatory part, same as Form No 1.*]

Whereas the above named [*claimant*] has claimed certain property, described in the schedule hereto annexed, seized by the above named sheriff under a writ of attachment issued out of the Supreme Court, (*or, as the case may be*), in a suit wherein is plaintiff and is defendant, and the said property has been delivered by the said sheriff to the said [*claimant*]: Now the condition of the above obligation is, that if the said [*claimant*] shall pay to the said sheriff, or his successor in office for the time being, the value of the said property, and also the costs of contesting the claim to the same, in case the said claim is found against the claimant on the trial thereof; then the above obligation shall be void, otherwise the same shall remain in full force and effect.

Signed, sealed, &c.

[*Schedule of property referred to.*]

No. 6.—Assignment of Bond.

I, A. B., sheriff of the county of , do hereby assign the within bond to the within named [*plaintiff in suit.*]—Sealed with my seal, and dated the day of , A. D. 18

A. B., *Sheriff.*

No. 7.—Execution for Costs (c).

VICTORIA, by the Grace of God, &c.

To the Sheriff of the County of

You are hereby required to levy of the goods and chattels of in your bailiwick the sum of , which has been awarded to for costs under the provisions of the "*Act to provide for Process of Attachment in certain Civil Suits, and to abolish Imprisonment for Debt*;" and to pay the same to the said , and make return hereof, and of your doings herein, before us at Fredericton on, &c. *(a return day in term).*

Witness the Honorable Wm. J. Ritchie, Chief Justice, at Fredericton, the day of , in the year of our Reign.

CARMAN.

N. B.—An execution when issued from the County Court to be in similar form as near as may be, and to be tested in the name of the Judge of the Court.

Fredericton, 31st October, 1874.

(*Signed by the Judges.*)

(c) This form was inserted in the Con. Stat. as schedule L to c. 42, now repealed, n. (*a*) *supra*, p. 174.

Execution instead of Attachment under C. S., c. 38, s. 27.

By C. S., c. 38, s. 27, (38 Vic., c. 4, s. 22; see stat. 1-2 Vic., c. 110, s. 18; Practice Rules 1853, schedule "Writs of Execution," No. 3), a person entitled to apply for an attachment may obtain an order that an execution in the form "B" in the schedule to that chapter may issue against the goods, &c., of the party. It was necessary in order to obtain this execution under the first Act (38 Vic.) that a demand should have been made (*Cotton* v. *Stack*, 3 Pugs., 211), but this is dispensed with by the Con. Stat. The Court refused to make an order under the Con. Stat. for an execution to issue against an attorney for costs which he had undertaken to pay, the proper remedy being a rule nisi for an attachment. Per Weldon, J., the act is confined to the parties to the action (*Gibson* v. *North British & M. Ins. Co.*, 1 P. & B., 571). *Quære*, whether the same promptitude is required in applying for an execution as would be necessary in an application for an attachment (*Cotton* v. *Stack*, 1 P. & B., 514). It appeared that a rule ordering the plaintiff to pay the defendant costs was made in Hilary Term, 1875, that the plaintiffs had not been in Canada since the rule was made, and that the costs had been repeatedly demanded of the plaintiffs' attorney and their agent in the Province—held, on an application for an execution in Michaelmas Term, 1877, that the delay was sufficiently explained (*id*). An execution cannot be granted against a corporation for non-payment of costs (*Chapman* v. *Providence W. I. Co.*, 4 P. & B., 91).

HILARY TERM, 1875—38 VIC.

General Rules.

1. The following Rules and Regulations, made pursuant to "The Common Law Procedure Act, 1873," shall be in force:—

Several Counts.

1. Except as hereinafter provided, several counts on the same cause of action shall not be allowed, and any count or counts used in violation of this rule may, on application of the defendant, within a reasonable time, be struck out or amended by the Court or a judge, on such terms as to costs or otherwise as such Court or judge may think fit (*a*).

(*a*) Taken from the Pleading Rules of 1853, r. 1. See r. 2 *infra* as to striking out counts. In practice it is advisable to insert in a declaration as many different counts as will fairly include the various causes of action resulting from all the facts relied upon; but it is useless and objectionable to multiply counts by stating the same cause of action in various ways (*Bul. & Lea.*, p. 11; see the cases on this rule collected in *Har. C. L. P. Acts*, p. 708; *Chit. Arch.*, 12 *ed.*, 235).

The plaintiff is liable to have a verdict and judgment against him upon the counts in respect to which he fails to establish a distinct cause of action (C. S., c. 37, s. 215; see 36 Vic., c. 31, s. 210; 13 Vic., c. 32, s. 5, and R. G. H. T. 4 Wm. IV., pt. 2, r. 5, Pleading Rules of 1853, r. 3). For the practice at common law see *Andrews* v. *Wilson*, 3 Kerr, 127; *Walsh* v. *Fairweather*, *infra*. Where after a verdict for the plaintiff on three counts he elects to proceed upon one only, he is not entitled to the costs of the other two (*Burk* v. *Niles*, 2 Han. 256). If he obtains a verdict on one of several counts and there is no finding on the others he is only entitled to costs on the one count (*Walsh* v. *Fairweather*, 2 All. 423; see *McMillan* v. *Ritchie*, *id.* 469, as to signing judgment in such a case).* Where the plaintiff inserted six counts in a declaration in replevin for the same property, costs for one count only were allowed (*Hanington* v. *Girouard*, 3 Pugs., 151). In trover for several articles the plaintiff may give evidence of acts of conversion on several days, though there be but one count, charging one conversion (*Ultican* v. *Moffatt*, 4 All., 298). If a plaintiff enters a *nolle prosequi* to one count, the defendant can not enter up judgment for his costs under C. S., c. 37, s. 210 (37 Vic., c. 31, s. 205; 12 Vic., c. 39, s. 20; 7 Wm. IV., c. 14, s. 25; stat. 3–4 Wm. IV., c. 42, s. 33) till the other counts are disposed of (*Allison* v. *Smith*, 4 All., 238). Where the *nolle prosequi* is entered on a count upon which the plaintiff has obtained a verdict, the defendant is not entitled to the costs of the trial of the issue on that count (*Burk* v. *Niles.*, 1 Pugs., 361). The counts are considered as dis-

* Where a general verdict is given on all the counts, some of which are bad, the *postea* may in some cases be amended (*Milner* v. *Gilbert*, 1 All. 51; *Rankin* v. *Clarke*, Bert., 303; *Leonard* v. *Hanson*, Bert. 373; *Henderson* v. *St. John* (*Mayor*), 1 Pugs., 197; *Spencer* v. *Geiger*, 1 H. Bl. 78; *Empson* v. *Griffin*, 11 A. & E. 186; *R.* v. *Virrier*, 12 A. & E. 331; *Edlowes* v. *Hopkins*, 1 Doug. 376).

tinct causes of action, and if one only is demurred to, the Court cannot notice any defects in the other counts (*Crawley* v. *Wilson*, 1 All., 704). Where damages are assessed by the Court or a judge costs are only allowed upon such counts as the damages may be assessed upon—C. S., c. 37, s. 214 (36 Vic., c. 31, s. 209; 13 Vic., c. 32, s. 6).

Several Pleas.

2. Several pleas, replications, or subsequent pleadings, or several avowries or cognizances, founded on the same ground of answer or defence, shall not be allowed: Provided, that on an application to the Court or a judge to strike out any count, or on an objection taken before a judge on a summons for leave to plead several matters, to the allowance of several pleas replications or subsequent pleadings, avowries or cognizances, on the ground of such counts or other pleadings being in violation of this rule, the Court or judge may allow such counts on the same cause of action, or such pleas, replications or subsequent pleadings, or such avowries or cognizances founded on the same ground of answer or defence, as may appear to such Court or judge to be proper for determining the real question in controversy between the parties on its merits, subject to such terms as to costs and otherwise as the Court or judge may think fit (*b*).

(*b*) Taken from the Pleading Rules of 1853, r. 2; see *Day's C. L. P. Acts*, 115; *Harrison's C. L. P. Acts*, 710.

Sec. 78 of 36 Vic., c. 31 (corresponding to s. 81 of the stat. 15-16 Vic., c, 76), and sec. 81 (86 of the English Act), permitting several pleas under certain limitations, were repealed and not re-enacted by the Con. Stat., but by s. 77 of c. 37 "The plaintiff may plead in answer to any plea or subsequent pleading of the defendant as many several matters as he thinks necessary to sustain his action, and the defendant may plead in answer to the declaration or other subsequent pleading of the plaintiff as many several matters as he thinks necessary for his defence, provided that the Court or a judge may, upon application of the opposite party, amend or strike out any of the matters pleaded upon such terms as to the costs or otherwise as to the Court or judge may seem best."

The practice as to pleading several pleas is thus stated in Bullen & Leake, 3 ed., 442:—

"The necessity for obtaining leave to plead several matters does not arise when no two or more pleas, or no pleas except those mentioned in s. 84,* are pleaded to the same part of the declaration or debt or cause of action (*Archer* v. *Garrard*, 3 M. & W., 63; 1 Chit. Pr., 12th ed., 279-286); nor where several defendants sever in pleading, and each pleads only such plea or pleas as he alone might plead without leave (*Cazneau* v. *Morrice*, 25 L. J. Q. B., 126).

* * * * * * * * * *

*C. S., c. 37, s. 79.

The words used in the repealed r. 5, H. T. 4 Wm. IV., were 'one and the same principal matter,' for which the above expression, 'same ground of answer or defence,' has been substituted; in the same way as with reference to declarations in r. 1, the words, 'the same cause of action' are substituted for 'subject-matter of complaint;' so that where a single state of facts produces several legal results, the latter may be made the ground of several counts, pleas, etc., without a violation of the rules; and the Court or a judge has a discretion to allow even a violation of the rules when it appears necessary for determining the real question in controversy on its merits. Where there is a reasonable doubt whether the pleas are founded on the same ground, they will be allowed together; lest otherwise the defendant should be deprived of his defence (*Shropshire Union Ry. Co.* v. *Anderson*, 3 Ex., 401–405).

The following are instances of pleas which the Courts have refused to allow to be pleaded together:—

Pleas of the general issue with special pleas of matter which might be proved under the general issue (*Norton* v. *Scholefield*, 1 Dowl. N. S. 638; *Matthews* v. *Matthews*, 7 C. B. 1024); and in actions on the *indebitatus* counts the plea of *nunquam indebitatus*, with a plea setting up the pendency of a special contract (*Gardner* v. *Alexander*, 3 Dowl. 146); in an action by a railway company for calls, *nunquam indebitatus*, with pleas that the defendant was not a proprietor, and that notice of the calls was not given; the company being bound to prove these facts under the general issue (*London and Brighton Ry. Co.* v. *Wilson*, 6 Bing. N. C. 138); to an action on a policy *non assumpsit* and a special plea setting up the terms of a memorandum annexed to the policy (*Heath* v. *Durant*, 12 M. & W. 438); a plea of the general issue 'by statute,' together with a special plea amounting to the general issue at common law (*Ross* v. *Clifton*, 11 A. & E. 631; *Legge* v. *Boyd*, 1 M. & G. 898; but see *Langford* v. *Woods*, 7 M. & G. 628, and see *post*, Chap. VI.); in an action for malicious prosecution, not guilty, and a special plea of an absence of probable cause (*Cotton* v. *Browne*, 3 A. & E. 312); in an action for polluting plaintiff's well, not guilty, and a plea denying that the water was polluted (*Norton* v. *Scholefield*, 9 M. & W. 465); in an action of libel, a plea of the general issue, with a special plea of circumstances showing that it was privileged (*Lucas* v. *Smith*, 1 H. & N. 481, 26 L. J. Ex. 94).

Pleas substantially founded on the same ground, though varied in statement, are objectionable; thus, four pleas, each amounting to an allegation of the same fraud, only stating it with various circumstances, were disallowed (*Reid* v. *Rew*, 2 Dowl. N. S. 543).

Also, whenever the statement in one plea is included in the wider statement of another, they are considered as founded on the same ground (*Thomson* v. *Bradbury*, 1 Bing. N. C. 326). As in an action on a bill, a plea that the bill was not duly stamped, and a plea traversing the acceptance (*Dawson* v. *Macdonald*, 2 M. & W. 26). So in an action for infringement of a patent, pleas to the whole patent, with pleas of the same matter to the undisclaimed part of the patent (*Clark* v. *Kenrick*, 1 D. & L. 392); or a plea that the patent was not a new manufacture, with a plea that it was not an invention in respect of which a patent could be granted (*Walton* v. *Bateman*, 3 M. & G. 773); or a plea that the plaintiff was not the first inventor, with pleas that other persons were the first inventors; but a plea that the invention was not new was allowed together with a plea that part of the invention was not new, because the invention collectively might be new, though parts of it were not (*Bentley* v.

Keighley, 6 M. & G. 1039). In trover by the assignees of a bankrupt, the plea of not possessed, and a plea that the goods were taken in execution without notice of a prior act of bankruptcy, were not allowed together, because the latter was contained in the former (*Turquand* v. *Hawtrey*, 9 M. & W. 727). In actions of trespass, pleas that the close is not the plaintiff's, and *liberum tenementum*, and a justification under a *jus tertii*, are allowed together (*Moss* v. *Apperley*, 6 M. & W. 145; *Slocombe* v. *Lyall*, 6 Ex. 119); although under the first the defendant might prove both the other defences (*Jones* v. *Chapman*, 2 Ex. 803).

The Court or a judge, in the exercise of their discretion, would not formerly allow any pleas to be pleaded together which were grossly repugnant and inconsistent; but at present this objection is substantially limited to not allowing any other pleas to be pleaded to the same parts of the declaration with a plea of tender (*Macdellan* v. *Howard*, 4 T. R. 194; *Orgill* v. *Kemshead*, 4 Taunt. 45; see '*Tender*,' *post*); or payment into Court (*Thompson* v. *Jackson*, 1 M. & G. 242; *Hart* v. *Denny*, 1 H. & N. 609; *Gales* v. *Holland*, 7 E. & B. 336; *O'Brien* v. *Clement*, 15 M. & W. 435. see '*Payment into Court*,' *post*); and to not allowing together such pleas as would produce an incongruity on the record, see 1 Chit. Pr,, 12th ed., p. 282.

In an action against an executor, the defendant has been allowed to plead *ne unques executor* and *plene administravit* (*Tyson* v. *Kendall*, 19 L. J. Q. B. 434). A defendant, sued as a member of a company, may plead that he was not a member of the company, with a plea of payment (*Phillipson* v. *Tempest*, 1 D. & L. 209).

In replevin, a defendant was allowed to plead two avowries, justifying under different and inconsistent titles (*Evans* v. *Davies*, 8 A. & E. 362).

Formerly pleas in bar and pleas in bar to the further maintenance of the action were not allowed to be pleaded together; but now by r. 22, T. T. 1853, 'a plea containing a defence arising after the commencement of the action may be pleaded together with pleas of defences arising before the commencement of the action; provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading such first-mentioned plea.' But this, by r. 23, does not apply to the case of such plea pleaded by one or more only out of several defendants, see *post*, p. 452 *n.**

Leave will be refused to plead manifestly bad or immaterial pleas (*London and Brighton Ry. Co.* v. *Wilson*, 6 Bing. N. C. 143; *Murray* v. *Boucher*, 9 Dowl. 537); as a plea of the defendant's bankruptcy in an action against him as the public officer of a company (*Steward* v. *Dunn*, 11 M. & W. 63); but not if there be any reasonable doubt on the subject (*Bulley* v. *Foulkes*, 7 Dowl. 839; *Bailey* v. *Cathrey*, 1 Dowl. N. S. 456). Leave will also be refused to plead pleas which, though not bad or immaterial on the face of them, are in fact beside the merits, and only pleaded to embarrass the opponent (*Gully* v. *Bp. Exeter*, 4 Bing. 525; 5 *Ib.* 42; and see *London and Brighton Ry. Co.* v. *Wilson*, 6 Bing. N. C. 137; *Cooling* v. *Gt. Northern Ry. Co.*, 15 Q. B. 486; *South Eastern Ry. Co.* v. *Hebblewhite*, 12 A. & E. 497).

A plaintiff has been allowed to plead a special replication, together with a general denial of the plea, although it does not raise a distinct defence, where the special replication enables the defendant to raise the question in dispute by demurrer (*Williams* v. *African Steam Navigation Co.*, 1 H. & N. 19).

* See C. S., c. 37, ss. 64, 65.

A new assignment and a replication to the same plea, when admissible, may be pleaded together without leave.

See further as to pleading several pleas, 1 Chit. Pr., 12th ed., p. 278."

Serving Declaration.

3. When a defendant appears, a copy of the declaration, with a notice to plead in twenty days, shall be served on his attorney, or on the defendant if he appears in person; and on default of his pleading within twenty days after such service, the plaintiff may sign judgment by default,—a plea being first demanded after the said twenty days (*c*).

(*c*) See the former rule, *ante*, p. 5, r. 10, and the cases there cited; and see C. S., c. 37, s. 38, in which this rule is incorporated.

Interlocutory Judgments.

4. From and after the present term, in every memorandum of interlocutory judgment, the date of the entry of the cause shall be stated in the margin, or at the foot of the memorandum (*d*).

(*d*) The memorandum of interlocutory judgment is as follows:—

(*Title of the court and cause*),

The day of A D 18 , (*see C. S., c. 37, s. 109, ante, p.* 124).

The plaintiff signs interlocutory judgment in this cause for want of an appearance ["plea," &c., *as the case may be*] by

P. A., *plaintiff's attorney*,

Cause entered and writ filed on the day of A. D. 18 .

Affidavits.

5. From and after the first day of April next, every affidavit to be used in any cause or civil proceeding, either on the Common Law or Equity side of the Supreme Court, shall be drawn up in the first person, and shall be divided into paragraphs; and every paragraph shall be numbered consecutively, and, as nearly as may be, shall be confined to a distinct portion of the subject. No costs shall be allowed for any affidavit, or part of an affidavit, substantially departing from this rule (*e*).

(*e*) Taken from the English R. G. M. V. 1854, r. 2. For the practice on the Equity side of the Court see C. S., c. 49, s. 52.

It was held in *ex parte Welling*, 3 Pugs., 217, that an affidavit drawn in the third person could not be read; see *contra*, Har. C. L. P. Acts, 680; Finl. C. L. P. Acts, 566, where it is said that loss of costs seems the only penalty for non-observance of this rule; and compare *ex parte Hall*, 19 C. B., N. S. 369).

Where there is a cause in Court an affidavit must in general be entitled of the Court (*Osborn* v. *Tatum*, 1 B. & P., 271; *Wigden* v. *Birt*, 1 Dowl., N. S. 93; *Rolfe* v. *Burk*, 4 Bing., 101; *Hands* v. *Clements*, 11 M. & W., 816). An affidavit

to hold to bail (*Cotter* v. *Brownell*, 1 Pugs., 356), and an affidavit on a motion for a rule nisi for a mandamus (*ex parte Kerr*, 2 Pugs., 62), have been considered sufficient though not so entitled, they appearing to have been sworn before a commissioner for taking affidavits to be read in the Supreme Court. The christian and surname of all the parties to the cause must also be writ.. 1 in full (*Anderson* v. *Baker*, 3 Dowl., 107; *Cohen* v. *Williams*, 8 Dowl , 418; see *Wilmot* v. *Cornwall*, Bert., 31, and Stockton's note; *Masters* v. *Carter*, 4 Dowl. 577); if so written in the proceedings, see C. S., c. 37, s. 164, *ante*, p. 55. The special character, if any, in which they sue or are sued must also be fully stated (*Wright* v. *Hunt*, 1 Dowl., 457; *Cusley* v. *Smith*, 4 Dowl., 477; *Phillips* v. *Hutchinson*, 3 Dowl., 20); it is, however, sufficient to describe plaintiffs as "trustees for all the creditors of" an absconding debtor, omitting the words "the estate and effects of" (*Allison* v. *Robinson*, 2 Han., 161). It must also clearly appear which parties are plaintiffs and which defendants (*Harris* v. *Griffith*, 4 Dowl., 289). Entitling cause as "C. D. *ats.* A. B." is bad (*Richards* v. *Isaac*, 2 Dowl., 710; *Cotton* v. *Stack*, 2 Pugs., 431), and the abbreviation "plff." for plaintiff renders the affidavit defective (*Bank of Nova Scotia* v. *Morrow*, 1 P. & B., 343; and see *Raymond* v. *Caldwell*, 6 All., 56). Where the same rule is to be moved for in several causes the motion may be made on a single affidavit entitled in all the causes (*Brown* v. *Trenholm*, 2 All., 515).

An affidavit for an attachment under the repealed Act C. S., c. 42, ought not to have been entitled in the cause as it was sworn before the writ was issued; the title, however, was treated as surplusage, and it did not vitiate the affidavit (*Davidson* v. *O'Connell*, 3 Pugs., 684; and see *Hargreaves* v. *Hayes*, 5 E. & B. 272). Where an application was made by a sheriff against an attorney to compel him to pay sheriff's fees, affidavits entitled in the name of the sheriff against the attorney by name were held to be improperly entitled, as there was no such cause in Court (*Drury* v. *Howe*, 3 Kerr, 588). A rule nisi for a mandamus obtained on an affidavit entitled "The Queen v. the Justices of York" was discharged without costs (*R.* v. *Justices of York*, 1 All., 90; and see *ex parte Nohre*, 1 B. & C., 167; *ex parte Walkwork*, 4 D. & L., 403; *R.* v. *Robinson*, 6 T. R., 642). A title "In the matter of an election," &c., in an affidavit on a motion for a rule nisi for a *quo warranto* is mere surplusage (*per Allen, C. J., ex parte O'Keefe*, 1 P. & B., p. 5). The affidavit for a prohibition ought not to be entitled in a cause but "in the matter of an action" in the inferior Court (*Wallace* v. *Allen*, 1 Fish. Sup. Dig., 31).

By an old rule of the King's Bench, M. T. 15 Car. II., "The true place of abode and the addition of every person who shall make affidavit in Court here shall be inserted in such affidavit" (see R. G., H. T. 2 Wm IV., pl. 5, Practice Rules of 1853, r. 138; *DeArgent* v. *Vivant*, 1 East,, 330). If either of these be omitted the affidavit will be irregular on the face of it, see *Cobbett* v. *Oldfield*, 16 M. & W., 469; but not a nullity, see *ex parte King*, L. R. 7, C. P., 74; *Scott* v. *Garnett*, 2 All., 624; and if either part be falsified by affidavit it will be in like manner rejected (*Lush*, 764). The rule does not, however, apply to affidavits made by parties in the cause (*Jackson* v. *Chard*, 2 Dowl. 469), and it is sufficient to describe them as "the above named plaintiff (or defendant)," without inserting the place of abode or any other addition (*Sharpe* v. *Johnson*, 4 Dowl. 324; *Shirer* v. *Walker*, 2 M. & G. 917; *Angel* v. *Ihler*, 5 M. & W. 16). It is sufficient to give the addition: "A B., of, (etc.), formerly a member of the firm of B. C., of, (etc.), attorneys for the above named plaintiffs" (*Bank of Nova Scotia* v. *Morrow*, *supra*). See the decisions on this rule, 2 *Chit. Arch.*, 12 *ed.*, 1618;

and the cases under the Bills of Sales Act, *Ros. Ev.*, 14 ed., 1189; Har. C. L. P. Acts 678.

The omission of the words "make oath and say" (*Allen* v. *Taylor*, L. R. 10 Eq. 52; see *ex parte Torkington*, L. R. 9 Ch. 298), or "oath" (*Doe* d. *Britton* v. *Clark*, 2 Dowl. N. S. 393) renders the affidavit inadmissible. So, it seems, the substitution of "said" for say (*Haworth* v. *Hubberstey*, 3 Dowl. 453).

Dates and sums ought to be expressed in words at length, but the use of figures in an affidavit under the Attachment Act was held not to be a ground for setting aside the attachment (*Gray* v. *Alcorn*, 1 P. & B. 555).

In 3 Chit. Gen. Pr. it is said "Every affidavit should be in the genuine natural language of the deponent, and where there are several deponents each should swear in his own peculiar terms, and if several affidavits be precisely in the same words it will naturally excite suspicion that the whole were dictated by the practitioner or his clerk and are not the genuine statements of the deponents," and this is quoted with approval by *Allen, C. J.*, in *Bennett* v. *Smith*, 1 P. & B., p. 39, and by *Duff, J.*, in *Busby* v. *Maritime Bank*, at chambers, Aug., 1880.

Prolixity in affidavits is remarked upon in *Betts* v. *Chapman*, 2 All. 450.

As to stale affidavits see *Gilbert* v. *Campbell*, 2 Han. 55; *Palmer* v. *Dinsmore*, 2 Pugs. 150.

See as to the wording of affidavits in reply, judgment of *Wetmore, J.*, in *ex parte Milner*, 3 Pugs. 96.

As to swearing "on information and belief" see *Gilbert* v. *Endean*, L. R. 9 Ch. D. 259; *ex parte Milner, supra*; *Arndt* v. *Porter*, 39 L. J. Ex. 19; *Doe* d. *Jones* v. *Roe*, 5 Dowl. 226; *Dowling* v. *Harman*, 6 M. & W. 132; *Doe* d. *George* v. *Roe*, 3 Dowl. 22; *Roe* v. *Bradshaw*, L. R. 1 Ex. 106; *Fry* v. *James*, 1 Fish. Sup. Dig. 32; *ex parte Tighe*, 2 Dowl. 148; *ante*, p. 110.

Where a statute authorizes justices "on evidence" of a certain fact to issue a warrant the fact cannot be proved by affidavit (*McGuirk* v. *Richard*, 2 Pugs. 240).

Quære, to what extent affidavits are admissible in proceedings under C. S., c. 83, s. 22, by a landlord against an overholding tenant, see *ex parte Bell*, 1 P. & B. 355.

Judgment Rolls.

6. No entry shall be made on any judgment roll, of any warrants of attorney to sue or defend (*f*).

(*f*) See C. S., c. 37, s. 110, to the same effect.

Nisi Prius Records.

7. No *placita, jurata*, or award of *venire*, shall be entered on the nisi prius record (*g*).

(*g*) See C. S., c. 37, s. 110, to the same effect.

All rules of Court heretofore made, inconsistent with the present rules, are hereby rescinded.

---

2. The following forms of proceedings (*h*) shall be used in the cases to which they are applicable, with such variations as the

nature of the action, the character of the parties, or the circumstances of the case may render necessary; but any variance therefrom, not being in matter of substance (*i*), shall not affect their validity or regularity.

(*h*) These forms, with some slight changes which are pointed out, are inserted in the Con. Stat., as schedules C and D to c. 37. They are in part founded on those given by the Practice Rules of 1853. As to effect of forms not warranted by the statute, see *Kendic* v. *Merritt*, 18 C. B. 173.

(*i*) See the cases cited, *ante*, p. 101, n. (*c*).

No. 1.—Form of Judgment by Default (*j*).

IN THE SUPREME COURT.

The day of in the year of our Lord one thousand eight hundred and [*date of the declaration (jj)*].

(*Venue.*)—A. B. by C. D. his attorney (*or*, in person, *as the case may be*), sued E. F., who had been summoned to answer the said A. B. by virtue of a writ issued on the day of in the year of our Lord one thousand eight hundred and out of Her Majesty's Supreme Court at Fredericton; for &c. [*copy the declaration to the end.*] And the said E. F. has not appeared (*k*); wherefore the said A. B. ought to recover against him on occasion of the premises.* And the said A. B. prays that the amount to be recovered in this action may be ascertained and assessed by the court; and thereupon it is proved, and appears to the court that the said A. B. ought to recover against the said E. F. the sum of (*l*), Therefore it is considered that the said A. B. do recover against the said E. F. the said sum of so ascertained and assessed by the court, and also for his costs of suit by the court here adjudged to the said A. B., which, in the whole, amount to (*m*)

If the damages have been assessed on a Writ of Inquiry, proceed as follows, after the asterisk in the above form :—

But because it is unknown to the court what damages the said A. B. has sustained by means of the premises, the sheriff of the said county of is commanded that by the oaths of seven good and lawful men of his bailiwick he inquire thereof, and that he send the inquisition which he shall thereupon take, to our Supreme Court at Fredericton, on &c. [*the return day of the writ of inquiry,*] under his seal, and the seals of the said jurors. At which day, before our said Court comes the said A. B. by his said attorney, and the said sheriff returns the inquisition taken before him in the said county, on the day of in the year, &c., by which it is found that the said A. B. has sustained damages by means of the premises, to the sum of . Therefore it is considered that the said A. B. do recover against the said E. F. the said sum of so found by the said inquisition, and also for his costs," &c. [*as above*].

If the judgment is on confession (*n*), *proceed as follows after the declaration :—*

And the said E. F. in person, (*or*, by his attorney, *as the case*

may be) comes and says that he cannot deny the action of the said A. B. in the declaration mentioned, and acknowledges that the said A. B. is entitled to recover against him the said E. F. the sum of . Therefore it is considered that the said A. B. do recover against the said E. F. the sum of so acknowledged; and also for his costs, &c. [*as above*].

(*j*) The attorney is not entitled to make up the judgment roll, in order to charge for it against the defendant, till damages are assessed, unless under special circumstances (*McInerney* v. *Chandler*, 5 All. 436).

(*jj*) *Quære*, if it should not be date of signing judgment, see Form 2, *infra*; C. S., c. 37, s. 109, *ante*, p. 124; *Chit. Forms*, 10 *ed.*, 71, 520.

(*k*) Under the English practice this judgment would be a judgment by default *for want of a plea* (*Chit. Forms*, 65), in which the statement of the default is: "And the defendant in person ['*or*, by D. A., his attorney'] says nothing in bar or preclusion of the said action of the plaintiff, whereby the plaintiff remains therein undefended against the defendant" (*id.* 520).

(*l*) See C. S., c. 37, s. 111 (36 Vic., c. 31, s. 114; stat. 15–16 Vic., c. 76, s. 95). An amendment by filling in the amount of damages and costs was allowed (*Smith* v. *Sonea*, 4 All. 266).

(*m*) For the form of judgment roll where judgment is signed against a defendant served abroad under C. S., c. 37, ss. 15, 16, see *Chit. Forms*, 10 *ed.*, 71.

In the margin of the judgment roll should be written "Judgment signed the day of , A. D. 18 ."

A judgment docket must be delivered to the clerk with every judgment roll (C. S., c. 37, s. 114; stat. 4–5 W. & M., c. 20). It may be as follows:—

"In the Supreme Court.

Of Term Victoria.

Mr. P. A.'s docket of judgment signed and filed the day of A. D. 18 .

Venue, Saint John. { A. B., plaintiff, and C. D., defendant. } Roll

Judgment for plaintiff [by default *or*] on verdict in assumpsit [&c.] for

Damages, $
Costs, $
$

Dated this day of , A. D. 18 .

P. A., plaintiff's attorney."

(*n*) See *ante*, p. 82, 123.

No. 2.—Form of Judgment of Non Pros. (*o*)

IN THE SUPREME COURT.

The day of in the year of our Lord one thousand eight hundred and [*date of signing judgment*].

(*Venue.*)—C. D. was served with a copy of a writ of summons, (*or*, arrested by virtue of a writ of capias, *as the case may be*,) issued out of

our Supreme Court at Fredericton, on the day of in the year of our Lord, &c., in an action at the suit of A. B. [*if the defendant was arrested, state*:—"directed to the sheriff of the county of "] and the said C. D. appeared to the said writ by E. F. his attorney, (*or*, in person, *as the case may be*,) according to the provisions of "The Common Law Procedure Act, 1873." (*p*) And the said A. B. hath not declared against the said C. D. in the said action within the time prescribed by the said Act. (*q*) Therefore it is considered that the said A. B. take nothing by his said writ. And it is further considered by the said Court that the said C. D. do recover against the said A. B. the sum of for his costs in this behalf, by the said Court now adjudged to the said C. D., and that the said C. D. have execution thereof, &c.

(*o*) See as to this judgment, *ante*, pp. 3, 70, 92. It cannot be signed for want of a declaration after the expiration of a year from the service of process (C. S., c. 37, s. 48).

(*p*) "Chapter 37 of the Consolidated Statutes" in the Con. Stat.

(*q*) "Chapter" in the Con. Stat.

No. 3.—Form of a Nisi Prius Record. (*r*)

IN THE SUPREME COURT.

The day of in the year of our Lord one thousand eight hundred and [*date of declaration*].

(*Venue.*)—A. B. by C. D. his attorney (*or*, in person, *as the case may be, and as in the declaration*), sues E. F., who has been summoned to answer the said A. B. by virtue of a writ issued on the day of in the year of our Lord [*the date of the first writ*], out of Her Majesty's Supreme Court of Judicature; for &c [*copy the declaration to the end, and all the pleadings, with the dates, writing each plea or pleading in a separate paragraph, and numbering the same as in the pleading delivered, and conclude thus*]: Therefore let a jury come before the Honorable Her Majesty's Chief Justice, assigned to hold Pleas in the Court of our Lady the Queen, at Fredericton, on the day of , in the year of our Lord 18 [*the first day of the Nisi Prius Sittings*], to try the matters in question between the said parties. [*If the cause is to be tried at a Circuit Court, instead of the above, state as follows*: "before the Honorable one of the Justices of our Lady the Queen, assigned to hold the Circuit Court and take the assizes in and for the said county of on," &c. [*the first day of the Circuit Court*].

(*r*) The record must be regularly and properly made up (*ante*, p. 164). A copy of particulars of demand and set-off (*ante*, p. 71) and a copy of notices of defence (*ante*, p. 133), are to be annexed.

No. 4.—Form of Postea on a verdict for Plaintiff. (*s*)

Afterwards, on the day of A. D. [*the first day of the Sittings, or Circuit Court, as the case may be*], a the County of before the Honorable Chief Justice, (*or*, ne of the Jus-

tices of the Supreme Court," *as the case may be*), come the parties within mentioned, by their respective attorneys within mentioned, and a jury of the said county being summoned, also come, who being sworn to try the matters in question between the said parties,* upon their oath say, that [*state the affirmative or negative of the issue as it is found for the plaintiff, and in the terms adopted in this pleading. If there be several issues joined and tried, say*, "as to the first issue within joined, upon their oath say that" [*state the affirmative or negative of the issue as found for the plaintiff*], "and as to the second issue within joined, the jurors aforesaid upon their oath say that" [*proceed to state the finding of the jury upon all the issues; and conclude with the assessment of damages thus*]: And they assess the damages of the said A. B. on occasion of the premises within complained of by him, over and above his costs of suit, at . Therefore, &c.

[*Where the verdict is for the defendant* (*t*), *the Postea must be varied to suit the circumstances*].

(*s*) See the form of *postea* where the jury are not unanimous, *ante*, p. 137.

The clerk is to "set down the day of the date of the verdict in the margin of the *postea* when he signs his name thereto" (C. S., c. 37, s. 112).

The *postea* belongs to the party substantially succeeding in the cause (*Abel* v. *Light*, 6 All. 423). If he neglects to enter up judgment thereon within a certain time it will be given to the opposite party, who succeeded on some of the issues, for that purpose (see *Dickinson* v. *Ketchum*, Bert. 63; *Read* v. *Botsford*, 4 All. 476).

When the *postea* is stayed by order of a judge the clerk of the circuits is not justified in delivering it out to the attorney of either party without the production of a rule of Court or judge's order (*Starrs* v. *Wilson*, 2 Pugs., p. 494).

See as to amending *postea*, *ante*, p. 178.

(*t*) *If the plaintiff was nonsuited proceed as in the above form to the* * *and then thus* "withdrew from the bar here," [*or if the plaintiff was nonsuited after giving evidence, say* "after evidence being given to them thereupon withdrew from the bar here"], to consider of the verdict to be by them given upon the premises; and after they had considered thereof and agreed among themselves they returned to the bar here to give their verdict in this behalf: Whereupon the plaintiff, being solemnly called, comes not nor does he further prosecute his suit against the defendant. Therefore, &c." (*Chit. Forms*, 10 *ed.*, 256).

No. 5.—Form of Postea on a verdict finding a balance in favor of a Defendant under a plea of set-off, Sec. 72. (*u*)

[*Proceed as in Form No. 4, to the asterisk, then thus*]: upon their oath say, [*if the first plea was* "never indebted," *say*—that the said E. F. never was indebted, as within alleged]. And as to the second issue within joined, the jurors aforesaid say, that the said A. B. was and is indebted to the said E. F., as within alleged, in an amount greater than the said A. B.'s claim in the declaration mentioned, and they find and assess the balance due from the said A. B. to the said E. F. in respect thereof, at the sum of . Therefore, &c.

(*u*) Sec. 71 of C. S., c. 37, This is a re-enactment of the statutes 2 Geo. II., c.

22, s. 13; 8 Geo. II., c. 24, s. 5, and 15-16 Vic., c. 76, s. 75, with an additional clause authorizing a verdict for the balance due, upon which the above form is founded. For the *postea* where the plea is pleaded in the English form see *Chit. Forms*, 10 *ed.*, 252.

No. 6.—Form of Judgment for Plaintiff on a Verdict. (*v*)

[*Copy the Nisi Prius Record to the end* (*w*) *of the Postea, and then proceed thus*]: Afterwards on the day of in the year of our Lord [*day of signing final judgment*], come the parties aforesaid, by their respective attorneys aforesaid, and the Honorable Her Majesty's Chief Justice assigned to hold Pleas in Her Majesty's Supreme Court at Fredericton, (*or*, "the Honorable one of the Justices of the Supreme Court of our Lady the Queen, assigned to hold the Circuit Court and take the assizes in and for the said county of," &c., *as the case may be*), before whom the said issue was (*or*, "issues were") tried, hath sent hither his record, had before him, in these words: Afterwards, &c., [*copy the postea*]. Therefore it is considered that the said A. B. do recover against the said E. F. the said moneys by the jurors aforesaid, in form aforesaid assessed, (or, *if the action be in debt, and the jury do not assess the debt, but only damages for the detention, say* "do recover against the defendant the said debt of and the damages by the jurors aforesaid assessed);" and also for his cost of suit by the Court here adjudged of increase to the said A. B.; which moneys and costs, (*or*, "debt, damages and costs)," in the whole amount to.

(*v*) For the form where there has been an offer to suffer judgment see *ante*, p. 144, where the Court awards interest, *ante*, p. 139.

Judgment is not to be signed before twenty days after verdict (C. S., c. 37, s. 112).

(*w*) "Commencement," C. S., p. 290.

No. 7.—Form of Judgment for Defendant on a verdict.

[*Proceed as in the preceding Form to the end of the Postea, then thus:*] Therefore it is considered that the said A. B. take nothing by his said writ, and that the said E. F. do go thereof without day, &c. And it is further considered that the said E. F. do recover against the said A. B. for his costs and charges by him about his defence in this behalf expended, by the Court here adjudged to the said E. F., and that the said E. F. have execution thereof, &c. (*ww*).

(*ww*) This form is also applicable where the plaintiff is nonsuited.

No. 8.—Form of Judgment for Defendant on a plea of Set-off.

[*Proceed as in the above Form to the end of the Postea—then thus:*] Therefore it is considered that the said A. B. take nothing by his said writ, but that the said E. F. do recover against him the sum of in form aforesaid found to be due from the said A. B. to the said E. F., together with for his costs of defence by the Court here adjudged to the said E. F., amounting in the whole to , and that the said E. F. have execution therefor.

No. 9.—Form of Postea on a verdict for Defendant in Replevin, on a plea of non cepit, under 1 Rev. Stat. c. 126, § 15. (*x*)

Afterwards &c. [*as in the preceding Form to the asterisk, then thus:*] that the said defendant did take and detain the goods and chattels mentioned in the declaration, as a distress for rent due for certain premises held by the plaintiff under a demise at a certain rent; and that there was due to the defendant for such rent at the time of the distress, and still is due, the sum of , and they assess the damages of the defendant for the said rent, and the cost and charges of making the distress, at the sum of , besides his cost of suit, &c.

[*If the bailiff of the landlord, or any one acting in aid of the landlord, be made a defendant, the postea may be varied, as follows:*] "And that there was due to the defendant C. D. [*the landlord*] for such rent, &c. [*as above*] and that the defendant E. F. was at the time of making the said distress, the bailiff of the said C. D. (*or*, "that the said E. F. was present aiding and assisting the said C. D. in making the said distress)," &c.

(*x*) Sched. D, No. 7, to C. S., c. 37. Sec. 205 of that chapter re-enacts 1 R. S., c. 126, s. 15. See the former rule, *ante*, p. 142.

"It was necessary in the avowry or cognizance to shew that the defendant or some person from whom the reversion came to him was seized and the quantity of estate which he was seized of, and that he made a lease to the plaintiff for life or years or at will, and the descent or grant of the reversion to the defendant (*Lib. Plac.* 264; Clift. 640). So if tenant for years had letten the estate to another for a less term at a certain rent, and distrained for the rent, it was incumbent on him in his avowry to shew the commencement of his estate by laying the fee in some person who granted the term and then deducing the title to it down to himself, from the grantee of the term, which was often a difficult and impracticable thing to be done, especially in long terms for years, which are generally assigned to a great number of persons (2 Salk. 562; *Scilly v. Dally*, S. C., Carth. 444, Comb. 476, 1 Ld. Raym, 331, 1 Bro. P. C. 74). And for the same reason an avowry for rent stating that A., *habens titulum*, demised to the defendant and that he made an underlease to the plaintiff was held bad on demurrer (2 Stra. 796; *Reynolds* v. *Thorp*)"—2 Wms. Saund., 5 *ed.*, 285.

To obviate these difficulties the stat. 11 Geo. II., c. 19, s. 22, enacted in effect that the defendant should not be obliged to state in detail the landlord's title. This stat. was enacted in this Province by 50 Geo. III., c. 21, s. 9, and again by 13 Vic., c. 53, s. 19, but on the revision of the Acts in 1854 these provisions were omitted, and by 1 R. S., c. 126, s. 15, above referred to, the defendant was permitted to give in evidence under a plea of *non cepit* any matter which would support an avowry or cognizance.

Unless the pleader is aware of the difficulties referred to in *Wms. Saund.* which does not very frequently happen in this Province) it is not advisable to proceed under the Act, as the advantage gained by putting on the plaintiff the onus of proving the taking, which from the nature of the case is not disputed and is easily proved (*McLeod* v. *McMillan*, 3 Kerr 64; *Ogden* v. *Bourgeois*, 2 Pugs. 365), is more than counterbalanced by the loss of the right to begin (*Myers* v. *Smith*, 4 All. 207).

And the better opinion seems to be that the plaintiff cannot deny the whole of the avowry or cognizance by taking issue thereon or by any general denial, but must take issue on some particular allegation (*Bul. & L.* 780 n.; *Chit. Jr. Prec.* 742; *Jones* v. *Kitchen*, 1 B. & P. 76; *contra*, *Chit. Forms*, 10 *ed.*, 624), so that a defendant cannot be turned round at the trial on some point there for the first time raised, as may easily happen if he proceeds under the Act and is not prepared to meet every conceivable defence that may be opposed to an avowry, &c. (see *Myers* v. *Smith*, 4 All. 207).

It was decided in the term at which the superseded rule (*ante*, p. 142) was made that a successful defendant was entitled to damages if he gave such evidence under *non cepit* as would have supported an avowry (*Myers* v. *Smith*).

As to what defences are available under *non cepit* at common law, see *Alexander* v. *Coiner*, 3 P. & B. 599.

No. 10.—Form of Judgment for Defendant in Replevin, under 1 Rev. Statutes, c. 126, § 15.

[*Proceed in the usual form to the end of the Postea—then thus:*] Therefore it is considered that the said A. B. take nothing by his said writ, and that the said E. F. do go thereof without day, &c. And it is further considered that the said E. F. do recover against the said A. B. the said sum of by the jurors aforesaid assessed, and also for his costs and charges by him about his defence in this behalf expended, by the Court here adjudged to the said E. F., which said damages and costs in the whole amount to , and that the said E. F. have execution thereof, &c.

No. 11.—Writ of Fieri Facias on a Judgment for Plaintiff (*y*).

VICTORIA, by the Grace of God, &c. To the sheriff of (*z*) greeting:

We command you (*a*), that of the goods and chattels (*b*) of C. D. in your bailiwick, you cause to be levied and made *[*the amount for which the judgment is signed* (*c*)], which A. B. lately in our Supreme Court recovered against him, whereof the said C. D. is convicted as appears by the record, and have that money before us at Fredericton, on," &c., [*a return day in term* (*d*)], to be rendered to the said A. B. And in what manner you shall have executed this our writ, make appear to us at the return hereof; and have you there then this writ. Witness, &c., (*e*) [*the date of issuing* (*f*)].

(*y*) A substantial variation from this form may render the writ irregular (*Willard* v. *Lodge*, 2 All. 160; see *R.* v. *McDonald*, 4 All. 440; *Atkinson* v. *Desmond*, 5 All. 564).

(*z*) Ground writs are abolished by C. S., c. 37, s. 123 (36 Vic., c. 31, s. 126; 12 Vic., c. 39, s. 34; stat. 15-16 Vic., c. 76, s. 121). See *Sewell* v. *Burpe*, 3 Kerr 363, and *Brown* v. *Partelow*, *id.* 324, under the common law.

(*a*) If an alias writ, say "as before we have commanded you;" if a pluries writ, say "as oftentimes before we have commanded you." The original should be returned and filed before the issue of an alias, see *Ryan* v. *James*, 1 Pugs 122; *Brown* v.

Partelow, supra; *Smith* v. *Jones*, 2 All. 176; *Stewart* v. *Hazen*, 2 All. 254; *Doe* d. *Walsh* v. *Dalton*, 6 All. 387.

(*b*) "Lands and Tenements," C. S., p. 291.

(*c*) A writ differing in amount only from the judgment is irregular merely (*Spence* v. *Stuart*, Bert. 219; and see *Linton* v. *Wilson*, 1 Kerr, 223; *Lynott* v. *Seelye*, 1 All. 35; *Willard* v. *Lodge*, 2 All. 160; *Doe* d. *Walsh* v. *Dalton*, 6 All. 387; *Ryan* v. *James*, 1 Pugs. 122; *Cameron* v. *Wilson*, T. T. 1864, Stev. Dig. 207. If part of the debt has been levied under a former execution the levy should be recited (*Smith* v. *Jones*, 2 All. 176).

(*d*) See C. S., c. 37, s. 124.

(*e*) The writ is tested on the day it is issued (C. S., c. 37, s. 124. *ante*, p. 28). It should not be issued before judgment signed, see *DeVeber* v. *Colling*, H. T. 1834, S. Dig. 204; *St. Stephen Bank* v. *N. B. & C. R. & L. Co.*, 5 All. 629; *Robinson* v. *the same*, *id.* 630.

Lands are bound from the time of the delivery of the writ to the sheriff to be executed (*Doe* d. *Nesmith* v. *Williston*, 2 Kerr, 459; C. S., c. 47, s. 3). So are goods in the county into which the writ issues (*Connell* v. *Miller*, 1 Kerr, 302; *Crane* v. *Clark*, H. T. 1828, Stev. Dig. 203; *Johnson* v. *Crocker*, 4 All. 94; *Hamilton* v. *Bryson*, 1 Han. 618; C. S., c. 76, s. 11 (stat. 29 Car. II., c. 3, s. 16).

Though the amount in the body of the writ must be that in the judgment, the writ must be endorsed to levy the sum really due (*Lunt* v. *Estabrooks*, 3 Kerr, 144).

On executions on judgment for debt or damages signed since 23rd April, 1862, a direction may be endorsed to levy interest at 6 per cent. from the time of judgment (C. S., c. 37, s. 121; 36 Vic., c. 31, s. 124; 25 Vic., c. 25; see stat. 1–2 Vic., c. 110, s. 17; Pr. Rules 1853, r. 76). See as to entering judgment *nunc pro tunc* in order to obtain interest (*Commercial Bank* v. *European Assurance Sy.*, 2 Han. 245).

The indorsement may be thus:—

"Levy [the whole, namely] $ with interest thereon at 6 per cent. from the day of , A. D. 18 , besides sheriff's fees, poundage, &c., and all incidental expenses, and $ for executions."

By stats. 2 Geo. II., c. 23, s. 22, and 12 Geo. II., c. 13, s. 4, every writ of execution, before the execution thereof, shall be subscribed or endorsed with the name of the attorney, written in a common, legible hand, by whom such writ shall be so sued forth.

(*f*) C. S., c. 37, s. 124.

No. 12.—Writ of Fieri Facias on a Judgment for Defendant (*g*).

VICTORIA, by the Grace of God, &c., [*as in the preceding form, to the asterisk*], which lately in our Supreme Court were awarded to C. D. for the costs of defence in an action lately prosecuted in our said Court by the said A. B. against the said C. D., whereof the said A. B. is convicted: [*If a verdict has been given in favor of the defendant for a balance on a plea of set-off, state thus:*] "were awarded to C. D. according to the provisions of 'The Common Law Procedure Act, 1873' (*h*), as well for a balance found due to him from the said A. B. in an action lately prosecuted in our said Court by the said A. B. against the said C. D.,

as for the costs of defence of the said action; whereof the said A. B. is convicted"]: and have that money before us, &c., [*as in the preceding Form*].

(*g*) C. S., c. 37, Sch. C, No. 10.

(*h*) "According to the provisions of the Common Law Procedure Act, 1873," omitted in Con. Stat.

See notes to Form 11, *supra*.

No. 13.—Writ of Fieri Facias on a Judgment for Defendant in replevin (*i*).

VICTORIA, by the Grace of God, &c., [*as in Form No. 11* (*j*) *to the asterisk*] which lately in our Supreme Court (*k*) were awarded to the said C. D. in an action of replevin lately prosecuted against him by the said A. B. in our said Court,* as well for unlawfully taking the goods and chattels of the said C. D. as for the costs of the defence of the said action; whereof the said A. B. is convicted: and have that money before us (*l*), &c., [*conclude as in Form No. 12*].

[*If the goods have not been restored to the defendant, and the value of them is awarded in damages under 1 Rev. Stat., cap. 126, proceed as above to the asterisk—then thus:*] as well for the value of certain goods and chattels of the said C. D. unlawfully taken by the said A. B., and for the said unlawful taking, as for the costs of defence of this (*m*) said action, whereof, &c.

(*If the goods replevied have been taken as a distress for rent, the form of the execution may be varied to suit the circumstances*).

(*i*) See the Form, C. S., c. 37, sch. D, No. 13.

(*j*) Including the words *lands and tenements*, Con. Stat.

(*k*) "*Or* County Court for the county of ," Con. Stat.

(*l*) "*Or* before our judge of the County Court for the county of ," Con. Stat.

(*m*) "His," Con. Stat.

---

3. The following regulations shall be observed in the office of the clerk of the pleas:—

Every record or paper to be filed in the office of the clerk of the pleas shall be plainly and legibly indorsed with the title of the cause and the name of the attorney filing the same, and shall be folded to a width of not less than two and a half inches. No record or paper substantially varying from this regulation shall be received by the clerk.

EASTER TERM, 1875—38 VIC.

Fees under the Attachment and Garnishee Acts (a).

IT IS ORDERED, That the table of fees and forms prescribed on the 31st day of October last, under the Act of Assembly 37 Victoria, cap. 7, "To provide for Process of Attachment in certain Civil Suits, and to abolish Imprisonment for Debt"; together with the Table of Fees under the Common Law Procedure Act 1873," shall, so far as may be applicable, be used, taken and allowed under the Act 38 Victoria, cap. 4, intituled "An Act to amend the Attachment and Abolition of Imprisonment for Debt Act," and under the Act 38 Victoria, cap. 5, intituled "An Act to provide for Garnishee or Trustee Process," until the same be altered under the authority given by the said last mentioned Acts.

(a) Obsolete, see 43 Vic., cc. 1 and 2.

HILARY TERM, 1876—39 VIC.

Motion Paper.

IT IS ORDERED, That so much of the rule of Michaelmas Term 30 Victoria, (a) as provides that causes entered on the motion paper shall come on to be heard immediately after the conclusion of the common motions at the beginning of each term, is hereby rescinded, and that hereafter causes and matters on the motion paper shall come on to be heard on the second day of each term as provided by the rule Hilary Term 6 Wm. IV. (b)

(a) *Ante*, p. 152.

(b) *Ante*, p. 62.

MICHAELMAS TERM, 1876—40 VIC.

Crown Cases Reserved.

IT IS ORDERED, That cases reserved for the opinion of the Supreme Court under the Revised Statutes, chapter 159, section 22, (a) shall come on to be heard immediately after the conclusion of the motions for new trials.

(a) This section, with ss. 23, 24, and s. 1 of c. 160 (C. S., pp. 1088–1090), is a re-enactment of the Impl. Act 11–12 Vic., c. 78, ss. 1, 2, 4, 5, the cases upon which

will be found in 2 *Fish. Dig.* 2872; *Arch. Cr. Pl.*, 18 *ed.*, 192, 208; *Rosc. Cr. Ev.*, 9 *ed.*, 225, 232, 234; 2 *Tasch. Cr. Law*, 375. The judge should report a case for the opinion of the Court and not make a return of all the evidence (*R.* v. *Ferguson*, 3 Pugs. 612). The Court has no discretion to refuse to hear a case reserved from a County Court because the defendant has left the country and is not under recognizance to appear and receive judgment (*R.* v. *Wright*, 1 P. & B. 363). The objections are confined to those taken at the trial and stated in the case (*R.* v. *Fenely*, 3 All. 132; *R.* v. *Tyrrc*, L. R. 1 C. C. R. 177–8). In *R.* v. *Dillon*, 6 All. 61, where the conviction could not have been sustained on the point reserved, but might have been supported under a statute not cited at the trial, the Court made no order, but recommended that a defendant be not called on his recognizance. A liberal construction should be put upon the Act, and it should be held to apply to any of the proceedings in the Court below after the indictment has been found (*R.* v. *Morrison*, 2 P. & B. 68.) The judgment of the Court below has been amended by confining it to the counts on which the conviction was sustainable (*R.* v. *McLean*, 1 P. & B. 377; see *R* v. *Ferguson*, 4 P. & B. 259).

A new trial will not be granted to the Crown, neither has the Crown an appeal to the Supreme Court of Canada from a judgment quashing a conviction (*R.* v. *Tower*, 4 P. & B. 168).

County Court Appeals. (*b*)

1. It is ordered, That the appellant from the decision of a judge of a County Court shall enter the cause on the appeal paper, of the term immediately succeeding the receipt, by the clerk of the pleas, of the proceedings from the judge; and when such proceedings are received during the term, the cause shall be entered by the appellant on the appeal paper (*c*) of the term, subject to the order of the Court as to the time when the same shall be heard. (*d*)

2. In case the appellant shall neglect to enter the appeal on the paper according to rule 1, or having entered it shall not proceed to argue and support the same, when reached in due course upon the paper during the term, if the appellant shall not proceed to support the appeal pursuant to any order of the Court made in respect thereof, then and in either of such cases, the respondent may upon the next or any subsequent common motion day after any such default, move that such appeal be dismissed, with costs (*e*).

3. Causes shall be entered on the Appeal Paper as A. B. Appellant, *vs.* C. D., Respondent, and any affidavit used in such cases may be entitled in the same way.

(*b*) The headings and the division into sections are as in the original rules.

(*c*) See R. Hil. 1869, *ante*, 161.

(*d*) The provisions of 30 Vic., c. 10, ss. 21–24; 33 Vic., c. 20, s. 4, and 36 Vic., c. 13, s. 3, relating to County Court Appeals, will be found in C. S., c. 51, ss. 50–52.

The time within which an appeal may be made is not limited to twenty days, and though the successful party may sign judgment if no stay of proceedings is obtained within that time, yet when he has not done so, and the proper bond is afterwards given, and the judge certifies the case to the Supreme Court, the appeal will be heard (*Currier* v. *Crosby*, 3 Pugs. 610; see *Francis* v. *Dowdswell*, L. R. 9 C. P. 243).

Where the County Court judge, under 33 Vic., c. 20, s. 4 (C. S., c. 51, s. 52) rescinded his order staying the proceedings till judgment on appeal and gave the respondent leave to proceed, which he accordingly did by signing judgment, the appellant's attorney attending without objection the taxation of costs,—held, that while the judge's order setting aside the stay of proceedings stood the appellant was bound by it and could not proceed to have the appeal heard, and it was accordingly dismissed without costs (*Fletcher* v. *Besnard*, 3 Pugs. 650). An application by the respondent to have the appeal entered on the appeal paper and dismissed on the ground that it had not been entered by the appellant, who had given notice of appeal, cannot be sustained if the proceedings have not been certified to the Court by the County Court judge (*Ryan* v. *James*, 2 Han. 408 n.); and, *quære*, whether the Court has any jurisdiction in the case until the proceedings are so certfied (*id.*, and see *Park Gate Co.* v. *Coates*, L. R. 5 C. P. 634; *ante*, 163). Where the judge returned copies of the proceedings had before his deceased predecessor, the Court refused either to dismiss or hear the appeal and ordered the originals to be returned (*Ryan* v. *James*, 2 Han. 407; see as to appeals from decision of deceased judge *Kinnear* v. *Calhoun*, *id.*, 483; *Boltenhouse* v. *Black*, S. Dig. 118). The judge should certify a copy of the pleadings, and where he did not do so the return was referred back to him to be amended (*McIntyre* v. *McMonagle*, 2 Pugs. 466), but papers entirely unnecesary for the decision of the question on appeal, *e. g.* the judge's order staying the proceedings, the bond, &c., should not be returned (*Little* v. *Cain*, 3 Pugs. 386). Where the proceedings certified by the judge were generally illegible the Court refused to hear the argument (*Dibblee* v. *Wood*, T. T. 1871, Stev. Dig. 117). An order to stay all proceedings and settle the cause on payment of the amount of the debt without costs may be appealed from (*Hanington* v. *Stewart*, 1 Pugs. 242), but *quære*, whether an appeal lies on an interlocutory order? (*id.*; *Ex parte McCulley*, 4 P. & B. 87;) and see as to what are final judgments appealable under sec. 11 of the "Supreme and Exchequer Court Act," (*Kandick* v. *Morrison*, 2 D. S. C. R. 12; *Wallace* v. *Bossom*, *id.*, 488). It has been doubted whether an appeal will lie from an order for costs under 30 Vic., c. 10, s. 40; C. S., c. 51, s. 45 (*Little* v. *Cain*, *supra*, and see *ante*, p. 159 n.) In *Ryan* v. *James*, 2 Pugs. 219, an appeal from a decision of a judge refusing to review taxation of costs on which the clerk, contrary to *Wood* v. *Stymest*, 5 All. 429, allowed the costs of an abortive trial, was allowed.* An appeal against a judgment granting or refusing a new trial on the ground of the verdict being excessive (*Bell* v. *Wetmore*, 3 P. & B. 534) or against evidence, will not in general be sustained (*Hilland* v. *Hamm*, 1 P. & B. 289; *Smith* v. *Andrews*, *id.*, 541; *Sheraton* v. *Whelpley*, 4 P. & B. 75).

An order of a County Court judge setting aside a judgment by default, and allowing

* An appeal from an order under the Insolvent Act of 1875 awarding costs was dismissed with costs (*Tait* v. *Dowling*, 4 P. & B. 265).

the defendant to come in and defend on payment of costs, is not a decision upon "a point of law" within the 51st sec. of the County Court Act (Con. Stat., c. 51). and cannot therefore be appealed from. Mandamus to compel the County Court judge to certify the proceedings refused (*Ex parte McCulley*, 4 P. & B. 87).

An order of a judge setting aside a writ of capias for a supposed misnomer of the plaintiff has been reversed on appeal (*MacMonagle* v *Grant*, 3 Pugs. 231).

The judgment may be opposed on other grounds than those on which the judge proceeded if they appear and are admitted in his notes (*Chapman* v. *Knight*, L. R. 5 C. P. D. 308).

It was held in *Law* v. *Harding*, 4 P. & B. 120, that where a nonsuit was set aside with costs on appeal, the costs were not recoverable by attachment or execution under C. S., c. 38.

See further as to these appeals, *Chit. Arch.*, 12 *ed.*, 1725; 1 *Fish. Dig.* 2197; 5 *id.* 9373; 1 *Sup. Dig.* 1156.

(*e*) The counsel for the appellant and respondent appeared in the case before it was reached on the paper, and when the respondent's counsel requested that the case be heard out of its turn the appellant's counsel stated that he did not intend supporting the appeal; the respondent's counsel then asked to have it struck off the paper, which was ordered accordingly without objection,—held, that the respondent was entitled on the next common motion day to have the appeal dismissed with costs (*Burns* v. *Botsford*, 3 P. & B. 5). See as to dismissing appeal, *Ryan* v. *James*, *supra*.

HILARY TERM, 1877—40 VIC.

Common Motion Day.

IT IS ORDERED, That the Rule of Michaelmas Term, 29th Victoria, (*a*) which provides that "Tuesday in the second week in each Term shall be the regular day for motions, instead of Saturday of that week," is hereby rescinded; and that the second Saturday in each term shall be a day for such motions *(b)*.

(*a*) *Ante*, p. 151.

(*b*) Motions distinguished as "common motions," of which no notice has been given and which are not entered on the motion paper, will be heard on this day (*Bot. Rules*, 148).

EASTER TERM, 1877—40 VIC.

Fees under Attachment and Garnishee Acts (a).

In pursuance of the powers given by the Acts of Assembly 38 Victoria, cap. 4, entitled "An Act to amend The Attachment and Abolition of Imprisonment for Debt Act," and 38 Victoria, cap. 5, entitled "An Act to provide for Garnishee or Trustee Process," the following Table of Fees has been fixed and ordained

by the Supreme Court to be taken in proceedings under the said Acts:

Order to bring up a confined debtor for disclosure,	$0 50
Holding examination,	1 00
Taking minutes of the same, per folio,	0 20
Adjournment, when necessary,	0 50
Order for discharge or to remand,	0 50
Attaching Order,	1 00
Every other Order,	0 50
Order for the examination of a Primary or Judgment Debtor, under 38 Victoria, cap. 4, sec. 25,	1 00
Holding examination,	2 00
Taking the minutes when required, per folio,	0 20
Garnishee, or other Summons,	0 50
Hearing on Garnishee Summons, or Order,	2 00
Taking minutes, per folio,	0 20
Examining and taxing costs,	0 30

TO THE SHERIFF OR GAOLER.

Bringing a debtor for disclosure,	0 60

For executing a Writ of Attachment for disobedience of Judge's order, or to a subpœna, the same fees as are allowed for executing Writs out of the County Court.

By the Court.

W. CARMAN.

(*a*) Obsolete, see 43 Vic. cc. 1 and 2.

MICHAELMAS TERM, 1878—42 VIC.

Admission of Attorneys.

1. Whenever any attorney intending to apply for admission as a barrister, or any student intending to apply for admission as an attorney, shall have been recommended for admission by the Barristers' Society, pursuant to the rules of court of Michaelmas Term 1847 (*a*); such recommendation, together with the necessary certificates of moral character and term of study, shall be delivered to the Court on the day preceding that on which it is intended to move for their admission; and if the certificates, &c., are satisfactory, the applicants may be admitted at the opening of the Court on the following day.

(*a*) *Ante*, p. 115; see R. Hil. 1867, *ante*, p. 153.

The following amendments to the By-Laws of the Barristers' Society, *ante*, p. 153, relating to the admission of students and attorneys, were adopted at a meeting of the Society held in Hilary Term 1881:—

Section 19 shall be and is hereby amended by striking out the word "the" between the words "of" and "term" in the fifth line and inserting the word "Trinity" in lieu

thereof, and by striking out all the words after "Fredericton" in the sixteenth line and inserting the following: "which examination shall only take place annually in Michaelmas Term at such time in term as may be appointed, and by written questions and answers, or orally, in such branches as two members of the Council, one at least being an examiner, may determine. No person applying, being a graduate of any chartered college, will be required to undergo an examination."

By-Law 21 is hereby repealed and the following substituted in lieu thereof: "Any student who shall hereafter enter and be admitted a student-at-law may make application for admission as an attorney in Michaelmas Term only, and shall give a term's notice in writing on or before the first Friday of Trinity Term of his intention to apply for admission, and shall undergo an examination at such time and place as the Council or any three members thereof, two being examiners, may appoint, which examination shall be either by written questions or orally, or both, at the discretion of the examiners. If by written questions, the answers to such questions shall be in writing and shall be written in a legible hand, in the presence of one of the Council or examiners, or such other person as the Council may for that purpose appoint. No applicant shall be permitted to refer to any book or person or other source of information to assist him in such answers. The written papers shall be marked or designated by letters or numbers only when there is more than one applicant, and shall be submitted to the examiners for inspection and approval; and if satisfactory the examiners shall certify their approval thereupon, and without such certificate no applicant shall be deemed qualified for admission. In the case of students who have already entered, the application for admission and examination shall be received and held semi-annually only in Easter and Michaelmas Terms. The term's notice and other provisions above contained shall apply to such applicants. Provided, however, that in the case of students already entered whose terms of study shall expire either in Hilary or Trinity Term, such students may, if they wish, be examined at the previous term, and if such examination be found satisfactory and they are in other respects entitled, may be admitted at the expiration of their term of study."

From and after Trinity Term next no barrister shall give his consent to any student who may be studying in his office to engage in any other business or employment, or receive any salary or remuneration from any person, or to practice or try causes in any Court, without having first obtained the approval in writing of three members of the Council, setting forth the business or employment which the student may be allowed to engage in.

Judges' Orders, &c.

2. Judges' orders, and orders of nisi prius, may be made rules of court on the production of counsel's signature, without any motion for that purpose. (*b*)

(*b*) For the former practice see *Tidd*, 9 *ed.*, 485, 486, 511; *Underwood* v. *McHenry*, 2 All. 94.*

It was only intended by the above rule to obviate the necessity of making a motion and not to give any new power or permit of an order being made a rule of Court ex-

* In that case an application for an attachment for costs under an order of nisi prius putting off a trial on payment of costs was refused because the order had been made a rule of Court by a side bar rule.

cept in term (*McLeod* v. *James*, 2 P. & B. 439; see *R.* v. *Price*, 2 C. & M. 212; 2 Dowl. 233; Practice Rules 1853, r. 158).

In order to bring a party into contempt by not paying money according to an order a demand of the money must be made after the order has been made a rule of court (*Chilton* v. *Ellis*, 2 C. & M. 459), and it is not necessary to previously serve the order or make the demand (*Bell* v. *Moffatt*, 2 P. & B. 406). Where the clerk taxed the costs of making an order which had not been served a rule of Court, the Court refused to review the taxation, the objectionable items being small (*id.*; see *Black* v. *Lane*, 4 D. & L. 285; *Ex parte Forrant*, 21 L. J. Q. B. 276; Eng. R. G. T. T. 3 Vic.; Practice Rules 1853, r. 159).

An order of nisi prius, unlike a judge's order (see *ante*, p. 74; *Jackson* v. *McLellan*, 2 Han. 323), must be made a rule of Court before moving to set it aside (*Smith* v. *Gerow*, 2 Pugs. 430, per *Allen, J.*) Where an amendment has been allowed at nisi prius an entry of it should be made by the clerk, and a party desirous of moving to set aside the order for amendment must first take out the order and get it made a rule of Court (*Ladds* v. *Vernon*, 2 Pugs. 462; see *Smith* v. *Gerow*,; *Berresford* v. *Geddes*, L. R. 2 C. P. 285). A submission to arbitration under an order of nisi prius must be made a rule of Court before moving to set aside the award (*Nugent* v. *Barron*, 2 All. 621).

A judge's certificate under C. S., c. 60, s. 42 (1 R. S., c. 137, s. 43), that there was no reasonable cause for bringing the action in the Supreme Court, cannot be made a rule of Court (*Horner* v. *Crookshank*, 4 All. 375).

On filing the order indorsed "To move to have the within order made a rule of Court, A. B., *col. for* [*Aff.*]," with the clerk, he will draw up the rule, and if costs are to be taxed, append to it an appointment for taxation.

Hilary Term, 1880—43 Vic.

Entering causes at Circuit—Demurrer pending.

It is ordered, That no cause in which issues in law and in fact are joined shall hereafter be entered for trial at any circuit until the issues in law are disposed of, unless the plaintiff, when he enters the cause, intends to try it in its order when it is reached on the docket. (*a*)

(*a*) Either party may, by leave of the Court or a judge, plead and demur to the same pleading at the same time (C. S., c. 37, s. 76; 36 Vic., c. 31, s. 77; stat. 15–16 Vic., c. 76, s. 80).

The dictum in *Lloyd* v. *Union. Ins. Co.*, 3 Pugs. 78, that where a party has leave to plead and demur the issues in law are to be first disposed of unless the judge orders otherwise, was entirely extra judicial, and it is optional with the plaintiff, subject to the control of the Court, which he will have determined first (*per Allen, C. J.*, and *Duff, J.*, *Bell* v. *Moffatt*, 2 P. & B. 151). Leave to plead and demur should not be granted *ex parte* (*id.*)

It is doubtful if a defendant can reply to a plea and afterwards demur to both the plea and rejoinder (*Hanington* v. *Girouard*, 3 Pugs. 151).

The costs cannot be taxed on a judgment on demurrer while issues in law are outstanding (*Anderson* v. *Fawcett*, 4 P. & B. 82).

HILARY TERM, 1881.—44 VIC.

Equity Appeals.—Special Cases.

1. IT IS ORDERED, That all appeals from the decision of a judge in Equity, and all special cases, be printed (*a*) and filed with the clerk of the pleas before the opening of the Court on the first day of the term at which such cases are to be argued, and that copies for each of the judges be filed with the clerk at the same time; and that until such appeals and special cases are so filed, no entry thereof shall be made on the respective papers.

(*a*) See R. Trin. 1868, r. 3, and C. S., c. 40, s. 63, *ante*, 160, as to printing Equity appeals. Special cases were required to be printed by R. Trin. 1868, r. 6, *ante*, 161.

Demurrer Books—delivery of.

2. That the attorneys for the respective parties shall deliver to the clerk of the pleas before the opening of the Court on the first day of term, the copies of the demurrer books required to be delivered to the judges by the rule of Hilary Term, 6th Wm. IV. (*b*); and that no entry of the cause shall be made on the special paper until the party demurring shall have delivered to the clerk the demurrer books which by the practice he is required to deliver.

3. So long as the Court shall sit in two divisions, under the provisions of the Act 42 Vic., c. 8 (*c*), it shall not be necessary to deliver more than three demurrer books, two of which shall be made up and delivered by the plaintiff's attorney.

(*b*) *Ante*, 71.

(*c*) Repealed by 44 Vic., c. 12.

Probate and County Court Appeals.

4. That no entry of any appeal from a Probate Court (*d*), or from any County Court (*e*), shall be entered on the appeal paper until the return of the judge of the Court appealed from shall be on file in the office of the clerk of the pleas.

(*d*) *Ante*, 161, 162.

(*e*) *Ante*, 195.

Entering Causes for Hearing at Term.

5. That hereafter all entries upon either the motion, crown, special or appeal papers shall be made before the opening of the Court on the first day of each term, and that no entry shall afterwards be allowed, except for good cause shewn by affidavit, and

upon motion made to the Court on one of the common motion days (*f*).

(*f*) See the former rule, R. Mich. 1866, *ante*, 152.

Crown Cases Reserved.

6. Crown cases reserved shall come on for argument immediately after the crown paper; or, if there should be no crown paper, then immediately after the conclusion of the motion paper (*g*).

(*g*) See R. Mich. 1876, *ante*, 194.

EASTER TERM, 1881.—44 VIC.

Adding Supplemental Statement to Bill.

1. IT IS ORDERED, That where leave is given to introduce facts and circumstances into a bill filed, by way of amendment, or where the plaintiff has liberty to state such circumstances on the record, pursuant to the provisions of the 56th section of chapter 49 of the Consolidated Statutes, such amendment or statement shall be made by filing with the clerk a printed or written statement thereof, to be annexed to the bill; and such proceedings by way of answer, evidence, or otherwise, shall be had and taken thereon as if the same were embodied in a supplemental bill; provided, that the judge may make such order for accelerating the proceedings as may be agreeable to justice (*a*).

(*a*) Taken from the English Consol. Ord. xxxii., 2, the origin of which was the 44th Ord. of 2nd Aug. 1852. See 8th Ord. of July, 1853, *ante*, p. 210.

Equity Appeals—setting down for hearing.

2. Whenever a judge receives notice of appeal under the 61st section of chapter 49 of the Consolidated Statutes, he shall, on the application of either party, order that the same be set down for hearing at the term of the Supreme Court next after such application, and the clerk shall thereupon enter the same upon the proper paper, and the same shall be heard when reached; and if not then prosecuted, such appeal shall be dismissed with costs, unless the Court shall, upon good cause shewn, postpone the hearing of such appeal (*b*).

(*b*) See *aute*, p. 159, as to Equity Appeals.

EASTER TERM, 1881.—44 VIC.

Attorneys and Students.

At a Meeting of the Barristers' Society held in Easter Term, 1881, the 19th and 21st Sections of the Bye-Laws of the Barristers' Society, passed on the 8th day of February, 1867, were repealed, and the following Bye-Laws were passed and substituted in lieu thereof, viz:—

19. Before any person is presented to the Barristers' Society for the purpose of being examined, in order to his being entered as a student in the office of any barrister, he shall give a term's previous notice in writing put up in the Library Room on or before the first Friday of Trinity Term, and shall present a petition to the Council of the said Society, setting forth his age, place of birth, residence, place of education, the branches in which he is prepared to undergo an examination, and the name of the barrister with whom he proposes to study, which petition shall be subscribed by the applicant and certified by such barrister, after a careful enquiry and personal examination as to the character, habits and education of the applicant, and that upon such enquiry and examination the barrister verily believes the applicant to be a proper person and properly qualified to be admitted as a student at law, and upon his being approved by the Council, he shall be fully examined at Fredericton, which examination shall only take place annually in Michaelmas Term, at such time in term as may be appointed, and by written questions or answers, or orally, in such branches as two members of the Council, one at least being an examiner, may determine. No person applying, being a graduate of any chartered college, will be required to undergo an examination.

21. Any student who shall hereafter enter and be admitted a student at law may make application for admission as an attorney in Michaelmas Term only, and shall give a term's notice in writing on or before the first Friday of Trinity Term of his intention to apply for admission, and shall undergo an examination at such time and place as the Council or any three members thereof, two being examiners, may appoint, which examination shall be either by written questions or orally, or both, at the discretion of the examiners If by written questions, the answers to such questions shall be in writing, and shall be written in a legible hand in the presence of one of the Council or examiners, or such other person as the Council may for that purpose appoint. No applicant shall be permitted to refer to any book or person, or other source of information, to assist him in such answers. The written papers shall be marked or designated by letters or numbers only, when there is more than one applicant, and shall be submitted to the examiners for inspection and approval, and if satisfactory, the examiners shall certify their approval thereupon; and without such certificate no applicant shall be deemed qualified for admission.

In the case of students who have already entered, the applications for admission and examination shall be received and held semi-annually only, viz: in Easter and Michaelmas Terms; the term's notice and

other provisions above contained shall apply to such applicants; provided, however, that in the case of students already entered whose terms of study shall expire either in Hilary or Trinity Term, such students may, if they wish, be examined at the previous term, and if such examination be found satisfactory, and they are in other respects entitled, may be admitted at the expiration of their term of study.

In cases where a student has, during his term of study, been engaged in any other occupation or employment, he shall state in his petition for admission particularly what the occupation or employment was and how long he was engaged in it, and his petition shall be accompanied by a certificate from the barrister with whom he studied, distinctly verifying the statement, and declaring that the student had engaged and continued in such occupation or employment during the time stated, and received the salary or remuneration (as the case may be) with his express knowledge and consent.

The aforegoing amendments and additions to the Bye-Laws and Regulations of the Barristers' Society of New Brunswick having been submitted to the Judges of the Supreme Court for approval and sanction, it was ordered that the same be approved and sanctioned.

30th April, 1881. *(Signed by the Judges.)*

The bye-laws of Michaelmas Term, 1880 (*ante*, 198), were not sanctioned by the Court.

GENERAL RULES AND ORDERS

OF

THE COURT OF CHANCERY

AND OF THE

SUPREME COURT IN EQUITY.*

Affidavits.

Service of.

Hilary Term, 1860.—It is ordered, that it shall not be necessary in any case where a defendant has not appeared, except in applications or notice for an injunction, to serve a copy of any affidavit to be used on any motion or the hearing of any petition on such defendant, unless service shall be specially directed by any judge; and it shall in no case be necessary to serve the opposite party with a copy of any affidavit of service of process, or of service of any notice or other paper, unless specially ordered.

Answer.—See DELIVERY OF PLEADINGS—EXCEPTIONS—INTERROGATORIES—OATHS—PRO CONFESSO—PROLIXITY.

Exceptions—amended Answer.

4th June, 1839, Ord. 18.—That where, upon exceptions to any answer, it becomes necessary to put in an amended answer, in case such amended answer be not put in in due time, it shall not be necessary for the plaintiff to proceed by attachment, but he may give notice of motion that the bill be taken *pro confesso*, unless the amended answer be put in within ten days after the

* In consulting these orders the practitioner must bear in mind the various Acts of Assembly repealed and unrepealed by which they are affected.

In some instances provisions relating to Equity Practice will be found in the Common Law Rules; for example, those respecting Affidavits (*ante*, 182). Appeal (*ante*, 158), Payment into Court (*ante*, 163), and Removing Papers from the files of the Court (*ante*, 157).

service of such notice; and in case the amended answer be not put in, and a copy delivered within the time, the bill may be ordered to be taken *pro confesso.*

Need only answer Interrogatories.

2nd Aug., 1842, Ord. 7.—That a defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto, and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answers shall be deemed impertinent.

Demurrable Interrogatory.

Ib., Ord. 17.—That a defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer, and that he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer.

Brevity enjoined.

*5th July, 1853, Ord. 17.**—Correspondent with the brevity enjoined in regard to the plaintiff's bill by the foregoing orders, the defendant in his answer is to state matter of defence in gen-

* MEANING OF WORDS.—In these orders and schedules the following words have the several meanings hereby assigned them over and above their several ordinary meanings, unless there be something in the subject of the context repugnant to such construction, viz:—

1st. Words importing the singular number include the plural number, and words importing the plural number include the singular number.

2nd. Words importing the masculine gender include females.

3rd. The word "affidavit" includes affirmation.

4th. The word "person" or "party" includes a body politic or corporate.

5th. The word "legacy" includes an annuity, and a specific as well as a pecuniary legacy.

6th. The word "legatee" includes a person interested in a legacy.

7th. The expression "residuary legatee" includes a person interested in the residue *(Ord. 18).*

eral terms as concisely as may be; provided that this order is not to be construed so as in any way to diminish the right of the plaintiff to a full answer to interrogatories.

Appearance.—See PRO CONFESSO.

Time for.

4th June, 1839, Ord. 9.—That defendants shall in all cases have thirty days to appear from the day of service of the subpœna, exclusive of the day of service.

Mode of.

Ib., Ord. 10.—That the mode of appearance shall be by filing a note in writing of such appearance with the register, and by giving a notice thereof to the plaintiff's solicitor.

Bill.—See DELIVERY OF PLEADINGS—DISMISSING BILL—INTERROGATORIES—PRO CONFESSO—PROLIXITY.

Indorsement.

4th June, 1839, Ord. 1.—That all bills to be filed with the register be indorsed with the name or firm of the complainant's solicitor or solicitors, who shall file the same, and the title of the suit be entered by the register in a book to be by him kept for that purpose.

*Form of.**

2nd Aug., 1842, Ord. 11.—That instead of the words of the bill now in use preceding the interrogating part thereof, and beginning with the words "To the end therefore," there shall hereafter be used, words in the form or to the effect following, "To the end therefore that the said defendants may, if they can, shew why your orator should not have the relief hereby prayed, and in case of appearing to this your orator's bill, may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereafter to be filed, as by

* Rescinded by Ord. 4, 5th July, 1853, *post*, p. 210.

a note thereunder written, they shall be respectively required to answer,"—And that the prayer of the bill shall immediately follow.

Bills of Revivor and Supplemental Bills.

Ib., Ord. 22.—That it shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the pleadings in the original bill, unless the circumstances of the case may require it.

Forms of Bills.

*5th July. 1853, Ord. 1.**—Any person seeking equitable relief in any of the following cases may file his bill in the form and to the effect set forth in Schedule A hereunder written, as applicable to the particular case :—

1st. A creditor upon the estate of any deceased person seeking payment of his debt out of the estate of the deceased.

2nd. A legatee under the will of any deceased person asking payment of his legacy or delivery thereof out of the deceased's estate.

3rd. A residuary legatee or one of the residuary legatees of any deceased person seeking an account of the residue and payment or appropriation of his share therein.

4th. The person or any of the persons entitled to the personal estate of any person who may have died intestate and seeking an account of such estate and payment of his share thereof.

5th. An executor or administrator of any deceased person seeking to have the estate of such person administered under the direction of the Court.

6th. A legal or equitable mortgagee or person entitled to a lien or security for his debt seeking foreclosure or sale, or otherwise, to enforce his security.

7th. A person entitled to redeem any legal or equitable mortgage or any lien seeking to redeem the same.

8th. A person entitled to the specific performance of an agreement for the sale or purchase of any property seeking such specific performance.

9th. A person entitled to an account of the dealings and

* See note, *ante*, p, 202.

transactions of a partnership dissolved or expired seeking such account.

10th. A person entitled to an equitable estate or interest and seeking to use the name of his trustee in prosecuting an action for his own sole benefit.

11th. A person entitled to have a new trustee appointed where there is no power in the instrument creating the trusts to appoint new trustees, or where the power cannot be exercised, and seeking to appoint a new trustee.

Ib., Ord. 2.—In any case other than those enumerated in Order 1, or in any case in which the Forms in Schedule A are not applicable, the party seeking equitable relief may frame his bill on the like principle as the Forms in the said Schedule.

Ib., Schedule A.—1. By a creditor upon the estate of a deceased person seeking payment of his debt out of the estate.

IN CHANCERY. To &c. [*address as usual*].

Humbly complaining, sheweth your orator, A. B., that C. D., late of , deceased, was, at the time of his death, and that his estate still is indebted to your orator in the sum of for goods sold and delivered by your orator to the said C. D; [*or otherwise, as the case may be, and if any security has been given for the debt by any written instrument, then state it thus:* which said debt was secured by a mortgage on certain real estate, bearing date] that the said C. D. died in or about the month of last, and that the defendant E. F. is the executor (*or* administrator) of the said C. D., and that the debt remains unpaid.

Your orator therefore prays payment of his debt, or in default thereof, that the estate may be administered in this Court on behalf of himself and the other unsatisfied creditors of the said C. D., and that all proper directions may be given and accounts taken; and he prays the process of the Court herein.

[NOTE.—This form may be varied according to the circumstances, where the plaintiff is not the original creditor, but has become interested in or entitled to the debt, in which case the character in which he claims is to be concisely stated.]

2. By a legatee under the will of any deceased person seeking payment or delivery of his legacy out of the testator's assets.

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B., that your orator is a legatee to the amount of £ under the will dated the day of , of C. D., late of , deceased, who died on the day of , and that the defendant, E. F., is the executor of the said C. D., and that the said legacy, together with the interest thereon from the [*the day mentioned in the will for payment, or the expiration of twelve*

calendar months after the testator's death,] is still unpaid, and your orator therefore prays to be paid the said legacy and interest, [*or to have the said legacy and interest appropriated and secured,*] and in default thereof, to have the estate of the said C. D. administered in this Court on behalf of himself and all other the legatees of the said C. D., and for that purpose that all proper directions may be given, and the accounts taken; and he prays the process of the Court herein.

[NOTE.—This form may be varied according to the circumstances, where the legacy is an annuity, or specific, or where the plaintiff is not the legatee, but has become entitled to or interested in the legacy, in which case the character in which the plaintiff claims is to be concisely stated.]

3. By a residuary legatee, or any of several residuary legatees, of any deceased person, seeking an account of the residue and payment or appropriation of his share therein.

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B., that your orator is the residuary legatee [*or one of the residuary legatees,*] under the will dated the day of , of C. D., late of , who died on the day of , and that the defendant, E. F., is the executor of the said C. D., and hath not paid to your orator the [*or his share of the*] residuary personal estate of the said testator; and your orator therefore prays to have the personal estate of the said C. D. administered in this Court, and to have the said residue [*or his share of the said residue*] paid him, and his costs of this suit, and for that purpose that all proper directions may be given and accounts taken; and he prays the process of the Court herein.

[NOTE.—This form may be varied according to the circumstances, where the plaintiff is not the residuary legatee, but has become entitled to or interested in the residue, in which case the character in which he claims is to be concisely stated.]

4. By the person or any of the persons entitled to the personal estate of a person who may have died intestate, and seeking an account of such personal estate and payment of his share thereof

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B., that your orator is the next of kin, [*or of the next of kin,*] according to the statutes of distribution of personal estate of C. D., late of , who died on the day of , intestate; and that your orator is entitled to [*or to a share of*] the personal estate of the said C. D., and that the defendant, E. F., is the administrator of the personal estate of the said C. D., and the said E. F. hath not accounted for or paid to your orator the [*or his share of the*] personal estate of the said C. D.; your orator therefore prays to have the personal estate of the said C. D. administered in this Court, and to have his costs of this suit, and for that purpose that all proper directions may be given and accounts taken; and he prays also the process of the Court herein.

5. By the executor or administrator of a deceased person

claiming to have the estate of such person administered under the direction of the Court.

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B., that your orator is the executor [*or* administrator] of E. F., late of , but now deceased, who departed this life on or about , and that he is willing and desirous to account for any part of the estate that has come to his hands, of which he hath possessed a certain amount, and that the whole of the estate of the said E. F. should be duly administered in this Court for the benefit of all persons interested therein or entitled thereto; and that C. D. is interested in the said estate as the next of kin of the said E. F., or as the residuary legatee of the said E. F., [*and in case there is another or other executors or administrators who are not plaintiffs, and are to be made defendants, then add as follows:*] and that the defendant G. H. is also an executor or administrator of the said E. F.; and your orator prays to have the estate of the said E. F. applied to a due course of administration under the direction of this Court, in the presence of the said C. D. [*and* G. H.] and such other persons interested in the said estate as this Court may be pleased to direct, and that the costs of this suit may be provided for, and for these purposes that all proper directions may be given and accounts taken; and he prays also the process of the Court herein.

6. By a legal or equitable mortgagee or person entitled to a lien as security for a debt, seeking foreclosure or sale or otherwise to enforce his security.

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B., that under and by virtue of an indenture [*or as the document may be,*] dated the day of , and made between [*the parties,*] your orator is a mortgagee [*or an equitable mortgagee*], [*or entitled to a lien upon certain freehold*] [*or leasehold*] property [*or other property, as the case may be*], therein comprised, for securing the sum of £ and interest, and that the time of payment thereof has elapsed, and that the defendant C. D. is entitled to the equity of redemption of the said mortgaged premises, [*or the premises subject to such lien*], and your orator therefore prays to be paid the said sum of £ and interest, and the costs of this suit, and in default thereof, he prays the equity of redemption may be foreclosed, [*and to have the said mortgaged premises sold, or to have the said premises subject to such lien sold, as the case may be*], and the produce thereof applied in payment of his said debt and costs, and for that purpose to have all proper directions given and accounts taken; and he prays the process of the Court herein.

7. By a person entitled to the redemption of any legal or equitable mortgage or any lien seeking to redeem the same.

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B., that under and by virtue of an indenture [*or other document, as the case may be*] dated the day of , and made between [*the parties*], your orator is entitled to the equity of redemption of certain freehold [*or other property, as the case may be*] therein comprised, which was originally mortgaged [*or pledged*] for securing the sum of £ and interest, and that the defendant C. D. is by virtue of the said indenture the mortgagee [*or by an assignment of the said mortgage dated the day of , the assignee of the said mortgage*], [*or holder of the said lien*], and entitled to the principal money and interest remaining due upon the said mortgage [*or lien*]; your orator therefore prays that he may be allowed to redeem the said property, and that the same may be reconveyed [*or delivered up*] to him, or the mortgage cancelled upon payment of the principal money and interest due and owing upon the said mortgage [*or lien*], and for that purpose to have all proper directions given and accounts taken; and your orator prays the process of the Court herein.

8. By a person entitled to the specific performance of an agreement for the sale or purchase of any property seeking such specific performance.

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B., that by an agreement dated the day of , and signed by the defendant, C. D., your orator contracted to buy of him [*or sell to him*] certain freehold property [*or other property, as the case may be*] therein described or referred to, for the sum of , and that he has made, or caused to be made, an application to the said defendant, specifically to perform the said agreement on his part, but that he has not done so; your orator therefore prays that the agreement may be specifically performed on the part of the defendant, and to have his costs of this suit, and for that purpose to have all proper directions given; and he hereby offers specifically to perform the same on his part, and he prays the process of the Court herein.

[NOTE.—This form may be adapted to an agreement to lease or to mortgage, with proper alterations.]

9. By a person entitled to an account of the dealings and transactions of a partnership dissolved or expired seeking an account.

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B, that from the day of down to the day of your orator and the defendant C. D. carried on the business of in co-partnership under certain articles of co-partnership dated the day of , and made between [*the parties*], [*or without articles, as the case may be*], which partnership was dissolved [*or expired*] on the day of ; and

your orator therefore prays that an account may be taken of the partnership dealings and transactions, and to have the said partnership wound up and settled under the direction of this Court, and for that purpose that all proper directions may be given and accounts taken; and he also prays the process of the Court herein.

10. By a person entitled to an equitable estate or interest and claiming to use the name of his trustee in prosecuting an action for his sole benefit.

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B., that under an indenture dated the day of , and made between [*the parties*], your orator is entitled to an equitable estate or interest in certain property therein described or referred to, and that the defendant C. D. is a trustee for your orator of such property, and that being desirous to prosecute an action at law against , in respect of such property, he has made or caused to be made an application to the said defendant, to be allowed to bring such action in his name, and has offered to indemnify him against the costs of such action, but that the said defendant has refused or neglected to allow his name to be used for that purpose; your orator therefore prays to be allowed to prosecute the said action in the name of the said defendant, and hereby offers to indemnify him against the costs of such action; and he prays the process of the Court herein.

11. By a person entitled to have a new trustee appointed in a case where there is no power in the instrument creating the trust appointing the new trustee, or when the power cannot be exercised, and seeking to appoint a new trustee.

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B., that under an indenture dated the day of , and made between [*parties*] [*or under a will of , or other document, as the case may be,*] your orator is interested in certain trust property therein mentioned or referred to, and that the defendant C. D. is the present trustee of such property [*or is the real or personal representative of the last surviving trustee of such property, as the case may be*], and that there is no power in the said indenture [*or will, or other document*] to appoint new trustees, or that the power in the said indenture [*or other document*] to appoint new trustees cannot be executed; your orator therefore prays to have a new trustee appointed of the said trust property in the place of [*or to act in conjunction with*] the said defendant; and he prays the process of the Court herein.

Amendment.

Ib., Ord. 3.—The bill may be amended upon petition, if the judge to whom the same is presented shall see fit, but every

application for leave to amend shall state the nature of the amendment proposed.

Ord. 11, 2nd Aug., 1842, rescinded.

Ib., Ord. 4.—The eleventh order of the 2nd August, 1842, is hereby rescinded.

Pretences and Charges.—Prayer.

Ib., Ord. 5.—No bill is hereafter to contain those allegations usually known as *Pretences* on the part of the defendant and contrary *Charges*, nor any prayer for answers, nor for the writ of subpœna.

Subsequent Facts.

Ib., Ord. 8.—Facts and circumstances which have occurred since the commencement of the suit may be introduced by way of amendment to the bill.

Prayer for General Relief.

Ib., Ord. 9.—The Court may in any case grant such relief as it might afford under the prayer for general relief, without any prayer for such relief being contained in the bill.

Foreclosure and Redemption.

*Hilary Term, 1875, r. 3.**—In every bill filed for the foreclosure or redemption of a mortgage the time or times appointed for the payment of the principal money and interest secured by the mortgage shall be briefly stated.

Clerk's Fees.

Hilary Term, 1863.—Ordered, that the clerk in Equity render to each solicitor during every term, or within ten days thereafter, a statement of the fees due from him to the said clerk, which are to be paid on or before the first day of the next term, or in default thereof, the solicitor be considered in contempt.

Clerks in Court.

Duties of, transferred to Register.

8th July, 1826.—Whereas the appointment of persons to be

* "The following rules and regulations shall hereafter be observed in proceedings in Equity :—"

clerks in the Court, who reside in different parts of the Province, and are remote from the place where the sittings of the Court are held, has been the occasion of great inconvenience, and has exposed the records and papers of the Court to accident and loss; It is therefore ordered, that all the appointments heretofore made of persons as clerks of this Court be and the same are hereby revoked and vacated: And it is further ordered, that the register of this Court be the officer in lieu of the clerks, to transact and file all proceedings by bill and answer, and to have the custody of all records, papers and proceedings relating to causes in Equity, and to make and sign all office copies thereof, and to enroll the decrees of the Court, and to sign and seal all writs and processes on the Equity side of the Court, and to perform all other such like services which appertained to the office of clerks of this Court.

29th June, 1827.—It is ordered, that all the former clerks of this Court do forthwith deposit with the register all bills, answers, pleas, demurrers and other papers filed and remaining with them as such clerks, in order to the same being filed gratis with the said register, in furtherance of the order of this Court of the eighth day of July last.

Contempt (process of).—See DECREE (PERFORMANCE OF).

4th June, 1839, Ord. 12.—That it shall in no case be necessary to issue an attachment with proclamations, or a commission of rebellion, but that in case of the return of *non est inventus* to a writ of attachment, the party may at once proceed to a sergeant-at-arms.

Costs.—See CLERK'S FEES—SUBPŒNA.

Bills of.

*Hilary Term, 1875, r. 4.**—Every bill of costs presented for taxation shall shew whether the decree or order was made *pro confesso*, upon demurrer, on evidence, or otherwise; and shall also state the respective dates of filing the bill, answer, &c., and

Ante, p. 210, note.

of the several motions, hearings, &c., in the cause. No charge shall be allowed for a copy of the bill of costs to file.

Court.—See SEAL.

Sittings.

4th June, 1839, Ord. 37.—That at each term, such day or days shall be appointed for the sitting of the Court, during the ensuing vacation, as the Master of the Rolls shall deem proper, which shall be published in the Royal Gazette on the week next after the term.

Decrees (performance of).—See CONTEMPT.

Service of Decree.—Writ of Execution, &c., unnecessary.

2nd Aug., 1842, Ord. 1.—That no writ of execution nor any writ of attachment shall hereafter be necessary for the purpose of requiring or compelling obedience to any order or decree of this Court, by subsequent process of contempt, but that the party required by any such order to do any act, shall, upon being duly served with such order, be held bound to do such act in obedience to the order.

Ib.. Ord. 2.—That if any party who is by an order or decree ordered to pay money, or do any other act in a limited time, shall, after service of such order, refuse or neglect to obey the same according to the exigency thereof, the party duly prosecuting such order shall, at the expiration of the time limited for the performance thereof, be entitled to an order for a sergeant-at-arms, and such other process as he hath hitherto been entitled to, upon a return of *non est inventus* to a writ of attachment issued for non-performance of a decree or order.

Decree to state time for doing act.—Indorsement.

Ib., Ord. 3.—That every order or decree requiring any party to do an act thereby ordered, shall state the time after service of the decree or order within which the act is to be done; and that upon the copy of the order which shall be served upon the party required to obey the same, there shall be endorsed a memorandum in the words or to the effect following, viz.:—"If you, the within named A. B., neglect to perform this order by the time

therein specified, you will be liable to be arrested under the authority of the Court of Chancery, and also be liable to have your estate sequestered for the purpose of compelling you to obey the same order."

Writ of Assistance.

Ib., Ord. 4.—That upon due service of a decree or order for delivery of possession, and upon proof made of a demand and refusal to obey such order, the party prosecutiug the same shall be entitled to an order for a writ of assistance.

Persons not parties.

Ib., Ord. 5.—That every person not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the cause; and every person not being a party in any cause against whom obedience to any order of the Court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party to the cause.

Delivery of Pleadings.

4th June, 1839, Ord. 13.—That the solicitors of the plaintiff and defendant, respectively, shall be entitled to furnish the opposite party with copies of the pleadings of which copies are required to be delivered.

Demurrers and Pleas.

Demurrer—when to be set down for argument.

2nd Aug., 1842, Ord. 13.—That where a demurrer shall be filed by the defendant to the whole bill or to a part of the bill, the demurrer shall be held sufficient, and the plaintiff be held to have submitted thereto, unless the plaintiff shall, within one calendar month after service of a copy of such demurrer upon him, cause the same to be set down for argument.

Plea—when to be set down for argument.

Ib., Ord. 14.—That when the defendant shall file a plea to the whole or part of a bill, the plea shall be held good to the same

extent and for the same purposes as a plea allowed upon argument, unless the plaintiff shall, within one calendar month after the service of a copy of such plea upon him, cause the same to be set down for argument, and the plaintiff shall be held to have submitted thereto.

Not covering so much of bill as they might.

Ib., Ord. 15.—That no demurrer or plea shall be held bad, and overruled on argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

Extending to same matter as answer.

Ib., Ord. 16.—That no demurrer or plea shall be held bad, or overruled upon argument, only because the answer of the defendant may extend to some part of the same matter that may be covered by such demurrer or plea.

Dismissing Bill.—See HEARING.

For not delivering copy.

4th June, 1839, Ord. 14.—That in case the plaintiff's solicitor neglect to deliver to the defendant's solicitor a copy of the bill filed, within thirty days after the appearance of the defendant shall have been put in and notice given, the defendant may move that the bill be dismissed, which may be ordered accordingly.

For not proceeding to examine witnesses.

Ib., Ord. 30.—That in case the plaintiff shall neglect to proceed to file interrogatories for the examination of witnesses, or to obtain an appointment to examine witnesses thereupon, in due time, the defendant, on giving fourteen days notice of motion, may move that the bill be dismissed, which shall be ordered accordingly, unless cause be shewn to the contrary.

English Practice.

4th June, 1839, Ord. 16.—That in all cases where, by the English practice, a different time is allowed or prescribed for the performance of any act in town causes and country causes, and

no provision is made for the same by the practice of this Court, the time for the performance of such act shall be the time allowed in country causes, without respect to residence.

Examination of Witnesses.—See DISMISSING BILL—SUBPŒNA.

Examiner's Oath.

4th June, 1839, Ord. 20.—That the oath to be taken by the masters in ordinary, as examiners, shall be in the form prescribed in that behalf in the appendix to these orders, and that the same be administered in open Court, and that the masters so sworn do subscribe their names, together with the day and year of being so sworn, on a roll to be kept by the register for that purpose; and that when examiners shall be specially appointed by order of the Court for taking the examinations in any cause under the provisions of the Statute of the 2nd Victoria, entitled "An Act for the improvement of the Practice in the Court of Chancery," such person may be either sworn in open Court or before some person empowered by commission under the seal of the said Court to administer the oath; and in case the oath be administered in Court, an entry shall be made in the minutes of the same, and a copy thereof, together with the order by which such person shall have been so appointed, shall be annexed to the copy of the examinations to be by him taken and transmitted therewith; and in case the oath shall be administered under a commission, then such commission, with a certificate indorsed thereon by the commissioner that the oath has been duly administered, shall be annexed to the examinations and transmitted therewith, which latter oath and certificate shall be in the form prescribed in that behalf in the appendix to these orders, or as near thereto as circumstances may admit.

Form of Examiner's Oath.

You do swear that you shall well and truly execute the duties of an examiner of this Court without favor or partiality.

So help you God.

Form of Oath where an Examiner is specially appointed in a particular cause under Statute 2nd Victoria.

You do swear that you shall well and truly execute the duties of an

examiner of the Court of Chancery in a certain cause now depending therein, in which A. B. is plaintiff and C. D. defendant, without favor or partiality.

So help you God.

Form of Certificate of Commissioner, that Examiner specially appointed has been duly sworn.

I, E. F., the commissioner named in the foregoing commission, do hereby humbly certify that A. B., therein likewise named, was this day duly sworn on the Holy Evangelists well and truly to execute the duties of an examiner in a cause pending in the Court of Chancery, in which A. B. is plaintiff and C. D. defendant, without favor or partiality.

Dated the day of A. D.

(Signed) E. F.

Rule to produce witnesses abolished.

Ib., Ord. 21.—That no rule to produce witnesses shall be necessary.

By Interrogatories and Cross Interrogatories.

Ib., Ord. 22.—That interrogatories for the examination of witnesses be filed with one of the masters, and copies thereof delivered to the opposite party, together with notice of the name of the master with whom the same were filed, within thirty days after replication filed, in which interrogatories shall be specified the names of the witnesses to be examined, and the particular interrogatories to which each witness is to be interrogated.

Ib., Ord. 23.—That the cross-examination of the witnesses may be conducted either on written interrogatories, to be filed in like manner with the master, or by interrogatories to be proposed at the time of the examination as hereafter mentioned. And that when the former mode of proceeding is adopted the cross interrogatories shall be filed, and a copy thereof delivered to the opposite party within fourteen days after receipt of a copy of the interrogatories in chief; or in case the party intends to attend and propose cross interrogatories at the time of the examination, then notice shall be given to the opposite party of such his intention within fourteen days after receipt of a copy of the interrogatories in chief.

Ib., Ord. 24.—That within fourteen days after the expiration of the time for filing cross interrogatories, the solicitor who filed the interrogatories in chief shall obtain an appointment from the

examiner, fixing the time and place of examination, which shall be served on the opposite party fourteen days, exclusive, before the day of such examination.

Ib., Ord. 26.—That when the cross-examination of witnesses is to be conducted by means of interrogatories proposed at the time of examination, counsel may attend for all parties, and each cross interrogatory shall be committed to writing and submitted to the examiner, who shall then propose the same, and in such case a re-examination in like manner as the cross examination, and confined to matters arising thereout, shall be permitted to the opposite party, such interrogatories to be afterwards fairly copied, certified by the master, and annexed to the depositions.

Ib., Ord. 27.—That all objections to any interrogatory shall be made at the time the same is proposed, and in such case if the party proposing the same submit to the objection, the question shall not be put, otherwise the same shall be proposed and the answer thereto taken, but at the same time the examiner is to note down the objection in connection with the deposition. He is also to note down in like manner any objection taken to the testimony of the witness, (as being hearsay, for instance), and the validity of all such objections, if persisted in, shall be decided at the hearing, at which time no objection not so made before the examiner shall be permitted.

Filing Depositions.

Ib., Ord. 28.—That at the expiration of fourteen days after the day appointed for the examination, the examiner shall transmit the interrogatories and depositions to the register under seal, unless he shall be of opinion that further time is necessary to take the depositions; in which case he shall defer transmitting the same so long as he may find requisite, and certify his opinion to the Court at the time of transmission.

Motion for Publication.

Ib., Ord. 29.—That on the depositions being filed with the register, either party may move for publication, (on six days notice of motion being given), which shall be directed to take place forthwith, or at such time as the Court, on sufficient cause shewn by affidavit, shall order.

Counsel's signature to Cross Interrogatories.

*5th July, 1853, Ord. 11.**—Where the cross-examination of witnesses is conducted by means of interrogatories proposed at the time of examination, no such interrogatories, and no interrogatory by way of re-examination, are to be signed by counsel.

Exceptions to Answer.

Setting down for Hearing.

Hilary Term, 1875, r. 2.†—Exceptions to a defendant's answer, or to a plaintiff's answer to interrogatories filed by the defendant, may, when submitted to a judge according to the directions of the Act 17 Victoria, cap. 18, sub-chap. 2, section 10, be set down for argument on the order of the judge—fourteen days notice of the time appointed for the argument to be given to the opposite party.

Guardian.

Appointment of.‡

5th May, 1840, Ord. 1.—That in petitions for the appointment

* See note, *ante*, p. 202.

† *Ante*, p. 210, note.

‡ "See the practice fully stated in 1 Turner's Pr. 675, 1 Grant, 421. The costs of the application will be paid out of the infant's property.—*Ex parte Mazerol.* At the Rolls, March, 1844.

The form of recognizance entered into by the guardian may be as follows :—

'IN [THE SUPREME COURT IN EQUITY.] In the matter of A. B., an infant, C. D., of the Parish of in the County of , before our Sovereign Lady Victoria, by the Grace of God, &c., in Her [Supreme Court in Equity] of the said Province, personally appearing, doth acknowledge himself to owe to our said Lady the Queen, her heirs and successors, the sum of £ , of lawful money of the said Province, to be paid to our said Lady the Queen or her successors; and unless he shall do so, he is willing and agrees for himself, his heirs, executors and administrators, that the said sum of money shall be levied, recovered and received of him, and of each of them, and of all and singular, his goods and chattels, lands and tenements, wheresoever the same shall be found. Witness our Sovereign Lady Victoria, &c.'

Whereas the above bounden C. D. hath been duly appointed by [His Honor the Judge in Equity] to be the guardian of the person and estate of the said infant A. B.; now the condition of this recognizance is such, that if the above bounden C. D. do and shall duly and annually, or oftener if thereunto required, account for all such monies or parts of the property and estate of the infant as may from time to time come to the hands of the said C. D., and pay, apply or secure the same in such manner as the said Court already hath, or may from time to time order and direct; then this recognizance to be void, or else to remain in full force and effect.

Taken and acknowledged by the above named C. D., at my office in Fredericton, the day &c., Before me

E. F., *Master in Chancery.*"

—(*Allen's Rules*, 120.)

of guardians in cases where a reference to a master will be required, no particular specification and description of the real estate, nor specific inventory of the personal property of the infant, be inserted, but the locality of the real property and the value of both classes be generally stated.

Ib., Ord, 2.—That no copy of such petition be made for the use of the judge to whom the same shall be presented, unless particularly desired.

Ib., Ord. 3.—That no state of facts other than is contained in the affidavits be laid before the master to whom the reference shall be made.

Ib., Ord. 4.—That the petition to confirm the master's report be in the form prescribed at the foot of these orders, or as near thereto as the case may admit.

Ib., Ord. 5.—That in cases where it is made to appear on affidavit that the whole property of the infant does not exceed three hundred pounds, a guardian may be appointed on the presentment of the petition, without reference, if the judge to whom the same is presented shall think fit so to order.

Petitions to confirm Masters' Reports.

Ib., Ord. 6.—That in petitions to confirm masters' reports it shall, in all cases, suffice to advert shortly to the order of reference, and to state the fact and date of filing the report, without reciting the particulars of such report.

Petition to confirm Report.

IN CHANCERY.

In the matter of A. B., an infant.

To His Excellency the Chancellor (*or* His Honor the Master of the Rolls.)

The humble petition of A. B., an infant, of the age of years,

SHEWETH:

That by an order bearing date the day of A. D. , made on the petition of your petitioner, Esq., the master to whom the matter of the said petition was referred, was directed to make certain enquiries respecting the age, fortune and relations of your petitioner, and to state what was proper to be allowed for the education and maintenance of your petitioner; That the said master hath duly made and filed his report on the matters referred, bearing date the day of , A. D.

Your petitioner therefore prays that the same may be in all things confirmed, and that such further order may be made in the premises as to Your Excellency (*or* Honor) may seem meet.

And your petitioner, as in duty bound, will ever pray, &c.

Hearing.—See EXAMINATION OF WITNESSES—PARTIES—REPLICATION.

Notice of bringing cause on to.—Setting down for.

4th June, 1839, Ord. 31.—That notice of bringing a cause on to hearing shall be served on the opposite party, and the cause set down for hearing with the register fourteen days before the day of hearing; and where publication has been ordered, no cause shall come on to be heard until the expiration of one calendar month from the day of publication.

Subpœna to hear judgment abolished.

Ib., Ord. 32.—That no subpœna to hear judgment shall be deemed necessary.

Dismissing cause for non-appearance of plaintiff at.

Ib., Ord. 33.—That if the plaintiff shall set down the cause and give notice of bringing the same on to be heard, and neglect to appear at the hearing, the cause may be ordered to be dismissed.

When defendant may bring cause to.—Dismissing Bill.

Ib., Ord. 34.—That if the plaintiff neglect to bring on the cause to a hearing at the earliest period at which, by the practice of the Court, the same might have been heard, the defendant may obtain an order upon affidavit of the state of the cause, and of such default on the part of the plaintiff, that he may be at liberty to bring the same to hearing; and if the defendant shall thereupon serve such order, set down the cause, and give notice to the plaintiff fourteen days before the day of hearing, and the plaintiff shall not appear at the hearing, the bill may be ordered to stand dismissed.

17 Vic., c. 18, sub-c. 2, s. 14, rescinded.

*Trinity Term, 1856, r. 3.**—The provisions contained in the fourteenth section of the second chapter of the Act relating to the administration of Justice in Equity, are hereby rescinded.

* See the explanation by the Court as to these rules, 3 All. 357.

*Order for viva voce hearing—when may be made.**

Ib., r. 4.—The order for hearing the cause in the manner provided for by the fifteenth section of the last named chapter of the said Act, instead of the time therein appointed, may be made within one calendar month after the cause shall be at issue, on service of notice and of a copy of the affidavit on which the application is to be made, on the opposite party, ten days before such application, the time for hearing which shall have been previously appointed by the judge to whom the same is to be made; provided, that in cases which are already at issue the order may be made within one calendar month from the Saturday next after the second Tuesday in the present term.

Setting down and entering cause for, with clerk.

Trinity Term, 1868, r. 5.—All causes intended for hearing at the sittings in Equity shall be set down with the clerk in Equity six days before the first day of the sitting of the Court, and shall be entered by him on a docket to be kept for that purpose, and no cause not so entered shall be heard without the order of the judge sitting in such Court.

Infants.—See GUARDIAN.

Proving case against, on default of appearance.

5th July, 1853, Ord. 12.†—When an infant defendant does not enter his appearance in due time after service of the subpœna to appear, it shall not be necessary to take further proceedings to compel appearance, but on proof of such default, the Court may order that unless the defendant do appear in twenty days from the date of such order, the plaintiff shall be at liberty to prove his case by affidavit. and such order is to be published in the Royal Gazette at least ten days before the day limited thereby for such appearance; and at the expiration of the time so limited, in case no appearance shall have been entered and notice thereof given, upon proof thereof, and of the allegations

* Where the cause is to be set down for hearing on *viva voce* evidence the plaintiff must wait for fourteen days after issue joined and until after he has put in a sufficient answer to the defendant's interrogatories (if any), and then he may obtain a judge's order for that purpose upon summons, after which fourteen days notice of the hearing is to be given (*Chase* v. *Briggs*, May 1880, *Palmer, J.*, 'Globe,' May 27. 1880).

† See note, *ante*, p. 202.

in the bill, by affidavit and such documentary evidence as may be requisite, the Court may make such decree as it might have made had the case been at issue and duly established in evidence.

Decree on affidavit against, on default of plea, &c.

Ib., Ord. 13.—When an infant defendant has appeared to the bill, and having been served with a copy thereof, makes default in putting in a plea, answer or demurrer thereto, in due time, the plaintiff may give notice of motion for a day therein named, for a decree to be made upon affidavit, which notice shall be served fourteen days before the day so named, and the Court, upon motion made pursuant to such notice, on proof thereof and of the allegations in the bill, in the manner prescribed by Order No. 12, of this date, may make a decree to such effect as is therein provided, unless upon special circumstances disclosed by affidavit it should think fit to allow the defendant further time for defence, in which case no such decree shall be made until the expiration of such further time.

Order for appearance—proving case against, after.

Trinity Term, 1868, r. 4.—When any person residing out of the Province against whom a suit is commenced is an infant and does not appear within the time limited by the order made for that purpose under the Act 17 Victoria, cap. 18, s. 3, the Court may make the like order for the appearance of the infant as is provided by the 12th rule of the 5th July, 1853, and at the expiration of the time so limited the plaintiff may proceed to prove his case against the infant in the manner provided by the said rule.

Injunction.

To stay proceedings at law.

4th June, 1839, Ord. 36.—That in every cause for an injunction to stay proceedings at law, if the defendant do not plead, answer or demur to the plaintiff's bill within ten days after service of a copy of the plaintiff's bill, the plaintiff shall be entitled to such injunction, as of course, upon motion.

Interrogatories.—See ANSWER—BILL—EXAMINATION OF WITNESSES.

To be separate from the bill.

2nd August, 1842, Ord. 6.—That no special interrogatories be inserted in any bill, but in case any defendant appears to the bill, the plaintiff shall thereupon be at liberty, without order, to file such interrogatories as might have been contained in such bill provided this order had not been made, subject to the regulations hereafter prescribed; and such interrogatories, when so filed, shall be deemed and taken to be part and parcel of the said bill.

Form of.

Ib., Ord. 8.—That the interrogatories so to be filed under the 6th order shall be duly entitled in the cause, and shall be in the form or to the effect following, viz.:—

"Interrogatories to be answered by the several defendants hereinafter specified," (*or*, by the defendant, *in case there be but one defendant*), "touching the matters alleged and contained in the bill filed in this cause, in which A. B., &c., are complainants, and C. D., &c., defendants:—1st. Whether, &c."

Form of.—Note at foot.—Service of.

Ib., Ord. 9.—That the interrogatories so to be filed shall be divided as conveniently as may be from each other and numbered consecutively, 1, 2, 3, &c., and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the interrogatories, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, &c." And with the copy of the bill to be served on any defendant or his solicitor, upon appearing to the bill, shall be served a copy of such of the interrogatories only as such defendant is required to answer, together with a copy of such note, unless such defendant shall, at the time of giving notice of appearance, require to be furnished with a copy of all the interrogatories, in which case a copy of the whole shall be furnished.

Ib., Ord. 10.—That the note at the foot of the interrogatories, specifying which of them each defendant is required to answer, shall be considered and treated as a part of the bill; and the addition of any such note, or any alteration or addition to such

note, or to the interrogatories after the same shall have been filed, shall be considered and treated as an amendment of the bill.

No allegation in bill warranting.

*5th July, 1853, Ord. 6.**—It shall be no objection to an interrogatory to any defendant that there is no special allegation in the bill warranting the same.

Putting in defence where plaintiff does not file.

Ib., Ord. 7.—When the plaintiff does not think proper to file any interrogatories for any of the defendants, or for any one or more of the defendants, any defendant not interrogated shall be entitled, on being served with a copy of the bill, to the like time for putting in a defence to the bill, if he thinks fit so to do, as if served with a copy of interrogatories.

Master (reference to).—See EXAMINATION OF WITNESSES—GUARDIAN.

Master's Report not to recite state of facts, &c.

2nd Aug., 1842, Ord. 20.—That in the reports made by the masters of the Court no part of any state of facts, charge, affidavit, deposition, examination or answer brought in or used before them shall be stated or recited; but such state of facts, charge, affidavit, deposition, examination or answer shall be identified, specified and referred to, so as to inform the Court what state of facts, charge, affidavit, deposition, examination or answer was so brought in or used.

Master's Report on reference to ascertain amount due on mortgage.

Ib., Ord. 21.—That when it shall be referred to a master to take an account of the amount due upon any mortgage, the master shall annex to his report and refer to therein a statement shewing the manner in which the amount reported to be due is made up and ascertained, which statement shall be deemed and taken to be a part of the report.

Master's Report not to recite order of reference.

*5th July, 1853, Ord, 15.**—Where a reference is made to a

*See note, *ante*, p. 202.

master, he shall in no case recite in his report the order of reference, or any part thereof, but he shall attach his report to the copy of the order of reference served on him, and the order shall be referred to in the report thus:—"By virtue of the order hereunto annexed, &c."; and the report and copy of order annexed, shall be delivered to the party entitled to receive the report.

Preliminary investigation may be had before judge.

Ib., Ord. 16.—In any case where any preliminary investigation is necessary to a final decree, the judge before whom the cause comes on, if he shall so think fit, may order and direct the investigation to take place before himself at chambers, or in open Court, and may prescribe the mode by which the investigation is to be conducted.

Petition to confirm Report.—See "Infants."

Notice of Motion and Petition.

Time for serving.

*Hilary Term, 1875, r. 1.**—That in all cases where no other time is fixed by any Act of Assembly or rule of this Court, every notice of motion, and every petition, notice of which is necessary, shall be served at least six clear days before the first day of the sitting of the Court at which such motion or petition is to be heard.

Oaths.—See EXAMINATION OF WITNESSES—PLEADINGS.

Order for Appearance.†—See INFANTS.

Under 48 Geo. III., c. 2, and 3 Wm. IV., c. 13.

24th June, 1839.—It is ordered by His Excellency the Chancellor, by and with the advice and consent of His Honor the Master of the Rolls, that when the defendant is not served with process, and proceedings are to be had under an Act made and

* *Ante*, p. 210.

† The plaintiff may file his bill under C. S., c. 49, s. 22, at the expiration of the time limited in the order for appearance and need not wait until forty days thereafter (*Gilpin* v. *Moor*, *Palmer*, *J.*, June 29, 1880). *Quære*, if an order for foreclosure *and sale* can be made on default of appearance under an order for appearance? (*id.*)

passed in the forty-eighth year of the Reign of His Majesty King George the Third, intituled "An Act for making process in Courts of Equity effectual against persons who reside out of the Province, and cannot be served therewith," and also an Act in addition thereto made and passed in the third year of the Reign of His late Majesty King William the Fourth, or either of them, in case the appearance is not entered within thirty days after the last day on which the subpœna issued may be served, under the eighth order of this Court of the fourth day of June instant, the like proceedings may be had as are authorized by the said Acts, or either of them, in case the appearance of the defendant be not entered within the time mentioned and prescribed in that behalf in the said Acts, or either of them respectively.

Where defendant has known place of residence (17 Vic., c. 18).

*Trinity Term, 1856, r. 1.**—Upon any suit being commenced against any defendant, if it shall be made to appear upon affidavit that such defendant doth not reside within the Province, but has a known place of residence without the limits thereof, an order may be made for the appearance of such defendant at a certain day therein named, and a copy of such order shall within one year be served upon such defendant, either personally or by delivering the same at the residence of the said defendant to some adult person belonging to his family, and if such defendant do not appear within the time limited by such order, or such further time as the Court may appoint, the plaintiff shall be entitled to the like decree as in case of non-appearance when the defendant is served with process within the Province; provided, that in case the defendant reside in any part of Europe or the West Indies, such service be made three calendar months before the day of appearance: and if such defendant reside in any part of the United States of America, or in any of the British North American Colonies, such service shall be made two calendar months before the day of appearance; and if in any other part of the world, such service shall be made six calendar months before the day of appearance.

* See note, *ante*, p. 220.

Affidavit of service.

Ib., r. 2.—The proof of such service may be made by affidavit sworn before any judge of any Superior Court in the country where the same is made, or the Mayor or other chief magistrate of any city, borough, or town corporate, in any part of Her Majesty's dominions; provided always, that where the same is sworn in any country not part of Her Majesty's dominions, it shall be authenticated by a certificate under the hand and seal of the British ambassador, envoy, minister, consul or vice consul; and if in any part of the British dominions, by a certificate under the hand and seal of a public notary.

Parchment.

Hilary Term. 1862, r. 2.—It is ordered, that from and after the first day of Easter term next the article called and known as 'patent parchment' be not used for the writs, bills, answers or pleadings of this Court in Equity.

Parties.*

Persons jointly and severally liable.

2nd Aug., 1842, Ord. 12.—That in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court as parties to a suit concerning such demand all the persons liable thereto, but the plaintiff may proceed against one or more of the persons severally liable.

Setting down cause on objection for want of.

Ib., Ord. 18.—That where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty within fourteen days after a copy of the answer delivered to him, to set down the cause for argument upon that objection only. And the purpose for which the same is so set

* In a foreclosure suit brought on a first mortgage against subsequent mortgagees and the owner of the equity of redemption, the heirs and personal representatives of the first mortgagee and the personal representatives only of the other mortgagees are necessary parties (*Barker House foreclosure, Palmer, J.*, January, 1880). In a suit by the assignee of an insolvent to set aside a conveyance by the insolvent and his wife before insolvency as fraudulent, the insolvent and his wife should not be made parties (*Fisher* v. *Driscoll, Palmer, J.*, Dec. 1880; *Weise* v. *Wardle*, L. R. 19 Eq. 171).

down shall be notified by an entry to be made in the register's book, in the form or to the effect following, that is to say: "Set down upon the defendant's objection for want of parties." And that where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties; but the Court, if it thinks fit, shall be at liberty to dismiss the bill.

Objecting to want of, at hearing.

Ib. Ord, 19.—That if a defendant shall, at the hearing of the cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the Court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

Pleadings.—See DELIVERY OF PLEADINGS—PARCHMENT.

Oath to answers, &c.—Indorsing Pleadings.

4th June, 1839, Ord. 17.—That all answers and pleas may be sworn before any one of the masters in ordinary or extraordinary, and that all pleadings, as well as the bill, be filed with the register and indorsed with the name or firm of the solicitor or solicitors by whom the same are filed.

Pro Confesso.—See ANSWER.

*For want of an appearance.**

4th June, 1839, Ord. 11.—That in case the defendant neglects

* The wording of C. S., c. 49, s. 29, is different from that of 17 Vic., c. 18, sub-c. 2, s. 7 (under which an appearance could be entered at any time before motion made) and admits of a different construction, and the practice in future will be that an appearance must be filed within the time required by s. 29; and if the defendant seek to appear after that time and before motion made he ought to offer to pay the costs incurred in preparing for the motion and to answer within the time he would have been allowed if he had appeared in proper time, or on special application, on such terms as the judge may under the circumstances direct (*Per Palmer, J.*, in *Smith* v. *Coldbrook R. M. Co.*, January, 1880).

It is not necessary to file the bill and summons under sec. 116 (where the amount claimed does not exceed $300) before moving to take the bill *pro confesso* (*Proud* v. *Coles, Palmer, J.*, September, 1880).

to appear in due time after the service of the subpœna, on affidavit of such service and default, an order may be made that the bill be taken *pro confesso* unless the defendant appear in twenty days from the date thereof, exclusive; which order shall be inserted in the Royal Gazette at least ten days before the day limited for the appearance by the said order; and at the expiration of the time so limited, in case no appearance shall have been entered and notice given, the bill may be ordered to be taken *pro confesso*.

For want of a plea, &c.

Ib., Ord. 15.—That the defendant shall have two calendar months, exclusively, to put in a plea, answer, or demurrer, after having been served with a copy of the plaintiff's bill, without any order for such purpose, and in default of so doing, on fourteen days' notice of motion given by the plaintiff and motion made in open Court, the bill may be ordered to be taken forthwith *pro confesso*, unless the Court on special circumstances disclosed by affidavit should allow further time; in which case no such order shall be entered until the expiration of the further time allowed.

Further proof before making decree.

*5th July, 1853, Ord. 14.**—In any case when the plaintiff moves to have the bill taken *pro confesso*, the Court may, if it shall see fit, require further proof before making any order or decree therein.

Prolixity.

*5th July, 1853, Ord. 10.**—If in any bill hereafter to be filed, or other proceedings in the Court, unnecessary allegations shall be introduced, or needless prolixity occur, the Court, in its discretion, may direct the master to disallow in the taxation of costs any charge in respect of such unnecessary matter.

Re-Hearing.

2nd Aug., 1842, Ord. 23.—That in any petition of re-hearing of any decree or order made by any judge of the Court, it shall

* See note, *ante*, p. 202.

not be necessary to state the proceedings anterior to the decree or order appealed from or sought to be re-heard.

Replication and Issue.—See PLEADINGS.

4th June, 1839, Ord. 9.—That the cause shall be considered at issue by the replication, and no subpœna to rejoin shall be necessary.

Seal.

4th June, 1839, Ord. 3.—That all subpœnas and other processes of the Court shall be sealed with a seal to be kept by the register, on which shall be inscribed the words "Court of Chancery."

Subpœna.—See HEARING—REPLICATION—SEAL.

To appear.

4th June, 1839, Ord. 2.—That the names of all the defendants in a suit may be included in one subpœna to appear.

Forms of.

Ib., Ord. 4.—That the several writs of subpœna shall be in the form mentioned at the foot of these orders, or as near as may be, with such alterations and variations as circumstances may require.

For costs.—Præcipe.

Ib., Ord. 5.—That it shall not be necessary to file a præcipe for the subpœna, but that on a subpœna for costs being sealed, the certificate or report shall be produced to the register, as his authority for sealing it.

Indorsement.

Ib., Ord. 6.—That the name or firm of the solicitor or solicitors issuing a subpœna shall be indorsed thereon.

Service of.

Ib., Ord. 7.—That the service of subpœnas shall be effected by delivering a copy of the writ and of the endorsement thereon to the person to be served therewith, and at the same time producing and shewing the original writ.

Ib., Ord. 8.—That the time of serving any subpœnas (except for costs) shall be limited to the last day of the term next following the term or vacation in which it issued out.

Ad testificandum.

Ib., Ord. 25.—That any number of witnesses may be included in one subpœna *ad testificandum*.

Form of Subpœna to appear and answer.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith

To Greeting:

We command you (and every of you, *where more than one defendant*) that within thirty days after the service of this writ on you, exclusive of the day of such service, laying all other matters and excuses aside, you do cause an appearance to be entered for you in our Court of Chancery at Fredericton, to a "Bill" (*or as the case may be*, "Information," *or* of "Revivor and Supplement," *or* "Supplemental Bill,") filed against you by (and others *or* another), and that you do answer concerning such things as shall then and there be alleged against you, and observe what our said Court shall direct in this behalf, upon pain of an attachment issuing against your person, and such other process for contempt as the Court shall award, and of the said bill being taken against you *pro confesso*.

Witness His Excellency at Fredericton, the day of in the year of our Reign.

ROBINSON.

Form of Subpœna for costs.

Victoria, &c. To Greeting:

We command you (and every of you) that you pay or cause to be paid, immediately after the service of this writ, to or bearer of these presents, £ costs by our Court of Chancery at Fredericton adjudged to be paid by you to the said under pain of an attachment issuing against your person, and such process for contempt as the Court shall award in default of such payment.

Witness, &c.

ROBINSON.

Form of Subpœna to testify viva voce in Court, or to testify before the Master.

Victoria, &c.

To Greeting:

We command you and every one of you that, laying all other matters and excuses aside, you personally be and appear before His Excellency the Chancellor (*or* before His Honor the Master of the Rolls) at Fredericton, *or* before Mr. one of the Masters of our Court of Chancery, at his office in on the day of

next, at of the clock in the forenoon, to testify the truth according to your knowledge in a certain suit now pending in our said Court of Chancery, wherein (and others *or* another) are plaintiffs, and (and others *or* another) are defendants, on the part of the (*in case of Subpœna duces tecum, add,* "and that you then and there bring with you and produce, &c.") And hereof fail not on your peril.

Witness, &c.

ROBINSON.

Time (computation of).

4th June, 1839, Ord. 35.—That when any specified time is, by the practice of this Court, allowed or prescribed for the taking of any step in the progress of proceedings therein, it shall always be computed exclusively of the day from which such time commences.

TABLE OF EQUITY RULES.

GENERAL RULES

OF THE

ELECTION COURT

FOR THE PROVINCE OF NEW BRUNSWICK;

Made under and by virtue of the Act of the Dominion of Canada passed in the 37th year of Her Majesty's Reign, Chapter 10, being "*The Dominion Controverted Elections Act, 1874.*" *

I.

An Election Petition shall contain the following statements :—

(*a*) The right of the petitioner to petition within section seven of the Act ;

(*b*) The holding and result of the Election ;

(*c*) A brief statement of the facts and grounds relied on to sustain the prayer ;

And shall conclude with a prayer for such relief as the petitioner claims to be entitled to.

II.

The petition shall be divided into paragraphs, to be numbered consecutively, each of which, as nearly as may be, shall be confined to a distinct portion of the subject ; and no costs shall be allowed for drawing or copying any petition not substantially in compliance with this rule, unless otherwise ordered by the Court or one of the Election Judges.

---

* See *Valin* v. *Langlois*, 3 Duval S. C. R. 1.

III.

The following form of petition, or to the like effect, shall be sufficient:—

IN THE ELECTION COURT.

The Dominion Controverted Elections Act, 1874.

Election of a member for the House of Commons for [*state the county or district*] in the Province of New Brunswick.

The petition of A. of (*or*, of A. of and B. of , *as the case may be*), whose name is subscribed (*or*, whose names are subscribed):

1. Your petitioner is a person (*or*, your petitioners are persons) who had a right to vote at the above mentioned election, (*or*, was a candidate at the said election, *as the case may be*).

2. That the said election was held on the day of , A. D. 18 , when A. B. and C. D. were candidates, and the returning officer has returned the said A. B. as being duly elected (*or as the case may be*).

3. Your petitioner says that [*here state the facts and grounds relied on*].

Wherefore your petitioner prays that it may be determined that the said A. B. was not duly elected and returned, and that the said election was void, (*or*, that the said C. D. was duly elected, and ought to have been returned; *or as the case may be*).

Dated the day of , A. D. 18 .

[*Signature.*]

IV.

Evidence need not be stated in the petition; but the Court, or one of the judges, may order such particulars to be given as may be necessary to prevent surprise and unnecessary expense, and to insure a fair and effectual trial, in the same manner as in proceedings in the Supreme Court, and upon such terms as to costs, or otherwise, as may be ordered.

V.

The petitioner shall, with the petition, leave a copy thereof with the clerk of the Court, to be sent to the returning officer, pursuant to section eight of the Act.

VI.

The petitioner shall leave with the petition at the office of the clerk of the Court a writing signed by him, or on his behalf, stating the name of some person entitled to practice as an attorney, whom he authorizes to act as his agent; or, stating that he acts for himself, as the case may be; and in either case, giving an ad-

dress at which notices addressed to him may be left; and if no such writing be left, or address given, then notice of objection to the petition, and all other notices, may be given by posting up the same in the office of the clerk of the Court.

VII.

Any person returned as a member may at any time after he is returned file in the office of the clerk of the Court a writing signed by him, or on his behalf, appointing a person entitled to practice as an attorney to act as his agent in case there should be a petition against him, or stating that he intends to act for himself; and in either case, giving an address at which notices in the matter of the petition may be left; and in default of such writing being filed within a week after service of the petition, notices may be given and served by posting up the same in the office of the clerk of the Court.

VIII.

When a petitioner claims the seat for an unsuccessful candidate, alleging that he had a majority of lawful votes, the party complaining of, and the party defending the election and return, shall each, seven days before the day appointed for trial, deliver to the clerk of the Court, and also at the address, if any, given by the petitioner and respondent (as the case may be), a list of the votes intended to be objected to, and of the heads of objection to each such vote; and the clerk of the Court shall allow inspection and office copies of such lists to all parties concerned; and no evidence shall be given against the validity of any vote, nor upon any head of objection not specified in the list, except by leave of the Court or one of the judges, upon such terms as to amendment of the list, postponement of the enquiry, and payment of costs, or otherwise, as may be ordered.

IX.

When, in a petition complaining of an undue return, and claiming the seat for some person, the respondent intends to give evidence to prove that the election of such person was undue, pursuant to the 66th section of the Act, he shall, seven days before the day appointed for trial, deliver to the clerk of the Court and

also at the address, if any, given by the petitioner, a list of the objections on which he intends to rely, and the clerk of the Court shall allow inspection and office copies of such list to all parties concerned; and no evidence shall be given by a respondent of any objection to the election not specified in such list, except by leave of the Court or one of the judges, upon such terms as to amendment of the list, postponement of the enquiry, and payment of costs as may be ordered.

X.

The clerk of the Court shall keep a book or books in which he shall record all the proceedings of the Court; the date of filing each petition; notice of preliminary objections; withdrawal or substitution; and the decision in each case tried;—the proceedings in each case to be kept separately. He shall also keep a record of the names and addresses of the agents given by either of the parties; which books shall be open to inspection by any person during office hours, without payment of any fee.

XI.

When it shall be made to appear to a judge by affidavit, within five days after the presentation of a petition, that there is reasonable ground to believe that such petition cannot be served upon the respondent within the time limited by the ninth section of the Act, such judge may allow further time for effecting such service. And in case service cannot be effected within the time so appointed, and the respondent has named an agent, or given an address, then the service may be made upon such agent personally, or by posting the copy in a registered letter to the address given, within such time as the judge may, on proof of the fact by affidavit, direct.

XII.

If no agent has been appointed, or address given by the respondent, and it is made to appear by affidavit to the satisfaction of a judge that service of the petition cannot be made upon the respondent personally, or at his domicile, such judge may order that a notice of the presentation of the petition and the prayer thereof shall be affixed in a conspicuous place in the office of the clerk of the Court; and such notice shall be deemed equivalent to personal service of the petition.

XIII.

Preliminary objections to a petition under the tenth section of the Act shall be filed in the office of the clerk of the Court; and notice thereof, and that a copy has been filed for the petitioner, shall be forthwith served by the respondent upon the petitioner or his agent.

XIV.

Either party may apply for an order fixing the time and place for hearing the preliminary objections.

XV.

The answer of the respondent shall be filed with the clerk of the Court. It shall be divided into paragraphs, numbered consecutively; and each paragraph shall be confined, as near as may be, to a distinct portion of the subject. Notice of the filing the answer shall be forthwith served by the respondent on the petitioner or his agent.

XVI.

The application to fix a time and place for the trial of a petition shall be made in writing to the judge assigned for the trial of election petitions in the county to which such petition relates; and the application shall state the time when such petition was filed, and when it was at issue.

XVII.

The judge's order fixing the time and place of trial shall be delivered to the clerk of the Court, who shall post up the same in a conspicuous place in his office, and shall send a notice thereof by post to the sheriff of the county to which it relates, so that he may receive the same at least fourteen days before the day appointed for trial; and such sheriff shall forthwith publish the same in the said county. The cost of publication of this and any other matter required to be published by the sheriff shall be paid by the petitioner, or the person at whose instance the same is published, and shall form part of the general costs of the petition.

XVIII.

The notice of trial may be in the following form :—

IN THE ELECTION COURT.

The Dominion Controverted Elections Act, 1874.

Election Petition for the County of

Between A. B. (*name of petitioner*] petitioner, and C. D. respondent.

Take notice that the above petition will be tried at on the day of , and on such subsequent days as may be needful.

Dated the day of , 18 .

By order of Mr. Justice————

W. C., *Clerk of the Court.*

XIX.

A copy of such notice shall be served upon the respondent or his agent, or upon the petitioner or his agent (*as the case may be*), by the party who obtains the order, at least fourteen days before the day appointed for the trial.

XX.

Notice of the time and place of the trial of each election petition shall be sent by post by the clerk of the Court to the secretary-treasurer of the county for which the election complained of shall have been held, or to such officer as may have the custody of the poll books and check lists used at the said election ; and the said secretary-treasurer or other officer shall forthwith deliver to the registrar of the judge who is to try the petition, or his deputy, the said poll books and check lists, for which the registrar or his deputy shall give, if required, a receipt ; and the registrar or his deputy shall keep the said poll books and check lists in safe custody until the conclusion of the trial, and then return the same to the said secretary-treasurer or other officer.

XXI.

The judge assigned to try the petition, or, in case of his absence or inability, any other judge of the Court, may by order postpone the commencement of the trial till such day as he may appoint ; and notice thereof shall be forthwith sent by the clerk of the Court to the sheriff of the county in which the trial is to take

place, and the said sheriff shall publish the same. Notice thereof shall also be forthwith served by the party obtaining the same upon the opposite party.

XXII.

In the event of the judge not having arrived at the time appointed for the trial, or to which the trial is postponed, the commencement of the trial shall, *ipso facto*, stand adjourned to the ensuing day, and so from day to day until the arrival of the judge.

XXIII.

No formal adjournment of the Court for the trial of an election petition shall be necessary; but the trial is to be deemed adjourned, and may be continued from day to day until the enquiry is concluded; and in the event of the judge who begins the trial being disabled by illness or otherwise, it may be recommenced and concluded by any other of the judges.

XXIV.

All affidavits, notices and other papers in any matter in the Court for the trial of an election petition may be entitled as follows:—

IN THE ELECTION COURT.

The Dominion Controverted Elections Act, 1874.

Election Petition for the County of

Between A. B. [*name of petitioner*] petitioner, and C. D. respondent.

XXV.

The judge assigned to try an election petition shall appoint an officer to attend at the trial, who shall be called the registrar of the Court, and who shall, in person or by deputy, perform all the functions incident to the officer of a Court of Record, and such other duties as may be prescribed to him. He shall keep a book in which shall be entered the proceedings of each trial, as in a trial at circuit; and at the conclusion of the trial shall send such book, together with any papers or documents filed with him during the trial, to the clerk of the Election Court.

XXVI.

At the time appointed for the trial of any election petition, the

petitioner shall leave with the registrar, for the use of the judge, a legibly written or printed copy of the petition, and of all the proceedings necessary to show the matters to be tried—including the particulars of objection on either side; the correctness of which, so far as the proceedings are filed with the clerk of the Court, shall be certified by him. The judge may allow amendment of the said copy. In default of such copy being delivered, the judge may refuse to try the petition, or may allow further time for delivery of the copy, or may adjourn the trial, in every case, upon such terms as to costs and otherwise as he shall see fit.

XXVII.

A judge's order to compel the attendance of a witness may be in the following form :—

IN THE ELECTION COURT FOR THE COUNTY OF———

To C. D. [*name and residence*]: You are hereby required to attend before the said Court at [*place*], on the day of at the hour of (*or*, forthwith, *as the case may be*), to be examined as a witness in the matter of an election petition between E. F., petitioner, and G. H., respondent, and to attend the said Court till your examination shall be completed.

Dated the day of

A. B., *Judge of said Court.*

XXVIII.

A warrant of commitment for contempt may be as follows :—

To the sheriff of the county of , and to any constable thereof, and to the keeper of the gaol of the said county :

At a Court held at on the day of for the trial of an election petition for the county of before the Honorable one of the election judges, pursuant to "The Dominion Controverted Elections Act, 1874":

Whereas C. D. was this day adjudged to be guilty of a contempt of the said Court, and was thereupon for his said contempt sentenced to be imprisoned in the county gaol at , for days, and to pay a fine of $, and further to be imprisoned in the said gaol till the said fine was paid; These are therefore to command you the said sheriff, and all constables and peace officers, to take the said C. D. into custody, and convey him to the said gaol, and deliver him into the custody of the keeper thereof; and the said keeper is hereby required to receive the said C. D. into his custody and detain him in the said gaol for the times above specified, in pursuance of the said sentence.—Given under my hand and seal this day of , A. D. 18 .

A. B. [L. S.]

Judge of the said Court.

XXIX.

Such warrant may be directed to the sheriff and peace officers of any county or place where the person adjudged guilty of contempt may be found; and may be executed by any or either of the persons to whom it is directed; and it shall be sufficient authority to the said sheriff or other peace officers, and to the gaoler, without further particularity.

XXX.

All interlocutory questions and matters may be heard and disposed of before any judge of the Court, who shall have the same control over the proceedings under the Act as a judge at chambers in the ordinary proceedings of the Supreme Court.

XXXI.

Notice of an application for leave to withdraw a petition shall be in writing, signed by the petitioner or his agent, and shall be left at the office of the clerk of the Court. It shall state the grounds on which the application is intended to be supported, and may be in the following form:—

IN THE ELECTION COURT, COUNTY OF————.

The Dominion Controverted Elections Act, 1874.

The petition of [*names of petitioners*] presented this day of

The petitioner proposes to withdraw his petition, upon the following grounds [*state the grounds*], and prays that a day may be appointed for hearing his application. Dated the day of

[*Signature.*]

XXXII.

On filing such application, a judge may appoint a time and place for the hearing thereof.

XXXIII.

A copy of the notice of intention to apply to withdraw the petition shall be served by the petitioner upon the respondent or his agent, and also upon the sheriff of the county, who shall publish the same in the county to which it relates.

XXXIV

The said notice may be in the following form :—

IN THE ELECTION COURT, COUNTY OF————.

The Dominion Controverted Elections Act, 1874.

In the election petition between petitioner
and respondent.

Notice is hereby given that the above petitioner did on the day of lodge at the office of the clerk of the Election Court notice of an application to withdraw his petition, on the following grounds [*state the grounds, as in the application*]. Also, take notice, that the said application will be heard before Mr. Justice . at on the day of . Dated, &c.

[*Petitioner's signature.*]

XXXV.

Notice of the abatement of a petition under the fifty-sixth section of the Act shall be given by the personal representative of the petitioner, or by some person interested, by serving a copy thereof on the respondent, or his agent, and also upon the sheriff of the county, who shall publish the same in the county to which it relates in the manner hereinafter described. Such notice may be in the following form :—

IN THE ELECTION COURT, COUNTY OF————.

The Dominion Controverted Elections Act, 1874.

In the election petition between petitioner
and respondent.

Notice is hereby given that the above named petitioner (*or*, the above named , the surviving petitioner, *as the case may be*), died on the day of , and that the said petition is thereby abated, according to the fifty-sixth section of the said Act.

Dated the day of , A. D.

[*Signature.*]

XXXVI.

Within one calendar month after the publication of such notice, any person intending to apply to be substituted as a petitioner may make a written application for that purpose ; and the judge to whom such application is made shall appoint a time and place for hearing the same, of which notice shall be given in the manner directed in case of an application to withdraw a petition. [Rule xxxiii.]

XXXVII.

If the respondent dies; or is summoned to Parliament as a member of the Senate; or if the House of Commons has resolved that his seat is vacant; any person entitled to be a petitioner under the Act in respect of the election to which the petition relates, may give notice of the fact in the county by causing such notice (stating with reasonable particularity his right to be substituted), and signed by him, to be published in at least one newspaper published therein, if any, and by leaving a copy of such notice with the sheriff of the county, and a like copy with the clerk of the Court.

XXXVIII.

The manner and time of the respondent giving notice to the Election Court that he does not intend to oppose the petition shall be by delivering a written notice thereof, signed by him, at the office of the clerk of the Court, seven days before the day appointed for trial, exclusive of the day of leaving such notice.

XXXIX.

Upon such notice being left at the office of the clerk of the Court, he shall forthwith notify the judge assigned to try the petition, and also send a copy thereof by post to the petitioner or his agent, and to the sheriff of the county; and the said sheriff shall cause the same to be published in the county in the manner hereinafter directed.

XL.

The time for applying to be admitted as a respondent in either of the events mentioned in the fifty-seventh section of the Act, shall be within ten days after the publication of the notices thereof respectively, as hereinbefore directed; or within such further time as the Court or one of the judges may allow.

XLI.

When a petition is withdrawn under the provisions of the fifty-ninth section of the Act, notice in writing of such withdrawal, signed by the petitioner, addressed to the clerk of the Election Court, shall be filed in the office of the said clerk. The

notice shall be entitled in the cause, and shall briefly state the facts which authorize the withdrawal of the petition.

XLII.

Costs shall be taxed by the clerk of the Court, or by his deputy specially appointed, upon the rule of Court or judge's order by which the costs are payable; and costs, when taxed, may be recovered by attachment or execution issued upon the rule of Court ordering them to be paid. If payable by order of a judge, then by making such order a rule of Court in the ordinary way, and issuing an attachment or execution upon such rule against the person by whom the costs are ordered to be paid, or against his goods and chattels; or in case there be money in Court available for the purpose, then to the extent of such money, by order of the Election Court or one of the Election Judges. The office fees payable for inspection, office copies, enrolment, and other proceedings under the Act and these rules, shall be the same as those payable for like proceedings in the Supreme Court.

XLIII.

Writs of subpœna *ad testificandum* and *duces tecum*, under the seal of the Election Court, may be issued at any time by the clerk of the Court; which writs may be in the following form:—

IN THE ELECTION COURT.

Dominion of Canada.
Province of New Brunswick. } Victoria, by the Grace of God, &c.
To-wit:

To———

We command you that, all excuses being laid aside, you and every of you be and appear before our Election Judge assigned to try the election petition for [*name the county*], at , in the county of , on the day of , 187 , by o'clock in the noon, and so from day to day until the sai election petition shall be tried, or otherwise disposed of; to testify what you (*or*, either of you) know in the matter of the said petition, wherein is (*or*, are) petitioner, and is (*or*, are) respondent, on the part of the , and at the Court for the trial of the said election petition for [*name the county*], at aforesaid, to be tried. [*In case of a subpœna duces tecum, add:*]—And also, that you bring with you and produce at the time and place aforesaid [*describing what is to be produced in the ordinary way*].

[*If the subpœna is to attend before the Election Court*:]—Before our said Election Court for the Province of New Brunswick, at Fredericton, on the day of , 187 , by o'clock in the noon, to testify all and singular those things which you, or either of you, know in the matter of an election petition depending in our said Court at Fredericton [*describing the petition as above, or other the matter in which the witness is called, as the case may be*]; and also that you bring with you and produce at the time and place aforesaid [*describing what is to be produced as aforesaid*], and this you, or any of you, shall by no means omit, under the penalty upon each of you of one hundred pounds.

Witness the Honorable [*the senior Election Judge*], one of the judges of our Election Court, at Fredericton, the day of 187 .

(Signed) A. B.,
Clerk of the Election Court.

XLIV.

The clerk of the pleas in the Supreme Court shall be the clerk of the Election Court.

XLV.

After the trial of an election petition, the judge shall deliver to the clerk of the Election Court the evidence and proceedings before the said judge, and his finding on the said petition, which shall be filed of record by the said clerk.

XLVI.

Publication of any petition, paper or notice by the sheriff shall, when it is not otherwise expressed in the Act, be by posting printed copies of such petition, paper or notice on the Court House, in the offices of the secretary-treasurer and of the registrar of deeds for the county to which the petition relates, and by publishing the same once in a newspaper published in such county, if any. In the City of St. John, the notices shall also be posted in the common clerk's office.

XLVII.

The word "County," wherever it is used in these rules, shall also mean "City and County," or "Electoral District," if necessary to give effect to the provisions thereof.

XLVIII.

No proceedings under "The Dominion Controverted Elections

Act, 1874," or under these rules, shall be defeated by any formal objection.

XLIX.

Any rule made, or to be made, in pursuance of the Act, shall be published by a copy thereof being put up in the office of the clerk of the Election Court.

JOHN C. ALLEN, *Chief Justice.*
J. W. WELDON.
CHARLES FISHER.
A. R. WETMORE.
CHARLES DUFF.

Fredericton, 2nd Nov., 1878.

Table of Contents of the Election Court Rules.

GENERAL RULES AND ORDERS

OF THE

COURT OF DIVORCE AND MATRIMONIAL CAUSES.*

JULY 19th, 1791.†

Citations, &c.—direction of.

1st. That all citations and other processes be directed to the sheriff of the county in which the defendant resides.

See C. S., c. 50, s. 7, (31 Vic., c. 20, s. 1).

See as to form of citation, rule 3 of Feb. 1869, *post*.

Serving Citation and Libel.

2nd. That all citations be served thirty days before the return and that a copy of the complainant's libel be delivered to the defendant at the time of serving the citation.

The libel and proxy (rule 1 of Feb. 1869, *post*) must be filed before serving the citation.

---

* The practice and proceedings of the Court shall be conformable, as near as may be, to the practice of Ecclesiastical Courts in England prior to 20-21 Vic., c. 85, subject to the provisions of C. S., c. 50, and the rules and orders of the Court consistent therewith (s. 3—23 Vic., c. 37, s. 10). The latter practice will be found in *Chit. Gen. Pr.*, vol. 2, p. 454, *et seq.* and vol, 4, p. 120, *et seq.*
An appeal lies to the Supreme Court. See *ante*, p. 150.

† "*Fredericton, in the Province of New Brunswick.*—At a Court of the Governor and Council of the Province of New Brunswick held in pursuance of an Act of the General Assembly of the said Province, intituled 'An Act for regulating Marriage and Divorce, and for preventing and punishing Incest, Adultery and Fornication.' PRESENT: His Excellency Thomas Carleton, Esquire, Lieutenant Governor and Commander in Chief; The Honorable George Duncan Ludlow, Isaac Allen, Edward Winslow, Jonathan Odell and Beverley Robinson, Junior, Esquires, of the Council, the following rules and orders were established for the regulation and government of the practice in the said Court":—
The table of fees given by these orders will be found in All. Rules XXII.

Evidence to be viva voce.

3rd. That all evidence touching the matters in controversy be examined *viva voce* in open Court.

See C. S., c. 50, s. 13 (23 Vic., c. 37, s. 8).

Attorneys may practice as Proctors.

4th. That all attorneys of the Supreme Court be admitted to practice as proctors and advocates in this Court.

See C. S., c. 50, s. 4 (23 Vic., c. 37. s. 15).

Depositions—before whom sworn.

5th. That the commissioners for taking affidavits in the Supreme Court be commissioners for taking affidavits in this Court, in all such cases where depositions are to be admitted *de bene esse* under the Act of Assembly.

See rule of Oct. 1860, *post.*

Filing Answer, and Trial.

6th. That on the return day of the citation the defendant file his or her answer and be ready with evidences for trial.

See rule 6 of Feb. 1869, *infra.*

An appearance is entered in the same manner as in the Supreme Court, by filing a memorandum and serving a copy on the plaintiff's proctor.

OCTOBER 23rd, 1860.

Affidavits, &c.—before whom sworn.

IT IS ORDERED, That all affidavits and petitions in matters and suits in this Court may be sworn before any commissioner for taking affidavits to be read in the Supreme Court, other than the proctors engaged in such matter or suit.

See C. S., c. 50, s. 8 (31 Vic., c. 20, s. 2; 28 Vic., c. 6).

FEBRUARY 23rd, 1869.*

Proxies to be filed.

1. Every proctor appearing for any party shall take from such

* "Whereas by an Act passed in the twenty-third year of the Reign of Her present Majesty, chapter 37, it is provided that there shall be a Court of Record to be called 'The Court of Divorce and Matrimonial Causes.' And whereas by the said Act it

party a proxy or authority in writing authorizing him to act, which shall be filed with the registrar at the time of filing the libel or appearance, as the case may be.

See the practice as to proxies, 2 *Chit. Gen. Pr.*, 482; 4 *id.*, 141, 144, 162, 164. They were required to be under seal and executed in the presence of two witnesses.

Parties to be styled Plaintiff and Defendant.

2. The parties litigant shall be styled plaintiff and defendant respectively.

Citation to state relief sought, &c.

3. The citation shall state shortly the relief sought for and the specific grounds.

The following is the form of a citation in a suit for divorce on the ground of adultery:—

New Brunswick, to-wit:

(L. S.) Victoria, by the Grace of God, of the United Kingdom of Great Br'tain and Ireland, Queen, Defender of the Faith, &c.

To the Sheriff of the City and County of Saint John (*see Rule 1 of July, 1791*). Greeting: We hereby strictly command and enjoin you peremptorily to cite or cause to be cited J. M. of the Parish of in the said City and County of Saint John and Province of New Brunswick, to appear before our Court of Divorce and Matrimonial Causes at Fredericton, at the place of judicature there, on the thirtieth day after he shall be personally served with this citation, if it be a Court day, otherwise at the Court day immediately following, at the usual hour of hearing causes and doing justice, there to answer the said E. M. wife of the said J. M. in a certain suit of divorce from the bond of matrimony for adultery by him committed, and further to do and receive what unto law and justice shall appertain, under the pain of the law and contempt thereof, at the promotion of the said E. M.; and whatever you do or cause to be done in the premises you shall duly certify to our said Court of Divorce and Matrimonial Causes, together with these presents.

Witness (see C. S., c. 50, s. 6—23 Vic., c. 37, s. 17) the Honorable A. Rainsford Wetmore, Judge of the said Court, at Fredericton, the day of (*the date of issue*) in the year of our Reign.

STRATON, *Registrar.*

(Indorsed.)

Issued the day of 18 .

W. & B., *Proctors for Plaintiff.*

---

is further provided that the said Court shall have power to make rules and regulations concerning the practice and procedure and the forms to be used under the said Act, and regulate the fees payable in all proceedings therein, and to alter and revoke the same or any of them as may from time to time be considered necessary:—

Now I the Honorable Charles Fisher, D. C. L., Judge of Her Majesty's Court of Divorce and Matrimonial Causes, do hereby make the following additional rules and regulations concerning the practice and procedure in the said Court of Divorce and Matrimonial Causes, and also the following table of fees for all proceedings therein to be taxed and allowed by the officer of the said Court, to take effect on and after this date.

Fredericton, 23rd Feb., 1869." CHARLES FISHER.

The table of fees given by this rule is inserted in C. S., c. 119 (p. 598) without any alteration except the conversion of sums into dollars and cents.

Libel—form of.

4. The libel shall, without any preamble, contain a brief statement of the material facts on which the plaintiff relies, in paragraphs numbered consecutively, and shall conclude with a prayer stating specifically the relief sought for.

The libel in a suit for a divorce is as follows :—

"In the Court of Divorce and Matrimonial Causes.
Province of New Brunswick.

Before the Honorable the Court of Divorce and Matrimonial Causes of Her Majesty's Province of New Brunswick, lawfully constituted by an Act of the General Assembly of the said Province.

Of Term in the year of the Reign of our Sovereign Lady Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c., and in the year of our Lord one thohsand eight hundred and .

The proctor of E. M. of the City of Saint John in the City and County of Saint John and Province of New Brunswick, wife of J. M. of the Parish of in the said City and County of Saint John, against the said J. M. , husband of the said E. M. , and against any other person or persons lawfully intervening or appearing in judgment for him, by way of conplaint and hereby complaining unto the said Court in this behalf, doth say, allege, and in law articulately propound as follows, that is to say :

First [*Set out the marriage and the facts relied on as grounds for a divorce (see the form 4 Chit. Gen. Pr. 194) in numbered paragraphs.*

In the forms in common use the conclusion is as follows :—)

That the said plaintiff, E. M. , hath rightly and duly complained of the premises in this Honorable Court, and the plaintiff doth propound and allege all things in this article mentioned jointly and severally as before.

That all and singular the premises were and are true, public and notorious, and thereof there was and is a public fame and report, and of which legal proof being made, the plaintiff prays that right and justice may be effectually done and administered to her and her party in the premises, and that the said marriage contract had and solemnized between the said E. M. and J. M. as aforesaid may be admitted and pronounced void and of no effect in law, and that they the said E M and J M may be divorced and pronounced free from the contract and bond of matrimony entered into as aforesaid by her the said E M with the said J M her husband, by reason of the premises and the adultery by him committed, and that she the said E may have the liberty and freedom of marriage with any other man; and further that this Honorable Court will therein do and decree in the premises what shall be lawful and right in this behalf, not obliging her or her party to prove all and singular the premises or to the truth of superfluous proof against which the plaintiff protests, and saving to herself and her party all benefit of law, prays that so far as she shall prove in the premises so far she may obtain in this suit, humbly imploring the aid of this Honorable Court in this behalf.

It is signed by the advocate for the plaintiff and endorsed—

"The defendant is to file [his] answer to this libel at the return day of the citation herewith, and be ready with [his] witnesses for trial.

P. P., *Proctor for Plaintiff.*

——— 18 ."

Alimony.

5. Every libel containing a claim for alimony shall state the property or income of the husband.

Time for answering, &c.

6. Each party shall be allowed thirty days to file any answer, plea, demurrer, or other proceeding.

Rescinded Rule 26 Eng/95

The form in common use of an answer in a suit for divorce on the ground of adultery is as follows :—

(*Title of the Court and Term, see the form of libel, ante, p. 250.*)

The proctor of C. B., of the Parish of in the County of and Province of New Brunswick, aforesaid, at the suit of A. B., of the Parish of aforesaid , the husband of the said C. B., and at the suit of any other person for him lawfully intervening and appearing, by way of answer and answering unto the libel or bill of complaint of the said A. B., doth say and allege as follows, to-wit :

First. [*&c., &c., denying or admitting the facts charged, and stating the defence.*]

And the defendant doth therefore pray that she may be dismissed from this Honorable Court with her reasonable costs by her in this behalf most wrongfully sustained (*or as the case may be*).

If the defendant neglects to appear or answer, the Court may proceed with the cause *ex parte*, see C. S., c. 50, s. 11 (31 Vic., c. 20, s. 3).

Dismissing Cause.

7. If the plaintiff neglect to proceed to hearing or argument according to the practice of the Court, the libel may be dismissed with costs, unless sufficient cause be shown to the contrary.

It is the duty of the promoter to prosecute the trial with reasonable expedition ; if he neglects to do so, the Court may dismiss the suit (*Sheppard* v. *Bennett*, L. R. 3 Ecc. 167).

Paper,—entering cause on.

8. The registrar shall keep a paper in which shall be entered all causes for hearing or argument, or in which any motion is intended to be made, which entries shall be made before the opening of the Court at each term, unless otherwise allowed by the Court.

OCTOBER TERM, 1871.

Filing Citation and affidavit of service.

No cause in which the plaintiff prays for a divorce from the bond of matrimony shall be entered on the paper for hearing until the

Rescinded 5 Rule Eng 24/95

citation, with an affidavit of the due service thereof, and of a copy of the libel, shall have been filed with the registrar three calendar months, except in case of appearance.

In this term the Court directed the registrar to "Require the proctors in future to insert the parish and county where the citation is served, and refuse to file any citation which is not accompanied by such an affidavit."

The affidavit of service may be as follows:—

In the Court of Divorce and Matrimonial Causes.
Province of New Brunswick.

Between A. B., plaintiff,
and
C. B., defendant.

We, E. F. of (&c.) and P. P of (&c.), the proctor for the above named plaintiff in this suit severally make oath and say as follows:

And first I the said E. F. for myself say—

1. That I did on at personally serve C. B., the above named defendant in this suit, with the annexed writ or citation by delivering to [her] the said C. B. a true copy thereof, and at the same time showing [her] the said writ or citation.

2. That at the time I so served the said citation as aforesaid I delivered to the said C. B. personally a paper writing purporting to be a copy of the libel in this suit, which said copy I received from the above named P. P., and of which the paper writing hereunto annexed marked B is a true copy.

And I the said P. P. for myself say—

3. That the paper writing received from me by the said E. F., as stated in the second paragraph of this affidavit, was a true copy of the libel filed in this suit, of which said libel the paper writing hereunto annexed marked B is also a true copy.

JUNE TERM, 1880.

Notice of Trial.

Rescinded Rule 28 Oct/96

Fourteen days notice of trial shall be given in all cases, unless inability to serve such notice in undefended cases is shown to the satisfaction of the Court.

of, and of a
egistrar three

ctors in future to
file any citation

e named plain-

B., the above
vering to [her]
he said writ or

elivered to the
el in this suit,
ch the paper

, as stated in
d in this suit,
o a true copy.

ses, unless
shown to

Petitions for Probate and Administration.

1. That every petition for letters testamentary or of administration shall state the name of the widow (if any) and of all the children (if any) of the deceased, and their additions and places of residence respectively, and in case there shall be no children, then the names and additions of all the nearest of kin in equal degree, and their representatives, with their several places of residence, and in case any of the persons whose names are required to be stated are married women or infants, the names and

The Court of Divorce and Matrimonial Causes.

FEBRUARY TERM, A. D. 1895.

WHEREAS by Section fifteen of Chapter 50 of the Consolidated Statutes, intituled 'The Court of Divorce and Matrimonial Causes,' it is provided *inter alia* that the Court shall have power to make Rules and Regulations concerning the practice and procedure in the said Court, and also to alter and revoke some or any of them, as may from time to time be considered necessary.

Now, I, the Honorable James A. VanWart, Judge of Her Majesty's Court of Divorce and Matrimonial Causes, do hereby alter the following Rules, namely:—

Rule 1, promulgated on the 18th day of July, A. D. 1791, to be rescinded, and the following to stand in lieu thereof:—

"That all Citations and other processes be directed either to the party against whom issued, or to the Sheriff of any County in the Province."

The Rule promulgated in October Term, 1871, to be rescinded, and the following to stand in lieu thereof:—

"No cause in which the plaintiff prays for a divorce from the bond of matrimony, shall be entered on the paper for hearing until the Citation with an affidavit of the due service thereof and of a copy of the libel shall have been filed with the Registrar."

Rule 6, promulgated on the 23rd of February, A. D. 1869, to be rescinded.

Rule promulgated in June Term, 1880, intituled "Notice of Trial," to be rescinded.

And I do hereby make the following Rule:—

Fourteen days' notice of trial shall be given in all cases in which defendant appears; and notice of trial may be served at the time of service of the Citation.

Dated at Fredericton, the twenty sixth day of February, A. D. 1895.

J. A. VANWART.

Rescinds Rule 28 ante 14

RULES

OF THE

SURROGATE COURTS.

ORDERS IN CHANCERY, 9TH OCTOBER, 1840.

Whereas, by an Act of the General Assembly made and passed in the third year of the Reign of Her present Majesty Queen Victoria, entitled "An Act in amendment of the law relating to Wills, Legacies, Executors and Administrators, and for the settlement and distribution of the Estates of Intestates," it is among other things enacted that the Court of Chancery shall and may from time to time make, establish, alter and amend rules and forms of practice and proceedings, as well for that Court in matters made cognizable before it by this Act, as for the Surrogate Court, in such manner as the Court of Chancery shall see fit, provided that such rules and forms be in nowise repugnant to that Act.

His Excellency the Chancellor, by and with the advice and consent of His Honor the Master of the Rolls, doth hereby order and direct as follows :—

Petitions for Probate and Administration.

1. That every petition for letters testamentary or of administration shall state the name of the widow (if any) and of all the children (if any) of the deceased, and their additions and places of residence respectively, and in case there shall be no children, then the names and additions of all the nearest of kin in equal degree, and their representatives, with their several places of residence, and in case any of the persons whose names are required to be stated are married women or infants, the names and

additions of the husbands or guardians of such infants (if any) shall also be stated with their places of residence, provided that in case any of the above particulars are sworn to be unknown to the petitioner, and the surrogate to whom the petition shall be presented shall deem it unnecessary under the circumstances of the case that the same should be stated, such particulars may be omitted.

See C. S., c. 52, s. 9 (3 Vic., c. 61, s. 23; 1 R. S., c. 136, s. 8). The petition must state the time and place of the death of the deceased, and the amount of his estate, real and personal, and such other particulars as may be necessary (*id.*).

Holding Courts.

2. That the surrogates in the several counties shall fix the time and place of holding their Courts as the business of the Courts may require, and shall be attended at the times appointed by the registers of probates, who shall enter in a book the minutes of proceedings at such Courts.

It will be presumed that the person acting has taken the oaths of office, but if he has not his acts will not be invalid, if he has been appointed to the office (*Crookshank* v. *Gibcrson*, 2 All. 544.)

The title of the judge was by 1 R. S., c. 136, altered to "Judge of Probates," and by C. S., c. 52, he is styled "Judge of Probate."

Pleadings.

3. That the allegations and proceedings in such Courts shall be oral, except in cases where the importance of the matters in question, or other circumstance, shall appear to the surrogate to render a more formal mode of procedure necessary, when they may, to such extent and subject to such limitations and regulations as the surrogate may prescribe, be required to be in writing.

The following extract from a decree pronounced by W. B. Kinnear, Esq., Judge of Probates for the City and County of Saint John, in *In re Nice's Will*, *Oct. 22nd*, *1864* is taken from the minutes of the Court, Book No. 3, p. 397.

After referring at length to the English practice and what were considered its defects, the deceee proceeds as follows:—

To adopt this practice in the Probate Courts of this Province would, I think, be productive of endless delay and expense, and in some cases might wreck a good cause upon some point or points, or some defect in acquiring the necessary information to frame a complete plea, or in obtaining an intimate knowledge beforehand of all the most minute details, or in being satisfied that the facts given in a law office, not

on oath, would be followed by their reassertion whe... under examination upon oath. Rejecting, therefore, this very tedious, difficult and complicated mode of procedure, but retaining the form of allegation responsive and counter allegation, and considering that the object to be gained in this Court is the exact state of the case upon hearing all the parties and their witnesses on oath, avoiding also everything which by any means can shut out any portion of the facts, and at the same time keeping in view the necessity of giving some notice to the opposing party of the general features of the case, I feel constrained in this cause, as in all future contested suits, to lay down as a rule for framing the several allegations, that the party should state the leading facts of his case, whether on bringing forward a will or other matter of a suit (which, if a will, can in general only be necessary when, owing to an alteration in it, or the like, he is desirous of varying the probate from its original aspect), or in impugning it, or whatever the case may be, by an original or responsive allegation, or on pleading a counter allegation. These leading facts need not be with all that exactness of time, place and other minute detail to be found in the forms, but any needful matter of that kind, with other points of the like nature, may be left to be elicited by the evidence and may then be received or rejected on the usual principles of evidence. The statement of facts should be so connected in the articles as to show whether there are more grounds of objection than one and what these grounds are, as, for example, incapacity from unsoundness of mind, imbecility, and so on, fraud, coercion, etc., and these grounds in general detail should be followed by a general charge of unsoundness, fraud, coercion, etc., under the respective heads, so as to admit evidence of other facts discovered since filing the plea (which, as has been seen, may be done even in England after the most complete state of the original pleadings). Each answering allegation should admit whatever can be admitted, as well as deny or explain and support the will, etc., according to circumstances, And it will be quite unnecessary hereafter to state or repeat the words that they are true, notorious, etc. As an additional reason for taking this more simple course of practice, it may be remembered that this Court can adjourn at any time to give effect to this mode of proceeding, and thus obviate any inconvenience which might arise from want of notice or surprise; and indeed, unlike the practice in all other Courts, the Probate Court is always open, and the cause is always in Court until every fact is brought out necessary to shew all the merits on both sides and do full justice on such merits, without nonsuit, failure for want of special plea, or other impediment of any kind. And when the case is closed on both sides and the advocates have been heard, I shall be called upon to decide not on a case presented, which when argued might or might not be the true case, but on the actual facts as they have been proved before me.

Evidence to be viva voce.

4. That the witnesses shall be openly examined before the surrogate, and the opposing party be allowed to cross-examine without any written interrogatories on either side.

The testimony is to be reduced into writing and filed (C. S., c. 52, s. 32).

Pronouncing Decision.

5. That when any matter is contested before the surrogate

his decision thereupon shall be openly pronounced in the presence of the parties or on due notice given, and the same shall be entered in the minutes and a copy furnished to the party requiring the same at his expense.

See *Ford's Estate*, 1 P. & B. 552.

The decision of the judge in a case within his jurisdiction is final, unless appealed from (*ante*, 162).

Appeals.

6. That upon filing an appeal with the register of probates, the appellant do forthwith give notice thereof to the opposite party by serving him with such notice in writing, or in such other way as the Court of Chancery may direct.

7. That upon the transmission of the copy of an appeal from the decision of any surrogate to the Court of Chancery, on application of the appellant and proof of due notice of such appeal having been given, the said Court shall make an order for the hearing of such appeal on a day to be thereupon appointed, which order shall be duly served on the opposite party fourteen days (or such longer time as the Court of Chancery may direct) before the d appointed.

8. That upon the day appointed for the hearing on proof of the service of the order, the appeal shall stand to be heard, unless the Court of Chancery, on special cause shewn, shall think fit to postpone the same, and in that case, on the day to which the hearing shall be postponed.

9. That in case the appellant shall not, within six weeks after the transmission of the copy of the appeal, obtain an appointment of a day for hearing the same, and serve the same as aforesaid, the Court of Chancery may, in its discretion, on the application of any other party interested, by an order of the said Court, appoint a day for hearing the same, which said order shall be served on the said appellant such time before the day appointed as the Court shall direct, and in case the said appellant shall make default in appearing and bringing on the cause to be heard on the day appointed, the said Court, on proof of due service of such order, may direct such appeal to stand dismissed.

See C. S., c. 52, ss. 47-50, *ante*, p. 162.

Forms.

10. That the following forms be used in matters relating to the said Surrogate Courts, with such alterations and additions as the case may render necessary or the surrogate in particular circumstances may permit or prescribe.

See C. S., c. 52, s. 48.

J. HARVEY, *Chancellor.*
N. PARKER, *M. R.*

No. 1.—Petition for Letters Testamentary.

To A. B. Esquire, ~~Surrogate~~ Judge of Probate for the county of C. and Province of New Brunswick.

The petition of D. E. of H. in the said county, yeoman,

Humbly sheweth,

That G. H. late of the parish of F. in the county aforesaid, yeoman, departed this life on or about the day of last past at the parish of F. aforesaid, having first duly made and executed his last will and testament in due form of law, bearing date the day of in the year of our Lord , and thereby appointed your petitioner the sole executor thereof. That immediately before the time of his death the said G. H. was an inhabitant of the said county of C. and that he died seized or otherwise entitled unto real estate of the value of £ situate within the said county [*or as the case may be*] and personal estate to the value of £ which without deduction therefrom for debts due by deceased &c.

Your petitioner therefore humbly prays that he may be admitted to prove the said last will and testament, and that letters testamentary may be granted thereof to him in due form of law, and as in duty bound will ever pray. Dated the day of A. D.

(Signed) D. E.

See as to what should be set forth in the petition, Rule 1 and note thereto, *ante*, 253.

A testator named seven executors in his will and directed that if any of them should die or renounce the remaining executors should by writing appoint others in their place, so that the same number should always exist. Two of the executors named in the will died, and the survivors appointed two others, who were sworn as executors and probate granted to them by the Judge of Probates after the original probate granted,—Held, that these seven persons could sue as executors (*Wright* v. *Stackhouse*, 5 All. 450).

No. 2.—Petition for Letters of Administration.

To A. B. Esquire, ~~Surrogate~~ Judge of Probate for the county of C. in the Province of New Brunswick,

The petition of D. E. of the parish of F. in the said county of C., Esquire,

Humbly sheweth,

That G. H. late of the parish of F. aforesaid , departed this life

on the day of in the year of our Lord at the parish of F. aforesaid, without having, to the best of the knowledge and belief of your petitioner, made any will. That the said G. H. immediately before his death was an inhabitant of the said county of C., and that he died seized or otherwise entitled unto real estate of the value of £ , situate in the said county (*or as the case may be*) and personal estate of the value of £ ; that the said G. H. left a widow I. H. and sons, namely, your petitioner the eldest, and (*here insert the names and additions of the other sons*) and daughters, namely, (*insert their names and additions*) him surviving, which said widow and children all reside at in the said county.

Your petitioner prays that letters of administration of the estate and effects of the said G. H. may be granted to him in due form of law, and as in duty bound will ever pray. Dated the day of A. D. .

(Signed) D. E.

See as to what should be set forth in the petition, Rule 1 and note thereto, *ante*, 253.

A statement in a petition by defendant that certain land in his possession belonged to the intestate, on which petition letters of administration were granted to defendant, is a sufficient acknowledgment of title in the heir of the intestate to prevent the operation of the Statute of Limitations (*Doe* d. *Spence* v. *Welling*, 6 All. 470).

Administration is in general granted in the following order of precedence:—1. A husband or wife; 2. Children; 3. Grandchildren; 4. Great-grandchildren; 5. Father; 6. Mother; 7. Brothers and sisters; 8. Grandfathers or grandmothers; 9. Nephews, nieces, uncles and aunts; 10. Great-grandfathers or great-grandmothers; 11. Great nephews.

With respect to the other next of kin, they take in their order, and it is the rule of the Court where there are several equally entitled, to make the grant to the first applicant without requiring the consent or renunciation of those entitled in the same degree (*Brown*, 174).

Primogeniture confers no legal right to be preferred, yet, if the scale be exactly poised, the fact of being the elder brother would incline the balance (*Warwick* v. *Greville*, 1 Phill. 123.)

The wish of the majority of interests gives a preference (*id.*).

Cæteris paribus, the Court in making a grant prefers a male to a female person (*Cordeux* v. *Trasler*, 34 L. J. P. & M. 127).

Concerniug the discretion which the Judges of Probate possess as to grants of administration, it is said: "That discretion must not be arbitrarily or capriciously assumed, but must be a legal discretion, governed by principle and sanctioned by practice. In exercising it, the Court is not to be guided by the wishes or feelings of parties, but is to look to the benefit of the estate and to that of all the persons interested in the distribution of the property. The first duty of the Court, then, is to place it in the hands of that person who is likely best to convert it to the advantage of those who have claims, either in paying the creditors or in making distribution, the primary object is the interest of the property (*Warwick* v. *Greville*, 1 Phill. 123).

No. 3.—Oath to be administered to Petitioner for Letters Testamentary or of Administration.

You do swear that the contents of this petition by you subscribed are true to the best of your knowledge and belief.—So help you God.

No. 4.—Memorandum of Jurat.

Sworn before me by the above named D. E. the day of A. D. .

(Signed) A. B., *Surrogate.*

No. 5.—Form of Renunciation by person entitled to Administration.

To A. B. Esquire, Surrogate Judge of Probates for the county of C.

Whereas G. H. late of F. in the county aforesaid, departed this life intestate (*or*, having made his last will and testament, bearing date the day of A. D. .)

I, J. H., the widow and relict of the said G. H. (*or as the case may be*) do hereby renounce all right and title to administration on the said estate. As witness my hand hereto subscribed this day of A. D. .

(Signed) J. H.

No. 6.—Affidavit in proof thereof.

A. B. of the parish of F. in the county of C. maketh oath and saith that he is well acquainted with J. H. of the same place, widow and relict of the late G. H., and he is also well acquainted with her handwriting from having seen her write; and this deponent further saith that he believes the signature "J. H." subscribed to the annexed certificate of renunciation to be of the proper hand writing of the said J. H. Sworn the day of A. D. before me.

S. T., *Surrogate.*

No. 7.—Form of Bond to Surrogate on granting Letters of Administration.

(See Appendix to Act 3rd Vic., c. 61, No. 1.)

See C. S., c. 52, s. 9, and the form of bond given by Schedule A.

Administration is not void for want of an administration bond, but the absence of one is a strong fact to rebut the presumption that administration was granted (*Doe* d. *Jarvis* v. *Read*, 1 All. 680).

The executors of a deceased administrator cannot file an account of his administration, and the remedy on the bond is not thereby affected (*In re Frost*, 6 All. 482; 1 Han. 127).

The non-payment of a debt is not a breach of the condition (*Sherlock* v. *Magee*, 1 All. 116).

On an application to put the bond in suit the Court will not determine whether

there has been a breach of the bond; if the applicant makes out a *prima facie* case of breach, and that he is a proper person to sue for it, he is entitled to an assignment (*In re Hunter*, 1 Han. 233). A copy of the proceedings in the Probate Court need not be produced (*id.*). See as to form of declaration on the bond, *Sherlock* v. *McGee*, 1 All. 346).

An assignment may be ordered though the bond is not in the form given by the Act (*In re Hunter*, 1 Han. 233).

No. 8. Form of Bond to Surrogate by Executor.

(See Note to Appendix, No. 1.)

See C. S., c. 52, s. 10.

No. 9.—Letters Testamentary.

Surrogate Court.

County of , Province of New Brunswick.

By His Excellency , Lieutenant Governor and Commander in Chief of the Province of New Brunswick, &c., &c., &c.

To all to whom these presents shall come or may concern, Greeting:

Know ye, that at F. in the county of C. on the day of in the year of our Lord , before A. B., Esquire, being thereunto delegated and appointed the last will and testament of G. H., late of in the county aforesaid, deceased, (a copy whereof is hereunto annexed), was proved and is now approved and allowed of by me, the said deceased having while he lived, and at the time of his death, goods, chattels and credits within this Province, by means whereof the proving of the said will, and the granting of administration of all and singular the said goods, chattels and credits, and also the auditing, allowing and finally discharging of the account thereof, unto me only doth belong: And that the administration of all and singular the goods, chattels and credits of the said deceased, and any way concerning his said will, is granted unto , in the said will named, having been already duly sworn to the faithful discharge of the duties of the trust thereby in him reposed.

In testimony whereof, I have caused the seal of the said Surrogate Court to be hereunto affixed the day of in the year of our Lord one thousand eight hundred and , and in the year of the Reign of our Sovereign Lady Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c., &c., &c.

Probate of a will in Nova Scotia gives no title in this Province, no will probate granted in this Province after declaration and issue joined support an action by the executor (*Mitchell* v. *Long*, A. C. MS. 76).

Probate of a will, though registered, was not, before C. S., c. 74, s. 15, evidence of due execution of the will to pass real estate (*Hamilton* v. *Low*, 2 Kerr, 246; *Knapp* v. *King*, 2 Pugs. 312; *Connell* v. *Haley*, 4 All. 636).

Quære, whether a certified copy under that section has any other or greater effect than the original probate? Compare secs. 25, 26.

No particular impression is necessary, any seal used by the surrogate is sufficient till a particular seal is provided (*Crookshank* v. *Gibeson*, 2 All. 544).

No. 10.—Oath to be administered to Witness on proof of Will made before 1st January, 1839, in common form.

You, C. D. and E. F., do severally swear that you did see G. H., named in the instrument hereunto annexed, sign the same [and that he at the same time published and declared the same to be his last will and testament], and that at the time of such signing [publishing and declaring] you, the said C. D. and E. F. [and also one J. K., whose name is likewise subscribed to the said instrument as a witness attesting the execution thereof], were all present, and that the said G. H. appeared to you at the time to be of sound and disposing mind and understanding, and that the names C. D. and E. F. [and J. K.] were subscribed to the said instrument by you the said C. D. and E. F. [and the said J. K.] respectively, in the presence of each other and of the said G. H.

See 1 Vic., c. 9, s. 33. Proof in solemn form *In re* goods of Fox, (4 P. & B.

No. 11.—Indorsement on Will of Oath having been Administered.

Province of New Brunswick,
County of C.

Be it remembered, that on the day of before me, A. B., Esquire, Surrogate for the county of C., personally appeared C. D. and E. F., whose names are subscribed as attesting witnesses to the instrument hereunto annexed, purporting to be the will of G. H., late of the parish of F. in the county of C., deceased, and being duly sworn did (each for himself) depose and say that they did see the said G. H. sign the said instrument, [and that he at the same time published and declared the same to be his last will and testament], and at the time of such signing [publishing and declaring] they the said C. D. and E. F. [and one J. K., whose name is also subscribed to the said will as a witness attesting the execution thereof] were all present, and that the said G. H. appeared to them, the said C. D. and E. F. respectively, to be of sound and disposing mind and understanding and that the names "C. D." and "E. F." [and "J. K."] were subscribed to the said will by them the said C. D., E. F. [and J. K.] respectively, in the presence of each other and of the said G. H.

(Signed) A. B., *Surrogate of the County of C.*

No. 12.—Oath to be Administered to Executors.

You do swear that you believe this paper to be the last will and testament of G. H., late of F. in the county of C., , deceased, and that you will pay all the debts and legacies of the said deceased as far as the assets shall extend and the law shall bind you, and that you will in other respects, to the best of your ability, faithfully discharge the duties of an executor of the said last will and testament.—So help you God.

No. 13.—Indorsement on Will of Executor having been duly Sworn.

Province of New Brunswick,
County of C.

Be it remembered, that on the day of A. D. before me, A. B., Surrogate for the county of C., personally appeared L. M., sole executor named in the within written will of G. H., late of the parish of F. in the county of C., deceased, hereunto annexed, and was duly sworn to the authenticity of the said will and to the faithful discharge of the duties of the trust thereby in him reposed by taking the oath of an executor as by law required.

No. 14.—Oath to be Administered to Witnesses on proof of Will made after 31st December, 1838.

(The same as form No. 10, omitting only the words between brackets, and substituting the word "both" for "all.")

No. 15,—Indorsement on Will made after 31st December, 1838, of Oath (No. 14) being Administered.

(Similar to Form No. 11, omitting words between brackets.)

No. 16.—Caveat.

A. B. of F. in the county of C., a creditor (*or*, legatee or otherwise, *as the case may be*) of G. H., late of the same place, , deceased, hereby enters his caveat against the granting of letters testamentary on the will of the said G. H. to C. D. therein named as executor thereof, on the ground that (*here the ground of objection is to be stated.*) Dated the day of A. D. .

(Signed) A. B.

No. 17.—Letters of Administration.

Surrogate Court.

County of C. Province of New Brunswick.

By His Excellency , Lieutenant Governor and Commander in Chief of the Province of New Brunswick, &c., &c., &c.

To T. S., of the parish of F. in the county of C. greeting: Whereas G. H., of F. in the county of C,, lately died intestate, as it is said, having whilst he lived, and at the time of his death, goods, chattels and credits within this Province, by means whereof the granting administration of all and singular the said goods, chattels and credits, and also the auditing, allowing and finally discharging the account thereof, unto me only doth belong; in order, therefore, that the said goods, chattels and credits of the said deceased may be well and faithfully administered, applied and disposed of according to law, I do by these presents grant unto you the said T. S. (in whose fidelity I do confide) full power and authority to administer and faithfully dispose of all and singular the said goods, chattels and credits of the said deceased, and to ask, de-

mand, recover and receive whatever goods, chattels, debts or credits to the said deceased, while living, and at the time of his death, did in any way belong, and to pay whatever debts the said deceased at the time of his death did owe or was chargeable with, so far as such goods, chattels and credits will thereunto extend, and the law charge you, you having been already sworn well and faithfully to execute the duties of the trust in you hereby reposed, as by law required. And I do by these presents make, ordain and depute you administrator of all and singular the goods and chattels, rights and credits of the deceased.

In testimony whereof I have caused the seal of the said Surrogate Court to be hereunto affixed, the day of in the year of the Reign of our Sovereign Lady Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the faith; and in the year of our Lord .

Administration irregularly granted to a creditor without citing the next of kin remains good till revoked by the proper Court (*Crookshank* v. *Giberson*, 2 All. 544; *Doe* d. *Shore* v. *Gearon*, 1 Han. 144). Where administration is granted in a wrong diocese it is void, where to a wrong person, voidable (*Sid. N. P.* 691).

As to secondary evidence of letters of administration, see *Doe* d. *Jarvis* v. *Read*, 1 All. 31, 680; *Doe* v. *Donovan*, 4 All. 116; *Doe* d. *Elston* v. *Thompson*, 4 All. 483.

That letters of administration are evidence of the intestate's death, see *Scribner* v. *Gibbon*, 4 All. 182; *contr.*, *Roe. Ev.*, 13 ed., 217.

"The following form of administration with the will annexed is taken, with slight alterations, from 4 *Burn's Eccl. Law*, 371:

'In order, therefore, that the said goods, chattels and credits may be well and faithfully administered, applied and disposed of, according to law, I do by these presents grant unto you the said , in whose fidelity I do confide, full power and authority to administer and faithfully dispose of the said goods, chattels and credits according to the tenor and effect of the said will: And first to pay the debts of the said deceased which he did owe at the time of his death, and afterwards the legacies contained and specified in the said will, so far as such goods, chattels and credits will thereto extend and the law requires, you having been already sworn well and faithfully to administer the same. And I do by these presents ordain, depute and constitute you administrator of all and singular the goods, chattels and credits of the said deceased, with the said will annexed.'"—*Allen's Rules*, 137.

No. 18.—Oath to be Administered to Administrator.

You do swear that you believe that G. H., late of F. in the county of C., died intestate, and that you will well and truly administer all and singular the goods of the deceased, and pay his debts so far as his goods or other assets which may come to your hands for that purpose shall extend, and that you will make a true and perfect inventory of his estate, real and personal, and render a just and true account of your administration into the Surrogate Court for the county of C., as by law required.—So help you God.

No. 19.—Warrant of Appraisement.

(See form, appendix to 3 Vic., c. 61, No. 4, and see memorandum of oath administered thereon, 36.)

See C. S., c. 52, s. 14, and form given by Schedule B.

No. 20.—Oath to be administered thereon.

You do severally swear that you will truly and impartially appraise the real and personal estate of G. H., late of F. in the county of C., , deceased, which may be exhibited to you, according to the best of your knowledge and ability.—So help you God.

No. 21.—Inventory.

The following is an inventory of all the real estate, goods, chattels and credits of G. H., late of F. in the county of C., , deceased.

REAL ESTATE.

Lot of land containing acres in the parish of in the county of , with a house, barn and appurtenances thereon (&c. &c.) valued at £ (&c. &c.)

PERSONAL ESTATE.

STOCK.

———Horses valued at £
———Cows " "
———Sheep " " (&c. &c.)

HOUSEHOLD FURNITURE.

———Tables, £
———Chairs, (&c. &c.)

DEBTS.

Bond and mortgage from C. D. to the deceased, dated . Penalty of bond, £ . Conditioned to pay £ and interest. Paid thereon day of A. D. £

Judgment against E. F. at the suit of the deceased, in Court, signed day of A. D. for £ (doubtful.)

Promissory note made by R. S., payable to J. K. and indorsed to the deceased for £ (desperate.)

BOOK DEBTS.

R. L., £
G. S., (doubtful.)
M. N., , (desperate.)

MONEY.

In specie, £
Bank note,

(Signed) A. B., *Executor or Administrator.*

The inventory, when duly returned and filed, becomes a judicial writing or record, and may be proved by an examined copy (*Cunliffe* v. *Morehouse*, 2 Kerr, 311).

No. 22.—Petition to sell Real Estate for payment of debts.

To His Excellency , Lieutenant Governor and Commander in Chief of the Province of New Brunswick, Chancellor of the same, &c., &c., &c.; or, To His Honor the Master of the Rolls.

The petition of J. W., executor of the last will and testament of G.

H., late of F. in the county of C., , deceased (*or*, administrator of all and singular the said goods, chattels and credits of G. H., late of F. in the county of C., deceased, who died intestate) humbly sheweth :

That the personal estate of the said deceased, which has come to the hands of your petitioner, amounted to the sum of £ , that the debts of the estate, so far as they can be ascertained, amount to £ , and that your petitioner hath fully administered all the said personal estate, as appears by the account thereof, herewith annexed, which said account contains a true statement of all the receipts and payments of your petitioner on account of the said estate, that the real estate of the deceased consists of the following lots, pieces or parcels of land, that is to say, [here describe the several lots, pieces or parcels of land or premises, with the value of each separately, stating whether the same are occupied or not, respectively, and if occupied, the names of the occupants, so far as they have come to the petitioner's knowledge] that the heirs of the said deceased are A. B., of , in the county of C. , C. D., of, &c. [and the devisees of the said deceased are J. K., of , in the county of C. , L. M. (of, &c.)

Your petitioner therefore humbly prays that license may be granted to him to sell such parts of the real estate of the said deceased as to your Excellency (or Honor) may seem meet and necessary for the payments of his debts ; and as in duty bound will ever pray.

(Signed) J. W.

day of A. D.

The within named J. W. was duly sworn to the truth of the contents of the within petition, the day of A. D. , before me.

A. B., *Surrogate, County of C.*

(Note.—A certified copy of the inventory on file and (in case deceased died testate) a copy of the will is to be annexed to the petition, also a copy of the administrator's or executor's account current with the estate.)

[When the petition is to the Surrogate for license to sell, a similar form with the necessary alterations may be used.]

Obtaining a license to sell does not waive any power an executor may have to sell under the will (*Doe* d. *Pike* v. *Tiernay*, H. T. 1833, Stev. Dig. 209).

The Act now in force respecting sales of real estate under license of the Court is C. S., c. 52.

The real estate of a deceased debtor descends to the heir, subject to be divested if the personal assets are insufficient and a license to sell is obtained (*Doe* d. *Hare* v. *McCall*, A. C. MS. 90). It cannot be taken in execution on a judgment against the executor (*id.*).

No. 23.—License to Sell the Real Estate by Court of Chancery.

NEW BRUNSWICK—IN CHANCERY.

day of A. D.

Whereas, J. W., executor of the last will and testament of G. H., late

of F. in the county of C., , deceased, hath by his petition bearing date the day of last, represented that the personal estate of the deceased which has come to his hands is deficient for the payment of the debts owing by the said estate, and hath prayed that license may be granted to him to sell such part of the real estate as may be deemed meet and necessary for that purpose.

And whereas (due notice having been given to the parties interested) on examination into the matter of the said petition, it has been made to appear to the satisfaction of this Court that the personal estate of the deceased which has come to the hands of the petitioner is not sufficient for the payments of the debts, but that a further sum of £ , over and above the amount of the said personal estate, will be required for that purpose. And whereas it is deemed necessary that the whole of the real estate of the said deceased should be sold for that purpose, it is hereby ordered that the said petitioner have license, and he is hereby empowered and authorized to make sale of the real estate of the said deceased, for the purpose of paying his debts, the said petitioner proceeding therein in all things according to law.

By the Court.

J. V., *Registrar.*

[In case a part only of the real estate is intended to be sold, or any particular lot or parcel of land is designated for that purpose, the license will be varied accordingly.]

The license to lease will contain similar recitals and may be framed in the same manner, with the necessary alterations.

The license need not have been under seal (*Caughey* v. *Inman*, 5 All. 399), and see *id.* as to proof of the license. A license granted by the Probate Court need only be signed by the registrar and not by the judge (*Doe* d. *Simpson* v. *Falls*, 5 All. 540).

See as to restraining the sale by injunction, *Coy* v. *Coy*, S. Dig. 346; 1 Han. 177.

It may be shewn in an action of ejectment that the license was obtaintd by fraud or without complying with the provisions of the Act (*Doe* d. *Elston* v. *Thompson*, 4 All. 483; see *Doe* d. *Bowen* v. *Robertson*, 5 All. 134, and cases cited, *ante*, p. 162, note *(d)*.

No. 24.—Notice of Sale.

To be sold by public auction on the day of at of the clock , at the house of , in the parish of in the county of *(or as the case may be)* for payment of the debts of the late G. H., of F. in the county of C., deceased, in consequence of a deficiency of the personal estate of the deceased for that purpose, pursuant to a license obtained from the Court of Chancery, the lands and premises following, that is to say, [*describe particularly the lands and premises.*]

(Signed) J. W., *Executor.*

A notice to sell land by executors, by virtue of a license from the Governor and Council under 26 Geo. III., c. 11, s. 18, should have been given 30 days, exclusive of day of sale, both by putting up notices and by publication in the newspapers, but it is not necessary to prove that the notices posted up continued up to the day of sale (*Doe d. Pike* v. *Tiernay*, Stev. Dig. 211).

No. 25.—Bond to be given by Executor on Sale of Real Estate.

(See Appendix to Act 3 Vic., c. 61, No. 3.)

See the form given by C. S., c. 52, Schedule F.

No. 26.—Appeal from decision of Surrogate respecting Sale of Real Estate.

To His Excellency , Lieutenant Governor and Commander in Chief of the Province of New Brunswick, Chancellor of the same, &c., &c., &c.

The humble petition and appeal of R. J., of F. in the county of C., , one of the heirs of G. H., late of the same place, , deceased, intestate, sheweth :

That A. B., of the parish of F. in the county of C. aforesaid, , administrator of all and singular the goods, chattels and credits of the said G. H., did, on the day of last, present a petition to , Esquire, Surrogate of the county of C., for license to sell the real estate of the said G. H. for the payment of his debts, on the alleged ground of the insufficiency of the personal estate for that purpose, a copy of which said petition is hereunto annexed; that the said application was resisted by your petitioner, who filed a caveat with the said surrogate against granting such license, a copy of which is likewise annexed. That notwithstanding the objection of your petitioner, the said Surrogate decided that license to sell the real estate should be granted to the said A. B , administrator, as aforesaid. And your petitioner humbly represents to Your Excellency that the circumstances of the case are not such as to warrant the sale of the real estate for the purpose aforesaid.

Your petitioner therefore humbly appeals to Your Excellency from the decision of the said Surrogate; and as in duty bound will ever pray.

The following additional forms, founded on those of the 3 Vic., c. 61, and 1 R. S., c. 136, are given by C. S., c. 52:—

Citation, Sched. C.
Subpœna, Sched. D.
Execution, Sched. E.
Bond on Appeal, Sched. G.
Attachment, Sched. H.
Bond by Guardian, Sched. I.
Attachment, Sched. K.

Table of Contents of the Surrogate Court Rules.

SAINT JOHN COUNTY COURT.

GENERAL RULES.

OCTOBER TERM, 1870.

In actions to be tried at the term, the writ shall be delivered from the files of the Court to the plaintiff's attorney, which, with a copy of the plea, shall form the record for trial at such term.

A copy of the bill of particulars of the plaintiff's demand and also of the defendant's set-off (if any) shall be filed by the plaintiff's attorney, with the writ and copy of the plea, at the time of entering the cause for trial.

That the clerk shall not in any case sign final judgment unless the writ be on file in his office.

New Trials.

That in future the attorney for the party intending to move for a new trial or for setting aside a verdict shall, within ten days after trial, cause to be delivered to the judge a note in writing, specifying particularly the grounds of the intended motion. For example: If on the ground of misdirection or the improper admission or rejection of evidence, the note shall set forth the particular part or parts of the direction objected to and the particular portion or portions of the evidence alleged to have been improperly admitted or rejected, and in like manner on all other grounds, specifying the same separately and distinctly and as particularly as the circumstances of the case will admit of, and the party shall on the hearing be confined to the grounds so specified. And no motion or application for a new trial shall be made after the said ten days, unless the Court or judge, for good reason, shall see fit to allow the same.

CHARLES WATTERS,
J. C. C.

APPENDIX.

ORDERS IN COUNCIL RELATING TO APPEALS TO THE PRIVY COUNCIL.

At the Court at Windsor, the 26th day of June, 1873. Present: The QUEEN'S Most Excellent Majesty in Council.

Whereas in many appeals now pending before Her Majesty in Council no effectual steps have been taken by the parties or their agents to set down their cases for hearing, although more than twelve months have elapsed since the arrival and registration of the transcript of appeal in this country, and it is expedient to make further provision in that behalf, Her Majesty, by and with the advice of Her Privy Council, and upon a recommendation of the Lords of the Judicial Committee of the Privy Council, is pleased to order, and it is hereby ordered, that the solicitors or agents for the party appellant in all such appeals now pending before Her Majesty in Council are hereby required to take effectual steps to set down their cases for hearing within six months from the date of this order, and in all other appeals to Her Majesty in Council, within a period not exceeding twelve months from the date of the arrival and registration of the transcript in this country.

And Her Majesty is further pleased to order, and it is hereby ordered, that it shall be the duty of the Registrar of the Privy Council to report to the Lords of the Judicial Committee the names of the parties and dates of the decrees in appeals in which no effectual steps have been taken within the aforesaid periods of time to set down the case for hearing; and the Lords of the Judicial Committee of the Privy Council shall be at liberty to call upon the appellant or his agent in such cases to show cause why the said appeal or appeals should not be dismissed for non-prosecution, and (if they shall so think fit) to recommend to Her Majesty the dismissal of any such appeal, or to give such directions therein as the justice of the case may require.

And Her Majesty is further pleased to order that nothing in the present order shall prevent the dismissal of an appeal under the 5th of the rules approved by Her Majesty on the 13th of June, 1853, in cases to which that rule is applicable.

Whereof the Governors of Her Majesty's Plantations and

Dominions abroad, and the Judges or Officers of Her Majesty's Courts of Justice from which an appeal lies to Her Majesty in Council. and all other persons whom it may concern, are to take notice and govern themselves accordingly.

(Signed) ARTHUR HELPS.

See the rules of the 13th of June, 1853, above referred to, 7 Moore P. C. VIII. The rules of 27th Nov., 1852, will be found in 4 All. 497.

An appeal from a judgment of the Supreme Court affirming a decree in Equity may be applied for fourteen days after the minutes of the decree are settled, though more than fourteen days have elapsed since the judgment was pronounced (*Brookfield* v. *St. Andrews & Q. Ry. Co.*, 4 All. 496. An order of a judge made in vacation, granting leave to appeal and settling the terms on which the appeal will be granted, is final and cannot be revised or rescinded by the Court (*per Weldon and Fisher, JJ., Allen, J., dubitante, Domville* v. *Kevan*, 2 Han. 175). See the form of declaration in an action for costs awarded by the Privy Council, *Doe* v. *Black*, 3 Pugs. 432.

See Macqueen on the Appellate Jurisdiction of the House of Lords and Privy Council; Palmer's Practice on Appeals to the Privy Council; Finlason's History, &c., of the Privy Council; Lattey's Handbook on Privy Council Practice; Macpherson's Practice of the Judicial Committee of the Privy Council; 1 Bla. Com. 229; 2 Knapp Appendix; 4 Fish. Dig. 7046; 2 Fish. Sup. Dig. 2899; and the following statutes and orders: 2-3 Wm. IV., c. 92; 3-4 Wm. IV., c. 41; 6-7 Vic., c. 38; 7-8 Vic., c. 69; 14-15 Vic., c. 83, s. 15-16; 16-17 Vic., c. 85; 34-35 Vic., c. 91; Orders issued by the Judicial Committee respecting the printing of a joint appendix in all cases on appeal, 23 July, 1838 (2 Moore P. C. N. S.); Order in Council, 11 Aug., 1842 (4 Moore P. C. IX.); Order in Council, 12 Feb., 1845 (4 Moore P. C. XXV.); Order in Council, 31 March, 1855 (9 Moore P. C. IX.); Memorandum on the removal of Colonial Judges, April, 1870 (6 Moore P. C. N. S. IX.); Order in Council, 31 March. 1870 (6 Moore P. C. N. S. XXI.)

INDEX.

ERRATA.

P. 16, ll. 15, 16. For "payments" read "payment."

P. 30, l. 2. For "c. 47" read "c. 45."

P. 35, l. 8 from bottom. For "s. 36" read "s. 27."

P. 47, l. 2 from bottom. For "Tenderden" read "Tenterden."

P. 76, l. 4. For "described" read "served."

P. 78. Form of entry docket. Add date to attorney's signature, "————18 ."

P. 81, l. 27. For "M. T." read "H. T."

P. 86, l. 27. For "s. 11" read "c. 11."

P. 88, l. 5. For "three months" read "two months."

P. 91, l. 10 from bottom. For "9-10 Wm. III." read "8-9 Wm. III."

P. 93, l. 5 from bottom. For "s. 59" read "s. 39."

P. 96, l. 12. For "specifically" read "specially."

P. 97, l. 1. For "M. T." read "H. T."

P. 108, l. 13 from bottom. For "3 Vic." read "36 Vic."

P. 116, l. 5. For "c. 49" read "c. 48."

P. 120, l. 26. For "T. T." read "E. T."

P. 161, l. 11 from bottom. For "Courts" read "Court."

P. 161, ll. 3, 4 from bottom. For "time prescribed by the rules of Court" read "times now prescribed by the rules of this Court."

P. 178, l. 10 from bottom. For "37 Vic." read "36 Vic."

P. 183, l. 13 from bottom. For "the addition" read "the true addition."

P. 225, l. 10 from bottom. For "c. 13" read "c. 9."

9 1